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# The Case for Nonmutual Privity in Vicarious Liability Relationships: Pushing the Frontiers of the Law of Claim Preclusion

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# The Case for Nonmutual Privity in Vicarious Liability Relationships: Pushing the Frontiers of the Law of Claim Preclusion

GLENN S. KOPPEL\*

## ABSTRACT

*This article sheds light on an evolving area of preclusion law—nonmutual claim preclusion and the related issue of privity between parties to a vicarious liability relationship—that merits scholarly attention and greater doctrinal clarity. To illustrate, if an injured party asserts a negligence claim against a truck driver, and judgment is rendered against the injured party based on a finding of the driver’s nonnegligence, may the driver’s employer invoke claim preclusion or issue preclusion in a subsequent action by the injured party? Are the employer and his employee in privity with each other despite the lack of mutuality? When this fact pattern actually became the subject of a sample multiple-choice question published in 2014 by the National Committee of Bar Examiners, several procedural scholars responded that a plausible case could be made for either of two of the four choices—claim preclusion or issue preclusion. Their various responses reveal a need to provide a measure of coherence to this corner of preclusion law.*

*These differing doctrinal views raise three significant issues addressed in this article. First, does claim preclusion bar the suit against the truck driver’s employer or only issue preclusion? Second, if the employer can reap the benefits of claim preclusion, is nonmutual claim preclusion available in the first instance or only as a fallback if issue preclusion is unavailable? Third, to the extent that nonmutual claim preclusion is applicable, is it justified doctrinally as an extension of privity to include employee and employer or as an exception to privity?*

*This Article proposes that adding derivative liability relationships to the recognized categories of substantive legal relationships that “are*

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*sometimes collectively referred to as ‘privity’<sup>1</sup> and applying nonmutual claim preclusion, even where issue preclusion would otherwise have been available, is—and as a matter of policy should be—the next logical step in the evolution of preclusion law.*

*The law of preclusion has evolved progressively beyond the formalist rule of mutuality that traditionally served as the basis for the so-called “narrow and broad exceptions” to the doctrine of collateral estoppel. As a consequence of the erosion of mutuality, a substantial number of American jurisdictions apply those exceptions to claim preclusion by expanding the concept of privity to include vicarious liability relationships.*

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## INTRODUCTION

In 2014, in anticipation of the expanded coverage of the Multistate Bar Examination to include civil procedure, the National Committee of Bar

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1. Taylor v. Sturgell, 553 U.S. 880, 894 n.8 (2008).

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Examiners (NCBE) published ten sample questions and answers, one of which sparked a controversy among several civil procedure academics who agreed that two of the four choices are arguably correct. This question focuses on an evolving, and somewhat incoherent, area of civil procedure common law—claim and issue preclusion in the context of vicarious liability relationships.<sup>2</sup> Are parties to those relationships in privity so that either may invoke nonmutual claim preclusion, rather than nonmutual issue preclusion? Here is the question (hereinafter referred to as “Question 9”):

A motorcyclist was involved in a collision with a truck. The motorcyclist sued the truck driver in state court for damage to the motorcycle. The jury returned a verdict for the truck driver, and the court entered judgment. The motorcyclist then sued the company that employed the driver and owned the truck in federal court for personal-injury damages, and the company moved to dismiss based on the state-court judgment. If the court grants the company’s motion, what is the likely explanation?

- (A) Claim preclusion (*res judicata*) bars the motorcyclist’s action against the company.
- (B) Issue preclusion (*collateral estoppel*) establishes the company’s lack of negligence.
- (C) The motorcyclist violated the doctrine of election of remedies.
- (D) The state-court judgment is the law of the case.<sup>3</sup>

The NCBE states that choice (A)—“claim preclusion”—is the correct answer. It explains that “the company is in privity with the truck driver (based on the employer-employee relationship)” and “[t]herefore, the first

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2. Vicarious liability is defined as “[I]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on a relationship between the two persons.” *Vicarious Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014). Examples of vicarious liability relationships include:

[T]hat of master and servant, wherein the master is liable for certain wrongs committed by the servant in the course of his employment; owner and driver of a motor vehicle when applicable law makes the owner responsible for injuries resulting from the driver’s use of the vehicle with the owner’s permission; principal and agent for matters within the scope of the agency relationship; principal contractor and sub-contractor to the extent the former is responsible for the conduct of the latter; co-obligors of a contract to the extent that the performance of the contract is the responsibility of both; property owner and person occupying the property with his consent with regard to injuries to third persons for which the property owner has a non-delegable responsibility; insurer and insured with respect to liabilities covered by the insurance agreement; and perhaps others.

RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. a (AM. LAW INST. 1982).

3. *MBE Civil Procedure Sample Test Questions*, NAT’L CONFERENCE OF BAR EXAM’RS 3 (2016), <http://www.ncbex.org/pdfviewer/?file=http%3A%2F%2Fwww.ncbex.org2Fdmsdocument2F16> [https://perma.cc/V7AP-K9CK].

judgment extinguishes the claim against the company . . . .”<sup>4</sup> Choice (B)—issue preclusion—was labeled “incorrect.”<sup>5</sup> Aside from the fact that “the jury’s general verdict for the truck driver does not necessarily establish that he was free from negligence” since “[i]t may instead reflect the jury’s conclusion that the motorcyclist was more negligent than the truck driver,” the NCBE’s answer opines that “the court is *not likely* to base its ruling on issue preclusion because *that defense will be utilized only if claim preclusion is unavailable*.”<sup>6</sup>

Quite apart from the problematic aspect of a multiple-choice question to which there are arguably two correct answers,<sup>7</sup> this question, and its answer, highlight the lack of doctrinal clarity that plagues this evolving area of preclusion law. After the NCBE published Question 9 and its proposed answer, four legal scholars responded with a range of disparate views on the correct application of preclusion doctrine. Three issues emerged from this range of responses. First, does claim or issue preclusion bar the suit against the truck driver’s employer? Second, if the employer, who was not a party to the first suit against the driver, can reap the benefits of claim preclusion, is nonmutual claim preclusion only available where issue preclusion is not? Third, to the extent that nonmutual claim preclusion is available, is it doctrinally justified as an *extension* of privity to include employee and employer or as an *exception* to privity? However, notwithstanding these disparate views on doctrine, all four academics agree that preclusion—whether claim or issue—bars the second suit in Question 9’s fact pattern.

Therefore, before turning to an exposition of these four responses, it is reasonable to ask why it matters whether the same result is reached through claim or issue preclusion. While these issues might seem to be hair-splitting, they are not. As I will conclude, allowing the use of claim preclusion in the first instance (rather than as a fallback if issue preclusion is not available) is more efficient. Additionally, redefining the indemnity relationship as within the definition of privity, as opposed to an exception to it, leads to a more coherent understanding of what we are trying to accomplish when we include certain relationships under the umbrella of privity.

4. *Id.* at 10.

5. *Id.*

6. *Id.* (emphases added).

7. *See, e.g.*, Posting of Allan Ides, allan.ides@lls.edu, to civ-pro@listserv.nd.edu (Nov. 11, 2015) (on file with author) (“I do agree that the issue preclusion alternative, which is also correct under a non-mutual estoppel principle, muddies the question and renders it an ineffective testing tool.”).

The varied responses to Question 9 by Professors Freer, Clermont, Green, and Ides are best understood as falling on a continuum of preclusion doctrine. On the “issue-preclusion-only” end of this doctrinal continuum, Professor Freer asserts that claim preclusion is not available at all to a nonparty indemnitor or indemnitee based on a prior judgment against the injured party because, “if employer and employee were in privity for claim preclusion purposes, there was no reason for the courts to have developed the narrow exception to mutuality.”<sup>8</sup> The roots of the “narrow exception” were firmly planted in a doctrine that, today, has been abandoned by most states and the federal courts—mutuality of estoppel.<sup>9</sup> The narrow exception effected one of the earliest erosions of the mutuality doctrine *as it pertained to issue preclusion*.<sup>10</sup> “For many years, most courts” followed the rule of mutuality, which prescribed that

the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects[,] . . . establish[ing] a pleasing symmetry—a judgment was binding only on parties and persons in privity with them, and a judgment could be invoked only by parties and their privies.<sup>11</sup>

Most jurisdictions have since abandoned the mutuality rule in favor of nonmutual issue preclusion.<sup>12</sup> The narrow exception—“the most important departure from mutuality,” which stemmed from indemnification relationships—“makes the benefits of preclusion available to anyone who, if defeated in the second action, would be entitled to demand indemnification from the party who won the first action.”<sup>13</sup> For example, if

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8. Posting of Richard D. Freer, [rffreer@emory.edu](mailto:rffreer@emory.edu), to [civ-pro@listserv.nd.edu](mailto:civ-pro@listserv.nd.edu) (Nov. 11, 2015) (on file with author). Professor Freer provides the following example:

In Case 1, *P* sues Driver. The parties litigate and Driver wins a valid final judgment on the merits, because the fact-finder expressly finds that Driver was *not* negligent. In Case 2, *P* sues Owner, asserting that Owner is vicariously liable for Driver’s negligence. Owner cannot have Case 2 dismissed under *claim* preclusion.

RICHARD D. FREER, CIVIL PROCEDURE § 11.3, at 577 (2d ed. 2009). This is “[b]ecause one requirement for claim preclusion is that Case 1 and Case 2 be brought by the same claimant against the same defendant.” *Id.* at 577 n.154.

9. 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2D § 4463, at 679 (2d ed. 2002).

10. *See, e.g.*, RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 655 (7th ed. 2016).

11. WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 677.

12. *Id.* at 679 n.4 (citations omitted) (indicating that only twelve states still follow the mutuality rule).

13. *Id.* at 681.

the court entered a judgment of nonnegligence in favor of an employee who allegedly committed a tortious act within the scope of his employment, that judgment would have issue preclusive effect in a subsequent vicarious liability suit against the employer.<sup>14</sup> The narrow exception seeks to avoid what would otherwise be

an impossible choice between unacceptable alternatives. If a second action can be maintained against the indemnitee [(e.g., an employer sued on a vicarious liability claim based on the tortious conduct of his employee, the indemnitor)], either the indemnitee must be allowed to assert his right of indemnification or the right must be defeated by the judgment in favor of the indemnitor.<sup>15</sup>

In application, many courts expand the narrow exception beyond its indemnification rationale and “into a rule that has often been identified as the ‘broad exception’ to the requirement of mutuality.”<sup>16</sup> Under the broad interpretation, “either party to a vicarious liability relationship” enjoys the preclusion benefit of a judgment “in favor of the other.”<sup>17</sup> Thus, if the indemnitee (e.g., an employer) were sued first on a vicarious liability claim and won a judgment, the indemnitor (e.g., the employee whose alleged tortious conduct formed the basis of the employer’s alleged vicarious liability) could preclude relitigation of the employee’s negligence.<sup>18</sup> As explained by Wright, Miller, and Cooper: “The broad exception by definition does not entail the special needs of indemnification that justify the narrow exception, since no harm is done by holding the indemnitor liable following victory by the indemnitee.”<sup>19</sup> Beginning with the landmark decision in *Bernhard v. Bank of America*,<sup>20</sup> most jurisdictions have abandoned the mutuality rule entirely as a requirement for *issue* preclusion.<sup>21</sup> Professor Freer’s view that claim preclusion is not at all available to a nonparty indemnitor or indemnitee appears to be based on two premises: (1) that claim preclusion, unlike issue preclusion, still requires mutuality and (2) that there is no privity between parties to a

14. *See id.*

15. *Id.* at 683 (“To allow the right of indemnification would be to destroy the victory won by the indemnitor in the first action. To deny the right of indemnification would be to destroy the indemnitee’s right by the result of an action in which he took no part. It is far better to preclude the third person, who has already had one opportunity to litigate, and who often could have joined both adversaries in the first action.”).

16. *Id.* at 689.

17. *Id.*

18. *See id.*

19. *Id.* at 690.

20. *Bernhard v. Bank of America Nat’l Tr. & Sav. Ass’n*, 122 P.2d 892 (Cal. 1942).

21. *See* FREER & PERDUE, *supra* note 10, at 656–57 (citing *id.*).

vicarious liability relationship because, otherwise, there would have been “no reason for the courts to have developed the narrow exception to mutuality.”<sup>22</sup>

As discussed in Section II.C, the privity concept has expanded beyond its narrow formalist origins to embrace a functional analysis.<sup>23</sup> This functional analysis creates room for adding derivative liability to the existing categories of substantive legal relationships that amount to privity.<sup>24</sup> The survey of relevant caselaw in Section II.A reveals that most jurisdictions that apply nonmutual claim preclusion do so as an *extension* of privity rather than as an *exception* to it.

Moving along the doctrinal continuum toward nonmutual claim preclusion, Professor Clermont’s response to Question 9 agrees that indemnitors and indemnitees lack privity between each other.<sup>25</sup> However, he does not agree that nonmutual claim preclusion is never available in derivative liability relationships.<sup>26</sup> Under this view, claim preclusion is available to the indemnitee-employer, *but only where issue preclusion is not otherwise applicable* because the previous judgment, such as a dismissal for failure to comply with a court order or for a failure to prosecute, did not decide any issues on the merits.<sup>27</sup> Professor Clermont takes issue with the view expressed in the NCBE’s suggested answer to Question 9 that the issue preclusion defense “will be utilized only if claim preclusion is unavailable.”<sup>28</sup> He notes that “[e]very court I have seen goes the standard nonmutual IP [issue preclusion] route if it is available.”<sup>29</sup> Furthermore, this limited application of claim preclusion is not justified as an *extension of privity* but as an *exception to the mutuality requirement of*

22. Posting of Richard D. Freer, rfreer@emory.edu, to civ-pro@listserv.nd.edu (Nov. 11, 2015) (on file with author).

23. WRIGHT, MILLER & COOPER, *supra* note 9, § 4448, at 326 (“Both the privity label and the mutuality rule are losing their former capacity to deter functional analysis.”).

24. See 18 MOORE’S FEDERAL PRACTICE § 131.40[3][a], at 131-137 (3d ed. 2016) (“[Privity] describes those relationships that the courts have *already* determined will qualify for preclusion.”).

25. Patricia W. Moore, *Questioning the Sample MBE Civil Procedure Questions*, CIV. PROC. & FED. CTS. BLOG (Aug. 22, 2014), <http://lawprofessors.typepad.com/civpro/2014/08/questioning-the-sample-mbe-civil-procedure-questions.html> [https://perma.cc/FBN5-SNWC] (providing Professor Clermont’s email response to Question 9).

26. *Id.*

27. WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 684.

28. *MBE Civil Procedure Sample Test Questions*, *supra* note 3, at 10.

29. Patricia W. Moore, *supra* note 25. With respect to the NCBE’s suggested answer to Question 9, Professor Clermont commented, “I think you could argue for Answer 1 (CP) or Answer 2 (IP), but in no way is Answer 1 right and Answer 2 wrong. I would have answered Answer 2. I can’t say that Answer 1 is wrong, however.” *Id.*



*privity* denominated “nonmutual *claim* preclusion,”<sup>30</sup> which extends the narrow and broad exceptions to issue preclusion to claim preclusion as well.<sup>31</sup>

Moving further toward the claim preclusion end of the continuum, Professor Michael Green agrees with Professors Freer and Clermont that *privity* does not exist between indemnitor and indemnitee.<sup>32</sup> However, unlike Professor Clermont, he contends “that nonmutual claim preclusion will often bar a plaintiff from suing an employer under respondeat superior if he already sued an employee concerning the same transaction and lost . . . . Non-mutual claim preclusion is commonly allowed in such cases.”<sup>33</sup> This view is consistent with the narrow exception.<sup>34</sup>

Finally, reaching the claim preclusion end of the continuum, Professor Ides comments that “the claim is precluded under the Restatement (Second) [of Judgments § 51], which purports to state the majority view of the law, and under the long-recognized vicarious liability (substantive legal relationship) exception to the ‘parties-only’ requirement, which is the source of the Restatement’s standard.”<sup>35</sup>

As explained in Part I of this Article, the Second Restatement of Judgments’ position on the preclusive effect of judgments as between parties to vicarious liability relationships has evolved since the original Restatement. The position now allows “Persons Having a Relationship in Which One Is Vicariously Responsible for the Conduct of the Other” to invoke the benefits of *claim* preclusion, regardless of who is sued first.<sup>36</sup> Thus it effectively encompasses both the broad and narrow exceptions to *claim* preclusion,<sup>37</sup> based on the premise that claims against the indemnitee

30. *Id.* (“The claim against employer is a different claim from the one against employee, and the Employer and Employee are not in *privity*. The argument for CP is nonmutual CP.”).

31. See WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 689 (“[The broad exception] has been extended to claim preclusion.”).

32. *Q.9 of the MBE Sample Questions*, MICHAEL GREEN’S CIVPRO BLOG (Aug. 29, 2014), <http://michaelstevengreen.typepad.com/blog/2014/08/q-9-of-the-mbe-sample-questions.html> [<https://perma.cc/GPD6-36C9>].

33. *Id.* (citing *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1502–03 (11th Cir. 1990)).

34. See WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 681–87.

35. Posting of Allan Ides, [allan.ides@lls.edu](mailto:allan.ides@lls.edu), to [civ-pro@listserv.nd.edu](mailto:civ-pro@listserv.nd.edu) (Nov. 11, 2015) (on file with author).

36. See RESTATEMENT (SECOND) OF JUDGMENTS § 51 (Am. Law Inst. 1982).

37. The Second Restatement of Judgments provides:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following

and indemnitor constitute but a single claim.<sup>38</sup> The foregoing disparate responses to MBE Question 9, which reflect a range of views on the state of preclusion in the derivative liability setting, raise three distinct issues which this Article aims to address. First, do most jurisdictions, explicitly or implicitly, apply the Second Restatement's approach, whether as an extension of privity or as a nonmutual exception to privity? Second, do the jurisdictions that apply nonmutual claim preclusion do so by expanding the privity concept to include what I have termed nonmutual or unilateral privity,<sup>39</sup> or by applying the broad or narrow exceptions to privity? Third, do jurisdictions that apply nonmutual claim preclusion in vicarious liability situations do so even where issue preclusion would also be an option—i.e., when the indemnitor's liability had been litigated and determined by the prior judgment—or only as a last resort, i.e., when issue preclusion would not otherwise be available? Part I provides historical context for considering these issues by shedding light on the evolution of the positions taken by the Restatements of Judgments on nonmutual claim preclusion in the context of vicarious liability relationships. Part II surveys the national landscape of caselaw among the states and federal circuits in this area of preclusion law.

Section II.A reveals that a very substantial number of jurisdictions, state and federal, explicitly or implicitly apply the Second Restatement's position on nonmutual claim preclusion. Section II.B focuses on the extent to which jurisdictions that adopt nonmutual claim preclusion do so, not as a last resort, but in the first instance. This article contends that applying claim preclusion over issue preclusion is consistent with section 51 of the

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preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1982).

38. *Id.* § 51 cmt. b (“In an important sense, however, there is only a single claim.”).

39. Also denominated by Wright, Miller, and Cooper as “bogus privity.” WRIGHT, MILLER & COOPER, *supra* note 9, § 4464.1, at 716 n.4. “One means adopted to accomplish nonmutual claim preclusion is to state that the party invoking preclusion is in privity with a party to the earlier action although the circumstances would not support a finding of privity to invoke preclusion against the new party.” *Id.* at 716.

Second Restatement of Judgments and is the most direct means<sup>40</sup> of realizing the purpose behind the narrow and broad exceptions to mutuality of estoppel. Section II.C addresses whether jurisdictions that adopt the Second Restatement's position do so on the basis of what I call nonmutual privity or "bogus privity,"<sup>41</sup> or as a nonmutual preclusion exception to privity. Section II.C demonstrates that a substantial number of jurisdictions frame their analyses in terms of privity between indemnitor and indemnitee, as confirmed by *Moore's Federal Practice and Procedure*.<sup>42</sup> I conclude that the broad and narrow *exceptions* to privity are vestiges of a formalistic, restrictive view of privity that tethered the recognition of qualifying relationships to the outmoded concept of mutuality, and that the goal of a simplified and more coherent approach to nonmutual claim preclusion in the context of vicarious liability relationships would be better served by adding those relationships to the existing categories of "substantive legal relationship[s]" commonly recognized as constituting privity.<sup>43</sup> This nonmutual privity concept presumes the existence of privity

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40. *See id.* § 4463, at 684 ("Claim preclusion often provides the simplest means of avoiding successive actions against the indemnitor and then against the indemnitee.").

41. *Id.* § 4464.1, at 716 n.4. "One means adopted to accomplish nonmutual claim preclusion is to state that the party invoking preclusion is in privity with a party to the earlier action although the circumstances would not support a finding of privity to invoke preclusion against the new party." *Id.* at 716.

42. 18 MOORE'S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][f].

43. *See, e.g.,* *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("[N]onparty preclusion may be justified based on a variety of pre-existing 'substantive legal relationship[s]' between the person to be bound and a party to the judgment."). The Court in *Taylor* further provided:

The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity." The term "privity," however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. To ward off confusion, we avoid using the term "privity" in this opinion.

*Id.* at 894 n.8 (citations omitted). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 51 (subsumes "Persons Having a Relationship to Which One Is Vicariously Responsible for the Conduct of the Other" under the general category of "Substantive Legal Relationships Resulting in Preclusion"). Privity in the preclusion context has also been described as:

[A] nonparty's rights may be concluded when his or her substantive legal right is so defined that it stands or falls according to a judgment involving another who was a party to prior litigation. Persons falling within [this] category were traditionally referred to as being in "privity" with the party to the judgment. This remains useful as a general descriptive term but it must be used with great caution. To say that a person is in "privity" with a party signifies only that the relation between them is such that the judgment involving the party may justly be conclusive on the one who is not a party. The problem remains: What relationships justify that consequence?

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in vicarious liability relationships, which can be overcome where circumstances would lead to an unjust result. Such unjust results exist in cases where “[t]he claim asserted in the second action . . . could not have been asserted against the defendant in the first action,” or where “[t]he judgment in the first action was based on a defense that was personal to the defendant in the first action.”<sup>44</sup>

#### I. THE EVOLUTION OF THE RESTATEMENTS OF JUDGMENTS FROM NONMUTUAL ISSUE PRECLUSION TO NONMUTUAL CLAIM PRECLUSION

The Second Restatement of Judgments broadened the scope of nonmutual preclusion in vicarious liability relationships far beyond the narrow confines of the original Restatement of Judgments, which clung to the fast-eroding mutuality rule.<sup>45</sup> Section 96 of the Restatement of the Law of Judgments, promulgated in 1942, limited the scope of nonmutual preclusion to the narrow exception and further limited its application exclusively to issue preclusion:

##### SUCCESSIVE ACTIONS AGAINST TORTFEASORS WHERE DUTY OF INDEMNITY.

(1) Where two persons are both responsible for a tortious act, but one of them, the indemnitee, if required to pay damages for the tort, would be entitled to indemnity from the other, the indemnitor, and the injured person brings an action against the indemnitor because of such act, a valid judgment (a) for the defendant on the merits for reasons not personal to the defendant terminates the cause of action against the indemnitee . . . .<sup>46</sup>

Section 96 was located under Topic 2 dealing with “Persons Not Parties or Privies,” indicating that this section was intended as an *exception*

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FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 11.23, at 714 (5th ed. 2001).

44. RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1982).

45. See, e.g., JAMES, HAZARD & LEUBSDORF, *supra* note 43, § 11.25, at 716 (citation omitted) (“The [mutuality] rule . . . remained almost universally recognized, though often criticized, until 1942, when it was repudiated in the leading case of *Bernhard v. Bank of America*.” (citing *Bernhard v. Bank of Am. Nat’l Tr. & Sav. Ass’n*, 122 P.2d 892 (Cal. 1942)); see also Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1, 5 n.12 (2013) (noting that “*Bernhard* opened a new path, while the first A.L.I. Restatement of Judgments embraced the old tradition of mutuality” and that “the first Restatement of Judgments [had been criticized as] ‘out of step with the times.’” (quoting FLEMING JAMES, JR., CIVIL PROCEDURE § 11.31, at 597 (1st ed. 1965))).

46. RESTATEMENT OF JUDGMENTS § 96 (AM. LAW INST. 1942).

to the requirement of *privity* under the rule of mutuality.<sup>47</sup> Section 96 embodied the narrow exception by limiting this mutuality exception to judgments in favor of the indemnitor “terminat[ing] the cause of action against the indemnitee.”<sup>48</sup> Comment *a* of Section 96 explains that the exception applied to *issue* preclusion, not claim preclusion<sup>49</sup>: “[A] person should not be entitled to litigate the *same issue* in more than one action. This second principle is limited to litigation with the same adversary, since normally a person is entitled to relitigate *an issue* where the adversary is a different person.”<sup>50</sup>

Section 51 of the Second Restatement of Judgments, promulgated in 1982 when most jurisdictions had abandoned the mutuality rule,<sup>51</sup> expanded the scope of nonmutual preclusion in vicarious liability situations to include nonmutual *claim* preclusion:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other. (1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action *extinguishes* any claim he has against the other person responsible for the conduct . . . .<sup>52</sup>

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47. *Id.* § 96 cmt. a (“Relitigation of *an issue* with a new adversary is permitted because of the assumed unfairness of binding one party to a proceeding by the rules of *res judicata* while the other party is not bound: where there is a new adversary who was not privy to the first action, since the second adversary would not be bound by the rules of *res judicata*, the person who was a party to the first proceeding should not be bound either. This desirability for equality between litigating parties with reference to the rules of *res judicata* is not, however, of pervading importance and disappears when there are countervailing reasons for requiring one to be bound while the other is not.” (emphasis added)).

48. *Id.* § 96.

49. *Id.* § 96 cmt. a. The term *res judicata* is often used to refer to both claim and issue preclusion. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (“The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as ‘*res judicata*.’”).

50. RESTATEMENT OF JUDGMENTS § 96 cmt. a (emphases added).

51. By 1980, only twelve jurisdictions adhered to the mutuality rule. *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 679 n.4 (“One list of fourteen jurisdictions that “still cling to the mutuality rule” is provided in [Janet Schmitt Ellis, Note, *Nonmutuality: Taking the Fairness Out of Collateral Estoppel*, 13 Ind. L. Rev. 563, 566 n.22 (1980)]. It is typical of the pace of change in this area that two of the states listed had formally abandoned the mutuality requirement during the period in which the Note must have been written.”).

52. RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1982) (emphasis added).

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Unlike Section 96 of the first Restatement, Section 51, located under Chapter 4 entitled “Parties and Other Persons Affected by Judgments,” dispenses entirely with the term “privity.”<sup>53</sup> In further contrast to Section 96, Section 51 expands the preclusive effect of a judgment with respect to vicarious liability relationships to include claim preclusion. The text of this section defines the preclusive impact of the prior judgment in terms of “extinguish[ing]” the injured person’s claim rather than “terminat[ing] the cause of action.”<sup>54</sup> In contrast to the Rationale of Section 96 of the original Restatement, Section 51’s Rationale omits reference to issues litigated in the prior action, focusing instead on the functional reality that the claim against the primary obligor (i.e., the indemnitor) and the persons vicariously responsible for his conduct (i.e., the indemnitee) are “[i]n an important sense . . . only a *single claim*.”<sup>55</sup> Although the Reporter’s Note acknowledges:

The results of most of the cases, indeed, could equally well be subsumed under the rule of § 29 [of the original Restatement], precluding a person who has unsuccessfully litigated an issue against one adversary from relitigating it against another . . . . [T]here is substantial authority that a judgment adverse to the claimant precludes the subsequent action even when the issues tendered in the second action were not actually determined in the first action.<sup>56</sup>

Further broadening the application of nonmutual claim preclusion, Section 51 encompasses both the broad exception as well as the narrow exception.<sup>57</sup> This suggests a policy concern that extends “beyond the

53. *Id.*

54. RESTATEMENT OF JUDGMENTS § 96.

55. RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b. (emphasis added) (“The same loss is involved, usually the same measure of damages, and the same or nearly identical issues of fact and law. . . . The optional additional security thus afforded by rules of vicarious responsibility should not . . . afford the injured person a further option to litigate successively the issues upon which his claim to redress is founded. He is ordinarily in a position to sue both obligors in the same action and may justly be expected to do so.”).

56. RESTATEMENT (SECOND) OF JUDGMENTS § 51 reporter’s note on cmt. b.

57. *Id.* § 51 cmt. b, illus. 1. Section 51 provides the following illustration:

P is injured while riding as a passenger in a taxicab owned by T and driven by C. P brings an action against T, alleging that C was negligent and that T was responsible as owner of the cab. T does not dispute that he is chargeable with C’s negligence but successfully defends on the ground that C was not negligent. P is precluded from bringing an action against C based on C’s operation of the taxicab.

*Id.* Wright, Miller, and Cooper provide the following comments on the Second Restatement’s approach:

The Restatement Second of Judgments . . . blend[ed] the broad exception and the narrow exception into a single set of rules . . . . It might have been better to abolish the broad exception, so that nonmutual use of ordinary claim-and

special needs that arise from indemnification,”<sup>58</sup> to include promoting judicial economy and discouraging harassment of defendants by “encourag[ing] joinder of multiple defendants in a single action.”<sup>59</sup> Finally, in light of my proposal in Section II.C that vicarious liability relationships be added to the category of substantive legal relationships constituting privity, it is also noteworthy that Section 51 is located under Topic 2 of Chapter 4, which addresses “Substantive Legal Relationships Resulting in Preclusion” and includes classic examples of privity relationships categorized in *Taylor v. Sturgell*.<sup>60</sup>

## II. CLAIM PRECLUSION IN VICARIOUS LIABILITY RELATIONSHIPS IN STATE AND FEDERAL JURISDICTIONS: THE NATIONAL LANDSCAPE

The national survey of caselaw presented in Section II.A supports Wright, Miller, and Cooper’s conclusion that “[t]here . . . is substantial authority in favor of nonmutual claim preclusion in derivative liability relationships, without regard to the special problems of indemnification.”<sup>61</sup> However, this survey does not support Wright, Miller, and Cooper’s position concerning the theoretical underpinning of nonmutual claim preclusion, i.e., whether to consider the application of claim preclusion to non-parties in a vicarious liability relationship as an *exception* to the requirement of privity—the so-called narrow and broad exceptions—or, rather, as an *extension of privity*—albeit a unilateral or nonmutual one. Wright, Miller, and Cooper characterize the courts’ use of the term “privity” to describe the relation between indemnitor and indemnitee as “bogus privity” because privity traditionally requires “mutuality”—that the party invoking preclusion based on a favorable judgment must have been at risk of being bound by an unfavorable judgment.<sup>62</sup> However, most of the jurisdictions cited in the survey frame nonmutual claim preclusion in terms of privity, rather than as an exception to the privity requirement.

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issue- preclusion rules is available only within the limits of the narrow exception. Nonmutual preclusion in all other circumstances would be limited by the same general requirements of justice and fairness, subject to recognition of the fact that justice and fairness may have distinctive dimensions in dealing with vicarious liability relationships.

WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 691 (footnotes omitted).

58. *Id.* § 4463, at 691 (“The result is to extend nonmutual claim preclusion and ordinary rules of issue preclusion beyond the special needs that arise from indemnification relationships.”).

59. *Id.*

60. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

61. WRIGHT, MILLER & COOPER, *supra* note 9, § 4464.1, at 713.

62. *See id.* § 4464.1, at 716 n.4.

Section II.C contends that the time has come to broaden the privity concept in the context of vicarious liability relationships by jettisoning, as a *sine qua non* of privity, the mutuality requirement—a vestige of the formalist, and now mostly abandoned, rule of mutuality of estoppel—and by including vicarious liability relationships as an additional category to the list of substantive legal relationships.<sup>63</sup> As discussed in Section II.B, the survey reveals that a significant number of courts have applied claim preclusion, rather than issue preclusion, where the latter was nevertheless a viable alternative because issues raised in the subsequent suit had actually and necessarily been determined in the previous action.

#### A. *Jurisdictions that Apply Claim Preclusion in Vicarious Liability Relationships*

This Section demonstrates that a substantial body of caselaw, both state and federal, supports nonmutual claim preclusion consistent with the Second Restatement of Judgments.

##### 1. *State Jurisdictions*

Most of the following state jurisdictions, explicitly or implicitly, adopt Section 51 of the Second Restatement of Judgments' approach to claim preclusion.

*Alabama:* Alabama is one of the few jurisdictions that still applies mutuality of estoppel<sup>64</sup> and recognizes “privity” as an exception to the mutuality rule.<sup>65</sup> However, its Court of Civil Appeals, in *Thompson v.*

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63. See *Richards v. Jefferson*, 517 U.S. 793, 798 (1996). In *Richards*, the Court explained:

Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is “privity” between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust. Moreover, although there are clearly constitutional limits on the “privity” exception, the term “privity” is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.

*Id.* (emphases added).

64. *Thompson v. SouthTrust Bank*, 961 So. 2d 876, 883 (Ala. Civ. App. 2007) (“It is noteworthy that Alabama has not followed the trend of abolishing the requirement that parties be identical, sometimes referred to as the mutuality of estoppel requirement.” (quoting *McMillian v. Johnson*, 878 F. Supp. 1473, 1520 (M.D. Ala. 1995), *rev’d in part on other grounds*, 88 F.3d 1554 (11th Cir. 1996))).

65. *Thompson*, 961 So. 2d at 883.



*SouthTrust Bank*,<sup>66</sup> adopted the equivalent of the broad exception. Citing Section 51, federal common law, as well as the law of other states, *Thompson* ruled that “employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued.”<sup>67</sup> The court held that the employees of a bank sued by plaintiff in connection with a failed transaction could successfully invoke claim preclusion based on a summary judgment in favor of the bank in a prior action by plaintiff.<sup>68</sup> Applying a “substantial identity”<sup>69</sup> privity test that turns on “whether the relationship between the parties was close enough,”<sup>70</sup> the Alabama court ruled:

Because the adjudication in the previous lawsuit in SouthTrust’s favor was based not on defenses that were personal to SouthTrust, but upon defenses that were applicable to the employees, Turner and Nicholson, through whom SouthTrust acted, Turner and Nicholson are in privity with SouthTrust with regard to that adjudication . . . [and, therefore] the trial court did not err when it entered a summary judgment in Turner’s and Nicholson’s favor on the basis of their affirmative defense of res judicata.<sup>71</sup>

*Alaska*: In *DeNardo v. Barrans*,<sup>72</sup> the Alaska Supreme Court labeled as privity the vicarious liability relationship between a state agency and its employees, relying on Section 51 of the Second Restatement of Judgments “in determining whether privity exists for res judicata purposes.”<sup>73</sup> The court precluded plaintiff’s wrongful termination claims against the agency based on the prior judgment dismissing plaintiff’s claims against agency employees:

Because the [Alaska Commission on Postsecondary Education] and the [Alaska Student Loan Corporation] are governmental entities, not individuals, and so could not act except through their officers and employees, their liability could only be established vicariously, through proof that their officers and employees (the individual defendants named in DeNardo’s complaint) acted wrongfully. Under these circumstances, privity arises between the agency defendants, who had not been sued in federal court, and the individual defendants, all of whom were sued for actions taken in the course of their employment, because their relationship is ‘such that one of them is vicariously responsible for the conduct of the

66. *Id.* at 876.

67. *Id.* at 887 (quoting *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288 (5th Cir. 1989)).

68. *Id.* at 888–89.

69. *Id.* at 884.

70. *Id.*

71. *Id.* at 888–89.

72. *DeNardo v. Barrans*, 59 P.3d 266 (Alaska 2002).

73. *Id.* at 270 n.22.

other.’ It follows that, by precluding DeNardo’s individual claims, we also must preclude his agency claims.<sup>74</sup>

*Arizona:* Following an automobile accident in which the front left tire of the injured plaintiff’s car was allegedly defective, plaintiff asserted a product liability claim against the seller of the tire.<sup>75</sup> The tire seller settled the suit with an offer of judgment.<sup>76</sup> In plaintiff’s subsequent action against the manufacturer, the federal district court, citing Section 51 of the Second Restatement of Judgments as well as “Arizona public policy [that] favors joining in one action all known and available tortfeasors as defendants,” held that an offer of judgment accepted by plaintiff in a products liability suit against the seller of a defective tire precluded plaintiff’s claim against the manufacturer.<sup>77</sup> Privity was not mentioned nor was issue preclusion available because no issues had been determined by the judgment in the prior suit.

*Connecticut:* In *Tibbetts v. Stempel*,<sup>78</sup> the federal district court, applying Connecticut law, ruled that plaintiff’s claims against Yale School of Divinity were precluded by a judgment in favor of employees of the Divinity School who had acted in the scope of their employment.<sup>79</sup> The court applied the “privity principle”<sup>80</sup> expressed in Moore’s Federal Practice<sup>81</sup> that “[g]enerally, an employer-employee or agent-principle [sic] relationship will provide the necessary privity for claim preclusion with respect to matters within the scope of the relationship, no matter which party is first sued.”<sup>82</sup>

*Florida:* In *St. Jude Medical S.C., Inc. v. Cormier*,<sup>83</sup> St. Jude sued Medtronic, a competitor, for “tortiously interfering with its business relationship” with Joe Cormier, a St. Jude employee.<sup>84</sup> St. Jude’s claimed

74. *Id.* at 270.

75. *Manjares v. Cont’l Tire N. Am., Inc.*, No. CV 06-1037-PHX-MHM, 2007 U.S. Dist. LEXIS 18452, at \*2 (D. Ariz. Mar. 13, 2007).

76. *Id.* at \*3.

77. *Id.* at \*20.

78. *Tibbetts v. Stempel*, 354 F. Supp. 2d 137 (D. Conn. 2005).

79. *Id.* at 148–49.

80. *Id.* at 148 (“In its modern form, the principle of privity bars relitigation of the same cause of action against a new defendant known by a plaintiff at the time of the first suit where the new defendant has a sufficiently close relationship to the original defendant to justify preclusion.” (quoting *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367–68 (2d Cir. 1995))).

81. 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][f].

82. *Tibbetts*, 354 F. Supp. 2d at 148 (quoting 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][f]).

83. *St. Jude Med. S.C., Inc. v. Cormier*, 745 F.3d 325 (8th Cir. 2014).

84. *Id.* at 326–27.

that Medtronic was vicariously liable for the acts of its employee, Annette Cormier.<sup>85</sup> After arbitrating its claims with Medtronic, St. Jude sued Annette for related claims.<sup>86</sup> Annette moved for judgment on the pleadings, claiming protection under *res judicata*.<sup>87</sup> Although Florida still adheres to the mutuality rule,<sup>88</sup> the court held that St. Jude's vicarious liability claims were barred by *res judicata*, finding, in *privity* terms, that the "identity of the parties" requirement was satisfied.<sup>89</sup> Florida law follows the general principle that "bars a 'plaintiff from relitigating his claim against the servant when a judgment has been entered in a prior suit brought against the master involving the same issues,'"<sup>90</sup> but only "when the master is not guilty of any independent or concurrent wrong, but must be held, if at all, under the doctrine of *respondet superior*."<sup>91</sup> The court also noted:

The district court stated in a footnote that collateral estoppel "likely" applied because "St. Jude is seeking to recover additional damages based

85. *Id.* at 328.

86. *Id.* at 327.

87. *Id.* at 326.

88. *See Massey v. David*, 831 So. 2d 226, 232 (Fla. Dist. Ct. App. 2002) ("In order for *res judicata* or collateral estoppel . . . to apply, Florida requires 'mutuality' and 'identity of parties.' Identity of parties and mutuality do not exist unless the same parties *or their privies* participated in prior litigation that eventuated in a judgment by which they are mutually bound. Even if not named as a party, a party may be deemed a participant in prior litigation for purposes of *res judicata* or collateral estoppel, but only if the party is bound by the final judgment entered to the same extent as the named parties." (second emphasis added) (footnote omitted) (citations omitted)).

89. *St. Jude*, 745 F.3d at 328.

90. *Id.* (quoting *Hinton v. Iowa Nat'l Mut. Ins. Co.*, 317 So.2d 832, 837 (Fla. Dist. Ct. App. 1975)).

91. *St. Jude*, 745 F.3d at 328–39 (quoting *Hinton*, 317 So.2d at 838). *See also West v. Kawasaki Motors Mfg. Corp.*, 595 So. 2d 92, 95 (Fla. Dist. Ct. App. 1992) ("In *Phillips v. Hall* . . . the court held that a plaintiff was barred by *res judicata* from suing an employee of a supermarket in a negligence action for injuries caused by the employee's negligent operation of a hand-powered merchandise cart. The plaintiff had previously sued the employee's employer [the supermarket] and had recovered a judgment for the same injuries arising out of the same accident. Although the employee was not a party to the prior negligence action against his employer, he was nonetheless allowed to raise the defense of *res judicata* based on the judgment entered in the prior action. The court adopted the rationale of a New Hampshire case which reached the same result upon the theory that in master/servant vicarious liability cases, the master and servant are not joint tortfeasors, and, consequently, a plaintiff who elects to sue only one of these two potentially liable parties for a single wrong may not receive a judgment against one party and thereafter attempt to pursue the other." (citing *Phillips v. Hall*, 297 So.2d 136 (Fla. Dist. Ct. App. 1974))).

on the same facts alleged in the Florida Arbitration.” However, the district court did not decide the issue, and this court declines to consider it.<sup>92</sup>

*Georgia:* Although Georgia is one of the few remaining states that follows the mutuality rule, Georgia law recognizes that “‘a master has privity with his servant and can claim the benefit of an adjudication in favor of the servant [but] a servant is not in privity with the master so as to be able to claim the benefit of an adjudication in favor of the master.’”<sup>93</sup> Accordingly, in *Sorrells Construction Company v. Chandler Armentrout & Roebuck, P.C.*,<sup>94</sup> the Georgia Court of Appeals reversed the trial court’s holding “that plaintiff’s voluntary dismissal of its claim against the principal barred pursuit of its claim against the agent.”<sup>95</sup> Instead, the Court of Appeals held that “unless an agent and principal otherwise have the ‘mutual or successive relationship to the same rights’ necessary to establish privity, the general rule that a servant is not in privity with his master applies for purposes of claim preclusion.”<sup>96</sup> Thus, Georgia appears to adopt what amounts to the narrow exception, but does so in terms of privity. As a further limitation, Georgia law appears to restrict nonmutual claim preclusion to cases where issue preclusion is not otherwise applicable.<sup>97</sup>

*Illinois:* Illinois law adopts the equivalent of the broad exception, but does so in terms of *privity* between employee and employer. In *Towns v. Yellow Cab Company*,<sup>98</sup> the Illinois Supreme Court held that a judgment involuntarily dismissing an injured taxicab passenger’s suit against the cab

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92. *St. Jude*, 745 F.3d at 330 (quoting *St. Jude Med. S.C., Inc. v. Cormier*, Civil No. 12-2098 (DWF/JSM), 2013 U.S. Dist. LEXIS 61477, at \*17 n.5 (D. Minn. May 7, 2013), *aff’d in part, rev’d in part*, 745 F.3d 325 (8th Cir. 2014)).

93. *Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P.C.*, 447 S.E.2d 101, 103 (Ga. Ct. App. 1994) (quoting *Gilmer v. Porterfield*, 212 S.E.2d 842 (Ga. 1975)).

94. *Id.* at 101.

95. *Id.* at 102. The court further observed:

[T]he result in the trial court in this case exemplifies the danger of blindly taking rules or exceptions applicable to issue preclusion and applying them to claim preclusion: the promulgation of a rule which would make it impossible to voluntarily dismiss a claim against a principal without losing the claim against the agent, even though settlements and voluntary dismissals are clearly desirable.

*Id.* at 103.

96. *Id.* (citations omitted) (quoting *Block v. Woodbury*, 438 S.E.2d 413, 415 (Ga. Ct. App. 1993)).

97. *Sorrells Constr. Co.*, 447 S.E.2d at 102–03 (“As no issues were litigated and necessarily decided when plaintiff voluntarily dismissed its action against the City, the possibility of applying issue preclusion is easily eliminated. Thus, if plaintiff’s action is to be barred, it would have to be on the basis of claim preclusion.”).

98. *Towns v. Yellow Cab Co.*, 382 N.E.2d 1217 (Ill. 1978).

company, for violating a court order to answer interrogatories, precluded the passenger's subsequent claim against the cab driver.<sup>99</sup> Although the decision did not cite Section 51 of the Second Restatement of Judgments, the court's analysis aligns with Section 51's "single claim" rationale:

[T]he rule has evolved that a judgment for either the master or servant, arising out of an action predicated upon the alleged negligence of the servant, bars a subsequent suit against the other for the same claim of negligence where the agency relationship is not in question. This result obtains even though the defendant in the subsequent suit was not a party to the first action and despite the fact the cases find that a master and servant are technically not in privity . . . .

. . . .

. . . . When an action is brought against a master based on the alleged negligent acts of his servant, and no independent wrong is charged on behalf of the master, his liability is entirely derivative, being founded upon the doctrine of *respondeat superior*. In this regard, it has been said that the liability of the master and servant for the acts of the servant is deemed that of one tortfeasor and is a consolidated or unified one. As such, any legal claim against the master must be said to be identical to that which the plaintiff may have asserted against the servant.<sup>100</sup>

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99. *Id.* at 1223. See also *Muhammad v. Oliver*, 547 F.3d 874, 878–79 (7th Cir. 2008). In *Muhammad*, claims against the chief executive officer of two companies, previously sued by the same plaintiff, were deemed precluded by *res judicata* based on the judgment in a previous suit dismissing the claims against the companies. *Id.* Applying the equivalent of the broad exception, the court stated:

[W]hen *respondeat superior* is the sole asserted basis of liability against a master for the tort of his servant an adjudication on the merits in favor of either the master or servant precludes suit against the other. The rule developed as an offshoot of the doctrine of *res judicata*. Although a master and his servant are not technically in privity, the preclusive principles underlying *res judicata* were thought to have equal application in the *respondeat superior* setting because the operative facts and law controlling a servant's direct liability are always identical to those that determine the vicarious liability of his master (so long as the agency relationship and its scope are not in dispute). If the master is vicariously liable, the servant must be directly liable (and vice versa); if the master is not vicariously liable, the servant cannot be directly liable (and vice versa). The *Towns* doctrine is established law in Illinois.

*Id.* at 879 (quoting *Bachenski v. Malnati*, 11 F.3d 1371, 1377–78 (7th Cir. 1993)).

100. *Towns*, 382 N.E.2d at 1221 (citations omitted). Other decisions applying Illinois law frame the employer-employee vicarious liability relationship in terms of privity. See *Berry v. Ill. Dep't of Human Servs.*, No. 00 C 5538, 2003 U.S. Dist. LEXIS 19286, at \*37–40 (N.D. Ill. Oct. 29, 2003). There, the court explained:

Defendants contend that the claims of Diab and Hayes are barred by *res judicata* (claim preclusion) in that they could have raised their present claims in

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The Seventh Circuit also noted “[t]he *Towns* doctrine is established law in Illinois.’ (And not only in Illinois; see *Peppmeier v. Murphy*, 708 N.W.2d 57, 63–64 (Iowa 2005).”<sup>101</sup>

*Iowa*: In *Criterion 508 Solutions, Inc. v. Lockheed Martin Services, Inc.*,<sup>102</sup> the federal district court, applying the privity label, extended the application of Section 51 beyond the derivative liability relationship.<sup>103</sup>

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the administrative review cases that they litigated in the Circuit Court of Cook County, Illinois. . . .

. . . .

An issue exists . . . as to whether the identity of parties requirement is satisfied. IDHS was a party to the administrative review cases, but the individual defendants were not. . . . However, Illinois courts hold that, where the employer’s liability is based on vicarious liability, the employee and employer are in privity for purposes of *res judicata*. . . . Also, *finding privity to exist* in such situations would be consistent with the *Restatement (Second) of Judgments* § 51 (1982). . . . In the administrative review cases, any “liability” on the part of IDHS would be based on the conduct of IDHS officials and employees being attributed to IDHS. It appears that, in the present situation, Illinois courts would find the individual defendants to be *in privity* with IDHS and therefore *res judicata* would apply.

*Id.* (third and fifth emphases added) (citations omitted). In another Illinois case, the Seventh Circuit explained:

The third element of *res judicata* . . . is an identity of parties *or their privies* in the earlier and later suits. The defendant in the appellant’s state court suit was the Village of Lombard. The defendants in his federal action include, in addition, the village major, the village manager, and several trustees of the village. A government and its officers are *in privity* for purposes of *res judicata*.

*Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983) (emphases added).

101. *Muhammad*, 547 F.3d at 879 (quoting *Bachenski v. Malnati*, 11 F.3d 1371, 1377–78 (7th Cir. 1993)).

102. *Criterion 508 Sols., Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078 (S.D. Iowa 2009).

103. *Id.* at 1095. *See also* *Golden v. Barenbord*, 53 F.3d 866, 870–71 (7th Cir. 1995). In *Golden*, the court reasoned:

The second requirement of *res judicata*, identity of parties, is also satisfied . . . .

Coldwell was acting on behalf of Salomon and Barenborg pursuant to arrangements each appellee had with Coldwell in effectuating the sale of Barenborg’s home. Therefore, through an agency-principal relationship, Coldwell was granted the authority to sell Barenborg’s home to Golden. In finding that Coldwell was an agent, the broad settlement agreement releasing Coldwell would also release the appellees as principals . . . . [T]he Illinois Supreme Court held that any settlement between the agent and the plaintiff extinguished the principal’s vicarious liability. Since Golden released Coldwell from further liability, his vicarious liability claims against the appellees must fail.

*Id.* (footnote omitted) (citations omitted).

The court observed “[a]s long as there is sufficient privity between the parties, Iowa courts have applied Section 51 on several occasions” and that:

Section 51 applies not only in vicarious liability situations, but also when there is sufficient privity between the parties to merit extending claim preclusion to a non-original suit party. This is especially true in instances where the losses and damages are similar, and “the same or nearly identical issues of fact and law” are present. RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b. Here, the facts demonstrate that there is sufficient similarity between the claims Criterion is alleging against Lockheed and Brooks [Lockheed’s *independent contractor* and the defendant in the prior suit], similar damages, and only superficial differences between issues of fact and law. Additionally, Lockheed and Brooks are *in privity* because Criterion’s claims against Lockheed are based on tortious acts Brooks committed while working as an independent contractor for Lockheed. All of the facts indicate that Criterion is suing Lockheed as the *functional equivalent* of Brooks and Criterion “cannot show any good reasons to justify a second chance.”<sup>104</sup>

*Kentucky*: In *Wayne County Hospital v. Jakobson*,<sup>105</sup> a hospital patient won a verdict against the hospital relating to the negligence of a doctor employed by the hospital.<sup>106</sup> The hospital subsequently sued the doctor seeking indemnification and then unsuccessfully moved for summary judgment based on both claim and issue preclusion.<sup>107</sup> The Sixth Circuit addressed the hospital’s claim preclusion argument first before moving on to issue preclusion.<sup>108</sup> While citing Kentucky law and Section 51 of the Second Restatement of Judgments for the proposition that “generally accepted principles of *res judicata* recognize that judgments concerning persons having a relationship in which one is vicariously responsible for the conduct of another may have preclusive effect under certain circumstances,”<sup>109</sup> the court declined to apply claim preclusion.<sup>110</sup> Instead, it agreed with the district court’s determination that “the Hospital’s notice to Dr. Jakobson two weeks before the Hardwick trial that it intended to

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104. *Criterion*, 806 F. Supp. 2d at 1095 (emphases added) (quoting WRIGHT, MILLER & COOPER, *supra* note 9, § 4464.1, at 724). See also *Peppmeier v. Murphy*, 708 N.W.2d 57, 64 (Iowa 2005) (holding that prior summary judgment in favor of physician-defendant in medical malpractice action by patient, based on the lack of admissible evidence to create a genuine issue of physician’s negligence, precluded patient’s claim against the hospital on basis of *respondeat superior*).

105. *Wayne Cty. Hosp. v. Jakobson*, 567 F. App’x 314 (6th Cir. 2014).

106. *Id.* at 314.

107. *Id.*

108. *Id.* at 317.

109. *Id.* at 318.

110. *Id.* at 321.

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seek indemnification from him in the event of the plaintiff's verdict 'suggests an antagonistic posture rather than an identity of interest . . . .'<sup>111</sup>

*Louisiana:* Although Louisiana does not extend *res judicata* to vicarious liability relationships, it functionally achieves the same result through the doctrine of judicial estoppel.<sup>112</sup> In *Williams v. Marionneaux*,<sup>113</sup> the Louisiana Supreme Court held that "a plaintiff's cause of action abates against the person secondarily liable when it is shown that he has already litigated with the tortfeasor or tortfeasors and they have been held to be without fault. Accordingly, a plea in bar of judicial estoppel would have been appropriate procedurally."<sup>114</sup> Judicial estoppel is "generally applied to parties to the prior actions or their privies. In some instances, involving vicarious liability resulting from employer-employee and lessor-lessee relationships, it has been held that the requirement of identity of parties may be waived in the application of judicial estoppel."<sup>115</sup>

*Maryland:* In another case applying the equivalent of the broad exception, a surgeon suffered summary judgment in his defamation suit against the hospital where he was previously employed on the grounds, *inter alia*, that "none of the statements relied upon [by the plaintiff had] been published to a legally distinct third party."<sup>116</sup> The surgeon then sued two of the hospital's nurses, asserting the same defamation claims.<sup>117</sup> The Maryland Court of Appeals held: "As we shall conclude that . . . all counts were barred by *res judicata*, we shall not reach the parties' arguments with respect to collateral estoppel and limitations."<sup>118</sup> The court framed the relationship between the hospital and its two nurses in terms of privity:

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111. *Id.* (quoting *Wayne Cty. Hosp. v. Jakobson*, Civil No. 09-44-GFVT, 2010 U.S. Dist. LEXIS 137819, at \*14 (E.D. Ky. Dec. 29, 2010), *aff'd*, 567 F. App'x 314 (6th Cir. 2014)).

112. *Baker v. Wheless Drilling Co.*, 303 So. 2d 511, 514 (La. Ct. App. 1974) ("Although the application of the doctrine of judicial estoppel in Louisiana has been criticized, questioned, and soundly rejected by one Court of Appeal, it continues to find acceptance in the opinions of the state's highest court." (citations omitted)).

113. *Williams v. Marionneaux*, 124 So. 2d 919 (La. 1960), *overruled by Sampay v. Morton Salt Co.*, 395 So. 2d 326, 329 (La. 1981).

114. *Id.* at 922.

115. *Barnett v. Develle*, 289 So. 2d 129, 139 (La. 1974).

116. *deLeon v. Slear*, 616 A.2d 380, 383 (Md. 1992) (quoting *deLeon v. St. Joseph Hosp.*, CA-86-1609-H (D. Md. filed May 22, 1986), *aff'd*, 871 F.2d 1229 (4th Cir. 1988), *cert. denied*, 493 U.S. 825 (1989)).

117. *deLeon*, 616 A.2d at 383.

118. *Id.* at 385; *see also id.* at 387 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1982)).



This Court has not squarely decided whether an employee is in privity with his employer, for purposes of res judicata, where a plaintiff brings a tort suit for damages against the employer, loses in the action against the employer, and then sues the employee for damages based upon tortious conduct occurring in the scope of employment and constituting the same “claim” as that involved in the earlier action. Numerous other courts have addressed the issue, however, and have concluded that res judicata bars the plaintiff’s suit against the employee in this situation.<sup>119</sup>

In addition to citing decisions of several states and federal courts, the *deLeon* opinion also cites Section 51 of the Second Restatement of Judgments.<sup>120</sup>

*Michigan*: Michigan law adopts Section 51’s approach to claim preclusion in vicarious liability relationships. In *Lamie v. Wright*,<sup>121</sup> the federal district court adopted the Magistrate’s recommendation precluding plaintiff’s claims against Wright and Cereska, employees of PW Services, a professional fiduciary, based on a prior probate court judgment which rejected plaintiff’s claim to property owned by his father, known as the Taft Road property.<sup>122</sup> Although it appears that the material issue—plaintiff’s rights to ownership of his father’s real estate—was determined against plaintiff in the probate court, possibly justifying application of issue preclusion, the federal district court agreed that “plaintiff’s claims concerning the Taft Road real property and personal property contained

119. *deLeon*, 616 A.2d at 385–86.

120. *Id.* at 387; see also *Cognate Bioservs., Inc. v. Smith*, Civil No. CCB-13-1797, 2016 U.S. Dist. LEXIS 30649 (D. Md. Mar. 10, 2016). In a suit by Cognate alleging misappropriation of trade secrets or products by Smith Consulting and MacroCure, the court held that Smith Consulting was *in privity* with Smith, the party against whom Cognate counterclaimed in a prior state court suit. *Id.* The court stated:

The amended complaint alleges that Smith acted as the agent of Smith Consulting, his wholly-owned company. . . . According to the Restatement [(Second) of Judgments § 51 (1982)] and Maryland law, these allegations are sufficient to establish that Smith Consulting is vicariously liable for Smith’s conduct. In the state court case, Cognate brought several counterclaims against Smith and lost. Therefore, the judgment against Cognate, the “injured person” in the Restatement definition, “extinguishes” any claim the plaintiffs have against Smith Consulting. . . .

*Id.* at \*15–16. Although the court explicitly found that a material fact essential to Cognate’s claim had been decided against Cognate in its earlier counterclaim, the court applied claim preclusion, rather than issue preclusion, to Cognate’s claim against Smith Consulting and only applied issue preclusion to Cognate’s claim against MacroCure, “even if the plaintiffs’ claims against MacroCure are not barred by res judicata.” *Id.* at \*18.

121. *Lamie v. Wright*, Case No. 1:12-cv-1299, 2014 U.S. Dist. LEXIS 93818 (W.D. Mich. June 4, 2014), *adopted by* 2014 U.S. Dist. LEXIS 92191 (W.D. Mich. July 8, 2014).

122. *Id.* at \*10–11.

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thereon were barred by *res judicata* arising from the Muskegon County Probate proceedings.”<sup>123</sup> The court concluded:

Plaintiff’s claims against Cereska and Wright in the foregoing counts are clearly barred by the doctrine of *res judicata*, arising both from the Probate Court judgment and from Chief Judge Maloney’s final judgment in *LaMie v. Smith*, case no. 1:12-cv-201. Under both Michigan law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the previous action . . . . Although neither Cereska nor Wright were parties to the previous two lawsuits, their employer, PW Services, was a party. The application of *res judicata* does not require an identity of parties. Rather, the parties need only be *in privity* or in a relationship, such as that between employer and employee, in which one party is vicariously liable for the acts of the other. See [RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1982)]. Both the federal courts and the Michigan courts hold that an employee acting within the scope of his employment is entitled to invoke the doctrine of *res judicata* defensively when a plaintiff sues the employee after having unsuccessfully litigated the same claims against the employer.<sup>124</sup>

*Nevada*: In *Spector v. El Rancho, Inc.*,<sup>125</sup> the Ninth Circuit held:

Where . . . the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff’s right of action against the other. Since there was a verdict and judgment in favor of the Hotel as Graham’s principal, Graham was entitled to raise this judgment as a bar to appellant’s action as against him.<sup>126</sup>

While this statement of the law appears to embrace the broad exception, the opinion does not explicitly refer to claim or issue preclusion. However, given the favorable resolution of the issue of the employee’s negligence, either preclusion doctrine was applicable.<sup>127</sup>

*New Hampshire*: In *Fiumara v. Fireman’s Fund Insurance Cos.*,<sup>128</sup> in an intentional infliction action by plaintiff against an insurance company, insurance investigators, and a testing laboratory, the First Circuit held that an earlier judgment in a suit filed against the insurance company alone barred plaintiff’s claims against the insurance investigators and the testing

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123. *Id.* at \*8.

124. *Id.* at \*9–10 (fourth emphasis added) (citations omitted).

125. *Spector v. El Rancho, Inc.*, 263 F.2d 143 (9th Cir. 1959).

126. *Id.* at 145 (citations omitted).

127. *Id.*

128. *Fiumara v. Fireman’s Fund Ins. Cos.*, 746 F.2d 87 (1st Cir. 1984).

laboratory based on *both claim and issue preclusion*.<sup>129</sup> The court noted that, “[w]hile [the investigators and the testing laboratory] were not parties to the state suit, the application of res judicata and collateral estoppel, both in the federal courts and in New Hampshire, is no longer grounded upon mechanical requirements of mutuality.”<sup>130</sup> Therefore, the court noted that “the res judicata defense is unmistakably available to them” because they were “acting as agents of the insurers when they committed the putative misdeeds for which they have now been sued . . . .”<sup>131</sup> Because there was a finding of fact in the prior suit exonerating the investigator and laboratory, the First Circuit acknowledged that, “[i]n our view, this case is governed by well-settled principles of res judicata and collateral estoppel.”<sup>132</sup> The court further explained in a footnote:

We recognize that there is a distinction between res judicata (claim preclusion) and collateral estoppel (issue preclusion). We are also cognizant that, at least as to some of Fiumara’s claims and as to certain of the appellees, the latter doctrine may be the more apposite. Yet, the splitting of such fine hairs would be meaningless in this case, as these two lines of defense share a distinct family resemblance; under the New Hampshire cases, collateral estoppel is viewed merely as “an extension of the doctrine of res judicata.” Thus, to facilitate our analysis of the questions before us, we will use a shorthand reference to the term “res judicata” to embrace both, without making any pretense of being more precise than the exigencies of the matter at bar warrant.<sup>133</sup>

*New Mexico*: New Mexico law adopts Section 51 of the Second Restatement of Judgments.<sup>134</sup> In *Gonzales v. Hernandez*,<sup>135</sup> plaintiff brought an unsuccessful civil rights claim in New Mexico state court against a hospital alleging that the hospital, through its employees, discriminated against her while she was employed there and was thereby vicariously liable.<sup>136</sup> The jury returned a verdict finding the hospital did not discriminate against her.<sup>137</sup> In her subsequent federal court action, the Tenth Circuit held: “[P]ursuant to [Restatement (Second) of Judgments]

129. *Id.* at 90.

130. *Id.*

131. *Id.* at 92.

132. *Id.* at 90.

133. *Id.* at 90 n.1 (citations omitted) (quoting *Bricker v. Crane*, 387 A.2d 321, 323 (N.H. 1978)).

134. *Gonzales v. Hernandez*, 175 F.3d 1202, 1205 (10th Cir. 1999) (“In the instant case, New Mexico law adopting the Restatement (Second) of Judgments § 51 (1980) controls questions of preclusion involving vicarious liability.”).

135. *Id.*

136. *Id.*

137. *Id.* at 1204.

section 51(1) as applied in New Mexico, the district court correctly held that Ms. Gonzales is precluded from litigating claims against the defendant [hospital] employees . . . .”<sup>138</sup>

*New York*: Citing Section 51(3) of the Second Restatement of Judgments, the federal district court held in *Garver v. Brown & Co. Securities Corp.*,<sup>139</sup> that the previous judgment and division of property in a divorce proceeding between plaintiff and her ex-husband, precluded plaintiff’s subsequent claim against her ex-husband’s securities broker based on the ex-husband’s alleged unauthorized transfer of funds out of plaintiff’s brokerage account.<sup>140</sup> In observing that “courts applying New York’s res judicata rules have found that ‘privity’ exists between parties in an indemnification relationship,”<sup>141</sup> the court applied the same rationale for this privity relationship underlying the narrow exception to mutuality of estoppel:

If [the ex-wife] were to prevail on these claims, [the broker] would have a right to seek indemnification from [the ex-husband]. . . . Allowing [the broker] to exercise its right of indemnification, however, would impermissibly upset the state court’s final judgment as to the appropriate allocation of property between the plaintiff and [her ex-husband]. On the other hand, denying [the broker’s] right of indemnification would destroy this right even though [the broker], unlike the plaintiff, did not have the opportunity to present its case to the state court. New York’s res judicata rules do not permit the plaintiff to use this Court as a forum in which to create such impossible choices and anomalous consequences.<sup>142</sup>

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138. *Id.* at 1206; *see also* Ford v. N.M. Dep’t of Pub. Safety, 891 P.2d 546, 555 (N.M. Ct. App. 1994) (citing Section 51 and applying claim preclusion in favor of defendant state agency in a state action based on a verdict in favor of the agency’s employees in prior federal court suit, where “the same operative facts form[ed] the basis of both [p]laintiff’s state court complaint and his federal amended complaint. The allegations in the state complaint [were] almost identical to those in the federal complaint.”).

139. *Garver v. Brown & Co. Sec. Corp.*, No. 96 Civ. 2507 (JGK), 1998 U.S. Dist. LEXIS 1454 (S.D.N.Y. Feb. 10, 1998).

140. *Id.* at \*19–20.

141. *Id.* at \*15–16 (emphasis added).

142. *Id.* at \*19–20; *see also* Bloom v. ProMaxima Mfg. Co., 743 F. Supp. 2d 219 (W.D.N.Y. 2010). In a suit against a manufacturer of exercise equipment and the distributor, distributor settled with the plaintiff and the jury found for the manufacturer, which then moved to dismiss distributor’s indemnity cross-claim against it *with prejudice*, thereby effectively precluding the distributor’s assertion of that claim in another court. *Id.* at 221. Applying Restatement (Second) of Judgments § 51, the court granted the manufacturer’s motion, finding that permitting the distributor the opportunity to be indemnified by the manufacturer on the distributor’s cross-claim, after the manufacturer had received a favorable judgment of no liability to the injured purchaser, would create the risk of an anomalous situation by having the indemnitor-manufacturer indemnify the

*North Dakota:* The Supreme Court of North Dakota, applying the equivalent of the broad exception in *Lucas v. Porter*,<sup>143</sup> involving a principal-agent relationship, held that claim preclusion barred claims against the agent based on the judgment in a prior suit in favor of the principal.<sup>144</sup> Applying a privity analysis, the court noted: “This Court has adopted an ‘expanded’ version of privity for claim preclusion. ‘[P]rivilege exists if a person is so identified in interest with another that he represents the same legal right.’”<sup>145</sup> The court also noted that “[f]undamental fairness underlies the determination of privity.”<sup>146</sup> The court held:

[The plaintiff’s] claims against [the agents] in this action arose out of the same underlying factual circumstances that established the existence of [the plaintiff’s] rights in [the first suit] and are derivative of his claims against the [principals] in [the first suit]. Under these circumstances, we conclude there is a sufficient identity of common interests of the corporate defendants in [the first suit] with the individual defendants in [the second suit] for purposes of claim preclusion and splitting a cause of action. We therefore conclude [the second suit] involves an action against the same parties or their privies as in [the first suit] for purposes of splitting a cause of action.<sup>147</sup>

*Ohio:* Ohio’s Ninth District Court of Appeals “determined that an employee’s employment relationship, coupled with an identity of desired result, created *privity* between the employee and his employer,”<sup>148</sup> in

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indemnitor-distributor after manufacturer was found not to be liable to the injured purchaser. *Id.* at 224–25. The court reasoned that:

[T]he rules of *res judicata* applicable in this situation should approximate those that govern when the same claim is successively asserted against a single defendant. The effect of the rule of [Section 51] is that those rules are applicable, with exceptions that take account of contingencies resulting from the fact that two defendants are involved.

*Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b). See also *Xu v. City of New York*, No. 08 Civ. 11339 (DLC), 2010 U.S. Dist. LEXIS 78404, at \*8–18 (S.D.N.Y. Aug. 3, 2010) (purporting to apply New York preclusion law by applying issue preclusion to preclude relitigation of issues determined in prior suit against city agency, applying claim preclusion to preclude claims that should have been asserted in prior action, and holding that the city agency’s employees sued in the second action were *in privity* with the city agency).

143. *Lucas v. Porter*, 755 N.W.2d 88 (N.D. 2008).

144. *Id.* at 98–99.

145. *Id.* at 98 (quoting *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992)).

146. *Id.*

147. *Id.* at 98–99.

148. *Elec. Enlightenment, Inc. v. Kirsch*, 9th Dist. Summit No. 23916, 2008-Ohio-3633, at ¶ 9 (emphasis added) (citing *Singfield v. Yuhasz*, 9th Dist. Summit No. 22432, 2005-Ohio-3636, at ¶ 11).

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concluding that an “employee who was acting within the scope of his employment was in privity with his employer.”<sup>149</sup> In *Electrical Enlightenment, Inc. v. Kirsch*,<sup>150</sup> plaintiff company brought action against a competitor’s worker who had posted and maintained the competitor’s website, alleging that the competitor’s website was impermissibly similar to plaintiff-company’s own website.<sup>151</sup> The Court of Appeals held that a prior judgment against the competitor company precluded the plaintiff’s claim against the competitor’s worker, finding the competitor’s worker to be *in privity* with the competitor, his employer.<sup>152</sup> Extending the privity concept further, the court found that, even if the worker was an independent contractor, “it is undisputed that [the worker] was hired by [plaintiff’s competitor] and was performing work for [the competitor] when he posted and maintained [the competitor’s] website.”<sup>153</sup> Accordingly, the court concluded “that [the worker and competitor’s] relationship [was] ‘close enough’ to permit the application of *res judicata*,”<sup>154</sup> and that their “work relationship, coupled with the identity of desired result, create[d] *privity* among them.”<sup>155</sup>

*Oklahoma:* In *Robinson v. Volkswagenwerk AG*,<sup>156</sup> plaintiffs, who were severely burned in a car accident while traveling in their Audi 100 LS, initially brought a products liability suit against Audi NSU, the manufacturer.<sup>157</sup> The jury returned a verdict in favor of Audi NSU.<sup>158</sup> Subsequently, plaintiffs sued Volkswagen AG alleging it “had a controlling relationship with Audi NSU and is therefore responsible for the torts of its subsidiary.”<sup>159</sup> The court determined that the jury’s verdict in favor of Audi NSU “necessarily means”<sup>160</sup> that the jury “actually decided”<sup>161</sup> at least one of three facts—(1) that Audi 100 LS fuel tank was not defective, (2) that the alleged defect did not make the product unreasonably dangerous, or

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149. *Elec. Enlightenment*, 2008-Ohio-3633 at ¶ 9 (citing *Doolittle v. Zapis Comm’n Corp.*, 11th Dist. Trumbull No. 99-T-0084, 2000 Ohio App. LEXIS 3781, at \*5 (Aug. 18, 2000)).

150. *Elec. Enlightenment*, 2008-Ohio-3633 at \*1.

151. *Id.*

152. *Id.* at ¶ 11.

153. *Id.* at ¶ 10.

154. *Id.*

155. *Id.* at ¶ 11 (emphasis added).

156. *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268 (10th Cir. 1995).

157. *Id.* at 1271.

158. *Id.*

159. *Id.* at 1275.

160. *Id.* at 1273.

161. *Id.*

(3) that the alleged defect did not cause plaintiffs' injuries—and that any one of these facts were “necessary to support the judgment.”<sup>162</sup> The Court of Appeals concluded that the district court properly dismissed the products liability claim against Volkswagen AG, the parent corporation, under the doctrine of *claim preclusion*, not issue preclusion.<sup>163</sup> Citing Section 51 of the Second Restatement of Judgments, the court stated that if Volkswagen AG had a controlling, “near alter ego”<sup>164</sup> relationship with Audi NSU which made Volkswagen AG responsible for the torts of its subsidiary, that relationship “would be sufficient to establish ‘privity’ between the two corporations such that Volkswagen AG is entitled to assert the previous judgment as a bar to the claim now asserted.”<sup>165</sup>

*Pennsylvania:* In *Michelson v. Exxon Research & Engineering Co.*,<sup>166</sup> the United States Court of Appeals for the Third Circuit, citing Pennsylvania law and Section 51 of the Second Restatement of Judgments, held that plaintiff's defamation claim in a suit against Exxon was precluded by *res judicata* based on a judgment notwithstanding the verdict entered against plaintiff in a previous Pennsylvania state court suit against an Exxon employee, Kelly.<sup>167</sup> In the state action, plaintiff alleged that Kelly sent a defamatory memo to plaintiff's supervisor at Exxon, Arthur Hanggeli, who, in turn, passed the memo on to his own supervisor.<sup>168</sup> Hanggeli was not a defendant in the state action. Based on this state court judgment, the Third Circuit held: “Because Pennsylvania courts have rejected the notion of mutuality of estoppel, [plaintiff] is collaterally estopped from pursuing his claim based on Hanggeli's republication” of the allegedly defamatory memo.<sup>169</sup> Thus, because plaintiff did not previously assert a defamation claim against Hanggeli, who was not a defendant in the state court suit, Exxon's alleged vicarious liability for Hanggeli's conduct could not have been barred by claim preclusion.<sup>170</sup>

*Rhode Island:* The Rhode Island Supreme Court, in deciding whether a stipulated dismissal with prejudice of a product liability claim against the manufacturer of a surgically implanted prosthesis, Dacomed, precluded a claim by the same plaintiff against the parent company of the manufacturer, Urohealth, ruled as a matter of Rhode Island law that “[a] privity

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162. *Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982)).

163. *Robinson*, 56 F.3d at 1275 (emphasis added).

164. *Id.*

165. *Id.* (emphasis added).

166. *Michelson v. Exxon Research & Eng'g Co.*, 808 F.2d 1005 (3d Cir. 1987).

167. *Id.* at 1007.

168. *Id.* at 1006.

169. *Id.* (citations omitted).

170. *Id.*

determination does not rise or fall on the distinction between direct and vicarious liability. Under Rhode Island law, privity is defined by a commonality of interests.”<sup>171</sup> The court held that a sufficient commonality of interest existed for purposes of res judicata because “[t]he parent [Urohealth] and subsidiary [Dacomed] are *in privity* because Urohealth always has taken legal responsibility for the product and Dacomed’s actions and stands ready to defend Dacomed in the state case.”<sup>172</sup>

*South Carolina:* In *E.A. Prince & Son, Inc. v. Selective Insurance Co.*,<sup>173</sup> the federal district court, applying South Carolina law, noted: “*Res judicata* bars a subsequent suit if the parties are the same *or their privies*,”<sup>174</sup> and that a “judgment on the merits *in favor of* the agent is a bar to an action against the principal for the same cause, because the principal’s liability is predicated upon that of the agent. But a judgment *against* the agent is not conclusive in an action against the principal.”<sup>175</sup>

*Tennessee:* The Supreme Court of Tennessee, in *Creech v. Addington*,<sup>176</sup> held that claim preclusion barred a vicarious liability claim for fraudulent misrepresentations, brought against defendants by investors in property owned by the defendants, based on a prior judgment on the merits dismissing a claim by the same investors against the defendants’ real estate agents arising out of the same failed investment transaction.<sup>177</sup> The court framed the vicarious liability relationship between the property owners and their real estate agents in terms of *privity*.<sup>178</sup> The court stated: “The doctrine of res judicata, also referred to as claim preclusion, bars a second suit between the same parties *or their privies* on the same cause of action with respect to all issues which were or could have been litigated in the former suit.”<sup>179</sup> The court then concluded: “The ‘same parties or their privies’ requirement for application of res judicata is met here.”<sup>180</sup> Although the court held that claim preclusion barred suit against the

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171. *Lennon v. Dacomed Corp.*, 901 A.2d 582, 591 (R.I. 2006) (citing *Duffy v. Milder*, 896 A.2d 27, 36 (R.I. 2006)).

172. *Id.* at 592 (emphasis added) (quoting *Doe v. Urohealth Sys., Inc.*, 216 F.3d 157, 162 (1st Cir. 2000)).

173. *E.A. Prince & Son, Inc. v. Selective Ins. Co.*, 818 F. Supp. 910 (D.S.C. 1993).

174. *Id.* at 915 (emphasis added) (citing *Branning v. Morgan Guar. Tr. Co.*, 739 F. Supp. 1056, 1064–65 (D.S.C. 1990)).

175. *Id.* (quoting *Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 65 S.E. 1047, 1047 (S.C. 1909)).

176. *Creech v. Addington*, 281 S.W.3d 363 (Tenn. 2009).

177. *Id.* at 383.

178. *Id.* at 373.

179. *Id.* at 376 (emphasis added) (citations omitted).

180. *Id.* at 376–77.



principal, it declined to apply issue preclusion because the trial court in the initial suit against the agents did not make a finding on the same issue raised in the suit against the principal.<sup>181</sup>

*Texas*: In *Soto v. Phillips*,<sup>182</sup> the Texas Court of Appeals, applying the equivalent of the broad exception and citing Section 51 of the Second Restatement of Judgments, ruled:

When the allegation is that the parties were in a vicarious relationship, . . . a judgment for the principal bars a later suit against the agent. The converse is also true. Res judicata is available to a principal whose liability rests on derivative or vicarious responsibility for an actor's conduct which was necessarily decided adversely to the claimant in an earlier suit against the actor.<sup>183</sup>

The court held that physicians, Dr. Phillips and Dr. Butler, could assert res judicata as a defense in a subsequent action brought by an injured employee against the physicians based on their alleged false testimony in a workers' compensation case. The physicians had acted as agents for the workers' compensation carrier and the employer when they examined the

181. *Id.* at 374.

182. *Soto v. Phillips*, 836 S.W.2d 266 (Tex. Ct. App. 1992).

183. *Id.* at 270 (citations omitted). In another case, *U.S. ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370 (S.D. Tex. 1994), the court, citing "Texas law which holds that 'where the rights and liabilities of a party are derivative, a judgment binding a party from whom the rights or liabilities are derived may be set up as a bar in the second suit,'" as well as the Restatement (Second) of Judgments § 51(1), found that a derivative relationship existed between two joint venture subcontractors that amounts to *privity* and a *derivative relationship* between a general contractor and its subcontractor. *Id.* at 373 (quoting *Lemon v. Spann*, 633 S.W.2d 568, 570 (Tex. Ct. App. 1982)). The court held that the judgment against plaintiff after a jury trial in his previous suit against one of the joint venturers precluded assertion of the same claim against the other joint venturer and the general contractor where judgment against the plaintiff in the first suit was based on a jury verdict and "the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit." *Id.* at 374. Therefore, issue preclusion presumably would have been available. In *Truck Insurance Exchange v. Mid-Continent Casualty Co.*, a suit against Mid-Continent Casualty Company where Truck Insurance Exchange ("Truck") sought "reimbursement for settlement and defense costs that Truck paid to defend the parties' mutual insured," 320 S.W.3d 613, 615 (Tex. Ct. App. 2010), the court held that Truck and the insured were in *privity* "[b]ecause all Truck's claims against Mid-Continent derive entirely from [the insured] and, as a result depend upon [the insured's] right to coverage under its policy with Mid-Continent [and therefore] Truck's interest in the policy is the same as [the insured's]." *Id.* at 619. Although the court framed the issue in terms of claim preclusion, there is some question as to whether this holding deals instead with issue preclusion (i.e., whether Truck is bound by the "no coverage" finding in the prior suit). *Id.* at 620. The court added, "[b]ecause we hold that Truck is in *privity* with [the insured] as to the federal coverage decision, Truck is precluded from relitigating the issues [of no coverage] decided by that decision." *Id.*

injured employee prior to the workers' compensation case and were therefore in privity with carrier and employer, who were defendants in the workers' compensation case.<sup>184</sup>

*Washington*: In *Kuhlman v. Thomas*,<sup>185</sup> a former employee of the state housing authority ("SHA") sued the SHA, claiming that its employees violated plaintiff's state due process rights in disciplinary proceedings.<sup>186</sup> The trial court granted summary judgment in the SHA's favor, "finding that SHA had not deprived Kuhlman of his right to due process."<sup>187</sup> In Kuhlman's subsequent suit against the SHA's employees, asserting the same state due process claim, the Washington Court of Appeals held that Kuhlman's claim was precluded by the prior summary judgment in the employer's favor.<sup>188</sup> It appears that the court applied the equivalent of the broad exception, allowing SHA's employees to enjoy the preclusion benefits of their employer's previous judgment. It is noteworthy that the court applied the doctrine of *res judicata*, rather than collateral estoppel, to preclude the entire claim.<sup>189</sup> The court did not merely apply the doctrine to preclude relitigation of the due process rights violation issue determined in the prior action. It is also significant that the court found the housing authority and the defendant employees were "in privity," noting: "[A] number of federal circuits have concluded that, in general, the employer/employee relationship is sufficient to establish *privity*."<sup>190</sup>

Fourteen years later, the Washington Court of Appeals, citing *Kuhlman* and Section 51 of the Second Restatement of Judgments, once again ruled, in *Ensley v. Pitcher*,<sup>191</sup> that "[t]he employer/employee

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184. *Soto*, 836 S.W.2d at 269–70.

185. *Kuhlman v. Thomas*, 897 P.2d 365 (Wash. Ct. App. 1995).

186. *Id.* at 366–67.

187. *Id.* at 367.

188. *Id.* at 370.

189. *Id.*

190. *Id.* at 368 (emphasis added). The court stated:

SHA's [the State Housing Authority's] liability in the first complaint [the first case] was premised entirely on the actions of its employees. In particular, Kuhlman specifically complained that the employees' accusations were false and that, as a consequence, SHA officials had wrongfully suspended and demoted him. The suit against SHA was therefore essentially a suit against its employees. That is to say, whether SHA violated Kuhlman's rights turned on the propriety of its employees conduct. Having defended that suit, SHA essentially acted as their representative, protecting their interests in the first suit. Under these circumstances, the parties must therefore be viewed as sufficiently the same, if not identical.

*Id.* at 368–69 (citations omitted).

191. *Ensley v. Pitcher*, 222 P.3d 99 (Wash. Ct. App. 2009).

relationship is sufficient to establish *privity*.”<sup>192</sup> In *Ensley*, plaintiff’s negligence claim against a bartender, who allegedly over-served drinks to a driver who injured plaintiff when the driver crashed into plaintiff’s car, was precluded by *res judicata* based on the summary judgment dismissal of plaintiff’s identical negligence claim against the bar itself; finding *privity* between the bartender and the bar based on their vicarious liability relationship.<sup>193</sup> And, once again, the court applied the “more lenient” concept of *res judicata* over collateral estoppel,<sup>194</sup> notwithstanding that the prior summary judgment in favor of the bar had determined the issue of the bartender’s non-negligence.<sup>195</sup>

*West Virginia*: In *Shafi v. St. Francis Hospital*,<sup>196</sup> the Fourth Circuit held that plaintiff’s state-law tortious interference claim against the Hospital and Wright, its president, was barred by claim preclusion.<sup>197</sup> The court reasoned that the plaintiff could have asserted the claim in his prior state court suit against the Hospital: “All of Wright’s allegedly tortious actions were taken in his capacity as president of [the Hospital], as indeed all ‘actions’ of [the Hospital] were actually performed by Wright. Hence, Wright is *in privity* with [the Hospital] so as to share its *res judicata* defense.”<sup>198</sup>

192. *Id.* at 104 (emphasis added).

193. *Id.* at 104. The court explained:

Different defendants in separate suits are the same party for *res judicata* purposes as long as they are in *privity*. [citing *Kuhlman*, 897 P.2d at 368]. The employer/employee relationship is sufficient to establish *privity*. [*Id.*] (holding that where the ultimate issue of whether the employer had violated the plaintiff’s rights turned on the propriety of its employees conduct, the parties must be viewed as sufficiently the same, “if not identical”); *see also Kuhlman’s* discussion of federal law therein. Pitcher and Red Onion are clearly in *privity*. *Ensley* could have sought to establish Pitcher’s personal liability in the first suit. The fact that *Ensley* did not name Pitcher as a defendant does not defeat the identity of the parties where the employer’s liability turns solely on vicarious liability.

*Id.*

194. *Id.* at 102 (observing a difference in “collateral estoppel’s requirement that the issue be actually litigated from *res judicata’s* more lenient standard where issues that could have been litigated and resolved are barred.” (citing 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.33, at 479 (1st ed. 2007))).

195. *Id.* at 100–01.

196. *Shafi v. St. Francis Hosp.*, Nos. 90-3107, 90-3117, 1991 U.S. App. LEXIS 15232, 937 F.2d 603 (4th Cir. 1991) (unpublished table decision).

197. *Id.* at \*13–14.

198. *Id.* at \*13–14 (first emphasis added) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. (1982))).

## 2017] NONMUTUAL PRIVITY IN VICARIOUS LIABILITY RELATIONSHIPS 35

*Wisconsin*: In *Landess v. Schmidt*,<sup>199</sup> plaintiff operated a milk hauling business.<sup>200</sup> Plaintiff collected and delivered milk from a number of dairy farms and delivered it to Borden's West Allis dairy ("the dairy").<sup>201</sup> After the dairy stopped accepting milk from Landess and arranged for different haulers ("the haulers") to collect and deliver the milk, Landess sued the dairy for tortious interference with his business relations and breach of implied contract.<sup>202</sup> The court granted the dairy's summary judgment motion and dismissed the claims.<sup>203</sup> Landess subsequently sued the dairy, three of its employees, and the haulers, alleging conspiracy to injure his reputation and business.<sup>204</sup> The dairy and the employees moved for summary judgment asserting that *res judicata* precluded the claims against them.<sup>205</sup> The haulers, who were not employees of the dairy, moved for summary judgment on the grounds that Landess was "*collaterally estopped*" from bringing the action by the judgment in the federal court suit.<sup>206</sup> The trial court granted both motions.<sup>207</sup> On appeal, the Wisconsin Court of Appeals affirmed both summary judgment motions.<sup>208</sup> Citing Section 51 of the Second Restatement of Judgments, the court held: "Since Landess claims that the employees are Borden's 'employees,' Borden is vicariously responsible for the conduct of those employees."<sup>209</sup> Therefore, "the prior judgment against Borden extinguishe[d] the conspiracy claim against the employees."<sup>210</sup> The court applied an equivalent of the broad exception because the employer was previously sued. The court applied the exception on the basis of *res judicata* rather than *collateral estoppel*.<sup>211</sup>

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199. *Landess v. Schmidt*, 340 N.W.2d 213 (Wis. Ct. App. 1983).

200. *Id.* at 215.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 218.

210. *Id.*

211. *Id.* In *Tyler v. Danielson*, the court held that Wisconsin law requires, *inter alia*, the "identity between the parties *or their privies* in the prior and present suits." Civil No. 06-2392 (PAM/RLE), 2006 U.S. Dist. LEXIS 77482, at \*10 (D. Minn. Oct. 16, 2006) (emphasis added) (quoting *Kruckenbug v. Harvey*, 694 N.W.2d 879, 885 (Wis. 2005)). Regarding whether the Bank employees Craig and Erwin Danielson were *in privity* with the Bank, the court stated:

The [c]omplaint . . . alleges that Craig and Erwin Danielson injured him through their actions as bank officials. "A prior judgment against an employer bars a

2. *Federal Caselaw Among the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits*

At the outset, it is worth noting that, when addressing nonmutual claim preclusion in vicarious liability relationships for the first time, two federal circuits—the Fifth in *Lubrizol Corp. v. Exxon Corp.*,<sup>212</sup> and the Eleventh in *Citibank, N.A. v. Data Lease Financial Corp.*<sup>213</sup>—observed: “Most other federal circuits have concluded that employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued.”<sup>214</sup>

*First Circuit:* The First Circuit recognizes “nonmutual claim preclusion” where there is a “close and significant relationship” between the new defendants and the original defendants.<sup>215</sup> Derivative or vicarious liability relationships were held to constitute a close and significant relationship in two federal district court cases, but neither decision cited the Second Restatement of Judgments’ Section 51 nor were the relationships framed in terms of privity.<sup>216</sup>

In *Andrews-Clarke v. Lucent Technologies, Inc.*,<sup>217</sup> the federal district court held res judicata barred a suit by an insured under an employee health plan against the insured’s employer based on a prior judgment dismissing the insured’s claim against the health plan insurers on grounds that the claims were preempted by ERISA.<sup>218</sup> Citing the complaint, which alleged, “under [the] doctrine of respondeat superior, [the employer is] vicariously liable for wrongful conduct of [the health insurers],”<sup>219</sup> the court found that a close and significant relationship between the employer and the health

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subsequent suit against its employees.” Because Plaintiff is suing Craig and Erwin Danielson for actions they took as agents of RiverBank, the first element is satisfied.

*Id.* at \*10–11 (citations omitted) (quoting *Lindas v. Cady*, 499 N.W.2d 692, 298 (Wis. Ct. App. 1993)).

212. *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989).

213. *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498 (11th Cir. 1990).

214. *Lubrizol Corp.*, 871 F.2d at 1288; *Citibank, N.A.*, 904 F.2d at 1502 (quoting *Lubrizol Corp.*, 871 F.2d at 1288).

215. *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10 (1st Cir. 1988) (citing with approval a formulation where nonmutual claim preclusion is appropriate “only if the new party can show good reasons why he should have been joined in the first action and the old party cannot show any good reasons to justify a second chance.” (quoting WRIGHT, MILLER & COOPER, *supra* note 9, § 4464, at 589 (1st ed. 1981))).

216. *See Andrews-Clarke v. Lucent Techs., Inc.*, 157 F. Supp. 2d 93 (D. Mass. 2001); *see also Silva v. City of New Bedford*, 677 F. Supp. 2d 367 (D. Mass. 2009).

217. *Andrews-Clarke*, 157 F. Supp. 2d at 93.

218. *Id.* at 103.

219. *Id.* at 101.

plan insurers existed, stating that the “[employer’s] liability (if any), is dependent upon a finding of wrongdoing by [the health plan insurers].”<sup>220</sup>

In *Silva v. City of New Bedford*,<sup>221</sup> the court found a relationship between a city and its police officers to be close and significant enough to justify nonmutual claim preclusion of derivative liability claims against the city.<sup>222</sup> Preclusion was based on the trial court’s dismissal of plaintiff’s claim against the officers pursuant to an offer of judgment.<sup>223</sup> The court reasoned, “Silva seeks to predicate liability solely on the officers’ actions and, in doing so, aligns this case with the previous one under a form of derivative liability.”<sup>224</sup>

Although both *Silva* and *Andrews-Clarke* involved the same narrow exception because the primary obligor was sued first, the *Silva* court cited language in the Eleventh Circuit’s opinion in *Citibank, N.A. v. Data Lease Financial Corp.*: “Most other federal circuits have concluded that employer-employee or principal-agent relationships may ground a claim preclusion defense, *regardless [of] which party to the relationship was first sued.*”<sup>225</sup>

*Second Circuit*: Three Second Circuit decisions applied nonmutual claim preclusion finding that parties to a vicarious liability relationship were *in privity*.<sup>226</sup> Two of these decisions, *Falbaum v. Pomerantz*<sup>227</sup> and *Krepps v. Reiner*,<sup>228</sup> expressly cited the Second Restatement of Judgments’ Section 51 in applying the equivalent of the broad exception.

In *Falbaum*, the court precluded an employee’s claim against a company’s officers and directors on grounds of *res judicata* based on the court’s finding that the company, previously and unsuccessfully sued by the former employee on an age discrimination claim, was in privity with the company’s officers and members of the Board.<sup>229</sup>

220. *Id.*

221. *Silva*, 677 F. Supp. 2d at 367.

222. *Id.* at 370.

223. *Id.* at 369.

224. *Id.* at 372.

225. *Id.* at 370 (quoting *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1502 (11th Cir. 1990) (emphasis added)).

226. See *Krepps v. Reiner*, 377 F. App’x 65 (2d Cir. 2010); *John St. Leasehold, LLC v. Capital Mgmt. Res., L.P.*, 283 F.3d 73 (2d Cir. 2002); *Falbaum v. Pomerantz*, 19 F. App’x 10 (2d Cir. 2001).

227. *Falbaum*, 19 F. App’x at 10.

228. *Krepps*, 377 F. App’x at 65.

229. *Falbaum*, 19 F. App’x at 14 (“Because we find that Defendants are in privity with [plaintiffs’ former employer], Plaintiffs are barred from bringing a disparate impact claim because they could have timely raised such a claim during the bankruptcy proceeding.”).

Similarly, in *Krepps*, the court held a vicarious liability relationship between employer and employee “support[ed] a determination of privity for the purpose of claim preclusion.”<sup>230</sup> Based on this privity relationship, the court held that claim preclusion barred plaintiff’s fraud claim against Reiner, an employee of plaintiff’s business competitor, Cognitive Arts, based on dismissal of plaintiff’s breach of contract claim against Cognitive Arts arising from the same transaction.<sup>231</sup> The court held:

[I]t is undisputed that [Reiner] was an employee acting within the scope of his employment in connection with the matter here at issue. Thus, Cognitive Arts clearly had a relationship of vicarious liability with Reiner supporting a determination of privity for the purpose of claim preclusion. In such circumstances, . . . “[a] judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for his conduct.”<sup>232</sup>

However, in both decisions, the respective appellate courts first considered and rejected the application of issue preclusion before relying on claim preclusion.<sup>233</sup>

In a third appellate decision, *John Street Leasehold, LLC v. Capital Management Resources, L.P.*,<sup>234</sup> the court found privity between principal and agent and, though not citing Section 51 of the Restatement, applied the equivalent of the broad exception.<sup>235</sup> John Street Leasehold (“JSL”) secured a mortgage-secured loan from a bank that eventually went into receivership with the FDIC, which appointed Capital Management Resources (“CMR”) to manage the failed bank’s assets.<sup>236</sup> When CMR foreclosed on JSL’s property, JSL sued the FDIC, in its capacity as

230. *Krepps*, 377 F. App’x at 68 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 51 & cmt. b (AM. LAW INST. 1982)).

231. *Id.* at 68.

232. *Id.* (citations omitted) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 51(1) (AM. LAW INST. 1982)).

233. *Compare Falbaum*, 19 F. App’x at 13 (“Issue preclusion, however, cannot bar Plaintiffs’ disparate impact claims because the disparate impact issue was not litigated before the Bankruptcy Court and was therefore unnecessary to its judgment.”), with *Krepps*, 377 F. App’x at 67 (“[E]ven if we were to conclude that fraud had not been litigated in the EA action, we would identify no error warranting remand because this action would still be barred by the doctrine of claim preclusion, which “extinguish[es] . . . all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010))).

234. *John St. Leasehold, LLC v. Capital Mgmt. Res. L.P.*, 283 F.3d 73 (2d Cir. 2002).

235. *Id.* at 74.

236. *Id.*

receiver, for “breach of contract, fraud, negligent misrepresentation, and breach of an implied covenant of good faith and fair dealing.”<sup>237</sup> After the trial court granted summary judgment for the FDIC, JSL sued FDIC employees as well as CMR asserting additional claims arising from the foreclosure.<sup>238</sup> Affirming the district court’s dismissal of JSL’s claims on res judicata grounds, the Second Circuit stated:

The District Court correctly concluded that John Street’s claims against FDIC employees and against non-FDIC defendants were barred by principles of *res judicata* because those persons were *in privity* with the defendants in the prior action. We agree with the District Court that John Street’s argument that the conduct of FDIC employees and non-FDIC defendants [CMR] was outside the scope of their agency is frivolous and that there is no evidence that either FDIC employees or non-FDIC defendants acted outside the scope of their agency.<sup>239</sup>

Two decisions out of the Southern District of New York—*Soto v. U.S. Lines, Inc.*<sup>240</sup> and *Mathews v. New York Racing Ass’n*<sup>241</sup>—are consistent with the foregoing Second Circuit decisions applying nonmutual claim preclusion in vicarious liability relationships. In *Soto*, the indemnitor-indemnitee relationship involved a ship owner-indemnitee, who under general maritime law could be held vicariously liable to a seaman injured aboard ship for the seaman’s negligent treatment by the hospital-indemnitor.<sup>242</sup> The district court concluded that settlement of the seaman’s medical malpractice suit against the hospital precluded a subsequent vicarious liability claim against the ship owner.<sup>243</sup> The court held:

General principles of *res judicata* hold that a judgment entered in an action against an indemnitor, such as the hospital, precludes a later action against an indemnitee, such as defendant, to the same extent as it precludes a second action against the indemnitor. . . . Therefore defendant need not worry about vicarious liability in this action, insofar as negligence of the

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237. *Id.*

238. *Id.* at 74–75.

239. *Id.* at 75 (second emphasis added) (citations omitted).

240. *Soto v. U.S. Lines, Inc.*, 608 F. Supp. 904 (S.D.N.Y. 1985).

241. *Mathews v. New York Racing Ass’n*, 193 F. Supp. 293 (S.D.N.Y. 1961).

242. *Soto*, 608 F. Supp. at 906 (“Defendant claims, correctly, that under general maritime law it could be held vicariously liable to plaintiffs—that is, liable without a finding of negligence on its part—for [the hospital’s] negligence . . . . A finding of agency would also impose vicarious liability to plaintiffs, but by way of the Jones Act. If defendant were to be found liable on either of these theories, it would ordinarily be entitled to indemnity from [the hospital].” (citations omitted)).

243. *Id.*



[hospital] is concerned. *Res judicata* bars any recovery premised upon [the hospital's] . . . negligence.<sup>244</sup>

In *Mathews*, a bench trial exonerating a racetrack's employees precluded plaintiff's claims against defendant operator of Jamaica Race Track for false arrest at the racetrack and for malicious prosecution for disorderly conduct.<sup>245</sup> The court held: "Clearly, any liability of the defendants for the acts or statements of their agents must be predicated upon the familiar principle of respondeat superior."<sup>246</sup> The court appears to have made its decision on grounds of claim preclusion rather than issue preclusion, despite the court's finding that "[e]ssentially . . . the same facts are the basis for liability in each suit,"<sup>247</sup> and despite the fact that the previous bench trial weighed those facts in favor of the race track's employees.<sup>248</sup>

A third Southern District of New York decision deserves mention even though the court's opinion does not explicitly refer to vicarious liability relationships.<sup>249</sup> In a suit by an investment company against a former employee alleging securities fraud arising from a series of securities transactions, the court permitted the employee to invoke claim preclusion based on a prior suit by the investment company against the company's employee fidelity bond insurance carrier, in which judgment was entered against the company. In *Index Fund, Inc. v. Hagopian*,<sup>250</sup> the court observed: "In order to invoke claim preclusion, mutuality is no longer required if the nonparty is in privity with a party to the initial action," and then found that the insurance carrier and the former employee were in privity on the grounds that their relationship was "sufficiently close" to warrant preclusion.<sup>251</sup> Reasoning that "liability was placed at issue in [the former action against the insurance carrier] 'so as to have interested the carrier in obtaining a favorable outcome there,'"<sup>252</sup> the court held: "[T]he economic interests of [the former employee] and [the insurance carrier] were sufficient to yield a finding of privity."<sup>253</sup> Although the court did not

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244. *Id.* (citations omitted).

245. *Mathews*, 193 F. Supp. at 296.

246. *Id.* at 295.

247. *Id.*

248. *Id.* at 294.

249. *See* *Index Fund, Inc. v. Hagopian*, 677 F. Supp. 710 (S.D.N.Y. 1987).

250. *Id.*

251. *Id.* at 715 (citations omitted). This statement reflects some doctrinal confusion since privity between a nonparty and a party would appear to satisfy mutuality.

252. *Id.* (quoting *Tolley v. Am. Transit Ins. Co.*, 638 F. Supp. 1191, 1194 (S.D.N.Y. 1986)).

253. *Hagopian*, 677 F. Supp. at 715.

expressly find a derivative liability relationship between the insurance carrier and the employee, presumably the employee would have been obligated to indemnify the insurer had the insurer been held liable to the employer on the fidelity bond.<sup>254</sup> It should be noted that, while the court applied claim preclusion as to those claims related to additional securities transactions that were not litigated in the prior action against the insurer, it applied issue preclusion—rather than claim preclusion—to claims related to the same securities transactions that were at issue in the previous suit.<sup>255</sup>

*Third Circuit:* In accord with the First Circuit, Third Circuit caselaw recognizes that the concept of privity, traditionally “limited to a set of substantive legal relationships,”<sup>256</sup> has been “pragmatically expanded”<sup>257</sup> to apply claim preclusion “whenever ‘there is a close or significant relationship between successive defendants.’”<sup>258</sup> A vicarious liability relationship between employer and employee acting within the scope of his employment is one of those close or significant relationships resulting in the conclusion that they are in privity for purposes of claim preclusion.<sup>259</sup>

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254. See generally *id.* But see 13 AM. JUR. PROOF OF FACTS 3D 559, § 22, at 607 (1991) (“Once the insurer pays to the insured employer the amount of a loss caused by the fraud or dishonesty of an employee covered by a fidelity bond, the insured is subrogated pro tanto to any right of action that the employer may have against the employee or against any third party who benefited from the employee’s act. As discussed in an earlier section, the insurer may also have an independent claim for indemnification against the covered employee if the court interprets the fidelity bond as a contract of suretyship.” (footnotes omitted)).

255. *Hagopian*, 677 F. Supp. at 717.

256. *Jackson v. Dow Chem. Co.*, 902 F. Supp. 2d 658, 670 (E.D. Pa. 2012) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 52 (1982); 18A WRIGHT, MILLER & COOPER, *supra* note 9, § 4448, at 326–27).

257. *Jackson*, 902 F. Supp. 2d at 670.

258. *Id.* (quoting *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir.1991)).

259. *Jackson*, 902 F. Supp. 2d at 671. In *Jackson*, the Third Circuit held:

The first three [defendants named in plaintiff’s second suit] are alleged to be employees of Rohm and Haas [defendant in prior suit] and are sued for actions arising out of their employment. The second two are alleged to be employees of Liberty Mutual [defendant in prior suit] and are also sued for actions arising out of their employment.

Based on the Complaint, these employees have the sort of close and significant relationship with their employers that has been found to justify preclusion in other cases. Thus, the newly named employees can benefit from the preclusive effect of the judgment entered in favor of their employers in the prior suit.

*Id.* (footnotes omitted) (citations omitted). In another case, while citing Section 51 of the Second, a Pennsylvania district court held that prior settlement of the plaintiffs’ action against a brokerage firm precluded the plaintiffs’ suit against the firm’s employees:

We agree with ML Defendants that Brubacher is in privity with Merrill Lynch. The doctrine of *res judicata* applies to parties where one is vicariously

*Fourth Circuit:* In a suit between an insured and an agent of the insurance company, the Fourth Circuit, in *Adkins v. Allstate Insurance Co.*,<sup>260</sup> upheld the agent's claim preclusion defense based on the judgment in a previous action against the insurance company, simply stating in a footnote: "As the district court noted, plaintiff's claim against Simmons implicates only actions taken by him within the scope of his employment as an Allstate agent. His status as defendant therefore in no way relieves plaintiff of the constraints of the doctrine of *res judicata*."<sup>261</sup>

*Fifth Circuit:* In *Lubrizol Corp. v. Exxon Corp.*,<sup>262</sup> the Fifth Circuit for the first time addressed "claim preclusion in a case where the parties who seek its benefit are related by vicarious liability to the defendant in the prior lawsuit."<sup>263</sup> Commenting that "[m]ost other federal circuits have concluded that employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued,"<sup>264</sup> the Fifth Circuit held that two Exxon employees could benefit from claim preclusion based on a settlement agreement and judgment of dismissal in plaintiff's earlier suit against Exxon.<sup>265</sup> Although the opinion did not cite Section 51 of the Second Restatement of Judgments, its application of nonmutual claim preclusion where the employer-indemnitee was sued first is consistent with Section 51 and the broad exception to mutuality. However, the opinion implies that, had the grounds for issue preclusion existed, the court would have rested its preclusion determination on that ground rather than claim preclusion.<sup>266</sup>

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responsible for the other, such as in an employer-employee relationship. Plaintiffs' Second Amended Complaint . . . contains no allegations that Brubacher was acting outside the scope of her employment such that Merrill Lynch would not be vicariously liable.

*Metcalf v. Merrill Lynch*, 895 F. Supp. 2d 645, 657 (M.D. Penn. 2012), *vacated*, 587 F. App'x 719, 726 (3d Cir. 2014) (holding that regardless of whether *res judicata* applied, defendant Merrill Lynch waived the defense, because "under New Mexico law, a defendant cannot engage in extensive, split litigation without objection, and still preserve its *res judicata* defense.").

260. *Adkins v. Allstate Ins. Co.*, 729 F.2d 974 (4th Cir. 1984).

261. *Id.* at 975 n.1.

262. *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989).

263. *Id.* at 1288.

264. *Id.*

265. *Id.* ("Exxon breached the New Jersey protective order, provoking the computer dispute, only because Evans and Lower—as Exxon employees acting in the scope of their duties—engaged in the exact conduct of which Lubrizol now complains.").

266. *See id.* at 1287 ("This determination rests upon 'claim preclusion' or true 'res judicata,' rather than 'issue preclusion,' once generally referred to as 'collateral estoppel.' Issue preclusion does not apply because the computer dispute was not fully litigated in the trial court.").

The court in *Lubrizol* declined to take a position on the underlying doctrinal justification for nonmutual claim preclusion, noting that “[t]he doctrinal basis for these decisions has varied according to their fidelity to traditional mutuality or privity concepts . . . .”<sup>267</sup> Acknowledging the divergent viewpoints on the doctrinal justification for nonmutual claim preclusion, the court further stated:

[W]e make no broad pronouncements about the doctrines of mutuality or privity in this circuit. It is enough for present purposes to decide that, *whether considered an “exception” to mutuality, or an “extension” of privity*, the vicarious liability relationship between Exxon and its employees Evans and Lower, which forms the only asserted basis for Exxon’s liability for the computer dispute, justifies claim preclusion.<sup>268</sup>

Section II.C addresses this doctrinal split and makes the case for extending privity to include the parties to a vicarious liability relationship in the context of nonmutual claim preclusion.

Three years after *Lubrizol*, the Fifth Circuit confronted nonmutual claim preclusion in the context of the derivative liability relationship between a corporation and its successor. In *Russell v. SunAmerica Securities*,<sup>269</sup> investors, whose money had allegedly been converted by a broker-dealer (Southmark), sued Southmark, asserting various securities fraud claims.<sup>270</sup> After settling with Southmark, the investors brought a securities action against Southmark’s successor corporation, SunAmerica.<sup>271</sup> While noting that “[u]nfortunately, we have little guidance as to whether a corporation and its successor are sufficiently related for preclusion purposes,”<sup>272</sup> the court concluded that “the derivative liability in an employer-employee relationship is analogous to that of a corporation and its successor under certain circumstances.”<sup>273</sup> Seeking “guidance from other circuits in another field of derivative liability: vicarious liability in the employment context,”<sup>274</sup> the court consulted decisions out of United States Courts of Appeal for the First,<sup>275</sup> Seventh,<sup>276</sup> Ninth,<sup>277</sup> Eleventh<sup>278</sup> and D.C.

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267. *Id.* at 1288.

268. *Id.* at 1289 (emphasis added) (footnote omitted) (citations omitted).

269. *Russell v. SunAmerica Sec.*, 962 F.2d 1169 (5th Cir. 1992).

270. *Id.* at 1171.

271. *Id.*

272. *Id.* at 1174.

273. *Id.* at 1175.

274. *Id.* at 1174.

275. *Fiumara v. Fireman’s Fund Ins. Co.*, 746 F.2d 87, 92 (1st Cir. 1984).

276. *Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976).

277. *Spector v. El Rancho, Inc.*, 263 F.2d 143, 145 (9th Cir. 1959).

Circuits<sup>279</sup> as well as the Fifth in *Lubrizol*,<sup>280</sup> along with Section 51 of the Second Restatement of Judgments. The court concluded that these “cases which find that a vicarious liability relationship justifies a finding of *privity* are instructive here.”<sup>281</sup> Issue preclusion was not a viable alternative basis for the court’s ruling because the prior action had been settled, dismissed with prejudice, and a consent judgment entered.

*Seventh Circuit:* In *Lambert v. Conrad*,<sup>282</sup> the Seventh Circuit quoted the Ninth Circuit’s opinion in *Spector v. El Rancho*<sup>283</sup>:

Where, as here, the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against plaintiff’s right of action against the other.<sup>284</sup>

Even though the *Lambert* court did not cite to the Second Restatement of Judgments, the position it takes is consistent with Section 51 of the Restatement. In *Lambert*, the plaintiff brought a civil rights suit against Northern Illinois University alleging that he had been improperly denied a pre-termination hearing before being discharged.<sup>285</sup> Judge Julius Hoffman dismissed the action on several grounds including failure to state a claim, “indicat[ing] that plaintiff’s interest did not approach the threshold level of a legitimate claim of entitlement which would give rise to a property interest,”<sup>286</sup> and “even if plaintiff’s interest could be considered a protected one, the hearing provided to him was sufficient to satisfy due process requirements.”<sup>287</sup> In plaintiff’s second suit seeking injunctive relief against the members of the University’s Board of Regents, the district court dismissed the complaint on *res judicata* grounds.<sup>288</sup> The appellate court affirmed, holding “that the difference in the identity of the defendants in

278. *Pelletier v. Zweifel*, 921 F.2d 1465, 1502 (11th Cir. 1991); *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1502–04 (11th Cir. 1990).

279. *Lober v. Moore*, 417 F.2d 714 (D.C. Cir. 1969).

280. *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1289 (5th Cir. 1989).

281. *Russell v. SunAmerica Sec.*, 962 F.2d 1169, 1175 (5th Cir. 1992) (emphasis added).

282. *Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976).

283. *Spector v. El Rancho*, 263 F.2d 143 (9th Cir. 1959).

284. *Lambert*, 536 F.2d at 1186 (quoting *Spector*, 263 F.2d at 145).

285. *Id.* at 1184.

286. *Id.*

287. *Id.* at 1184–85. It is unclear whether the court could have relied on issue preclusion to conclusively bind plaintiff with Judge Hoffman’s finding that the hearing provided to the plaintiff satisfied due process.

288. *Id.* at 1184.

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the present action from those in the prior action is insufficient reason to prevent plaintiff from being bound.”<sup>289</sup>

Several years after *Lambert*, the Seventh Circuit considered the issue of privity between the Village of Lombard and the Village mayor, manager, and several trustees of the Village board.<sup>290</sup> The Village’s former chief of police first sued the Village in state court asserting a claim of wrongful termination in violation of Illinois state law and state constitutional due process, which was dismissed by judgment on the pleadings.<sup>291</sup> In the plaintiff’s subsequent federal court action against the Village mayor, manager, and board trustees for wrongful termination, alleging violation of his civil rights under federal law and the First, Fifth, and Fourteenth Amendments to the U.S. Constitution, the Court of Appeals held that “[t]he district court correctly concluded that the individual defendants in Mandarino’s federal action are *in privity* with the Village of Lombard, the defendant in his state court action.”<sup>292</sup>

*Ninth Circuit:* In *Spector v. El Rancho*,<sup>293</sup> the Ninth Circuit appears to have applied nonmutual *claim* preclusion in a typical employer-employee relationship where a hotel guest, injured when she slipped on a walkway, sued the hotel based on the alleged negligence of its employee.<sup>294</sup> After an initial verdict in favor of the hotel, the guest pursued her claim against the employee.<sup>295</sup> Analogizing the relationship between the hotel and its employee to that of principal and agent, the court affirmed the trial court’s dismissal of the plaintiff’s action stating:

[The employee’s] dismissal would appear to present a purely moot question. Where, as here, the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either,

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289. *Id.* at 1186.

290. *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983).

291. *Id.* at 847.

292. *Id.* at 850 (emphasis added); *see also* *Tamari v. Bache & Co.*, 637 F. Supp. 1333, 1341 (N.D. Ill. 1986) (“[A] decision on the merits of an action against a principal is res judicata to a subsequent action against the agent (which Bache Lebanon may or may not be) if the prior action concerned a matter within the agency.” (citing *Lambert*, 536 F.2d at 1183 and RESTATEMENT (SECOND) OF JUDGMENTS § 51 (AM. LAW INST. 1980))). In *Tamari*, the court held that res judicata did not bar the claim:

However, because the court cannot determine whether or not the arbitration decision was based on a defense personal to Bache Delaware (the lack of agency authority for Bache Lebanon’s actions), the arbitration decision and *Tamari* Case No. 77 C 301 cannot bar this action under the doctrine of res judicata.

*Id.* at 1342.

293. *Spector v. El Rancho*, 263 F.2d 143 (9th Cir. 1959).

294. *Id.* at 144.

295. *Id.* at 145.

in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other. Since there was a verdict and judgment in favor of the Hotel as Graham's principal, Graham was entitled to raise this judgment as a bar to appellant's action as against him.<sup>296</sup>

It is not clear whether the court was applying claim or issue preclusion. While the judgment was based on a verdict in the hotel's favor, so that issue preclusion presumably would have been applicable, the court does not specify the preclusion grounds as either issue or claim preclusion, but rather states that the employee "moved to *dismiss the action* as against himself, and his motion was granted" and, in the quoted passage above, refers to "the plaintiff's *right of action*."<sup>297</sup> The Seventh Circuit's opinion in *Lambert v. Conrad* cites *Spector* as *claim* preclusion precedent.<sup>298</sup> To the extent that *Spector* can be interpreted as precluding plaintiff's entire claim, it provides an example where claim preclusion was applied over issue preclusion.

However, two federal district courts in Washington applied nonmutual claim preclusion in addition to, or instead of, issue preclusion, where the trial court initially entered judgment for the indemnitee based on a jury verdict of non-liability. In both opinions, the courts cited Section 51 and framed the relationship between the principal and agent in terms of privity. In *Equal Employment Opportunity Commission v. Evans Fruit Co.*,<sup>299</sup> plaintiff-intervenors sued Evans Fruit and its employee, Marin, alleging sexual harassment by Marin "acting in the course and scope of his duties and . . . at all times acting for and on behalf of Evans Fruit."<sup>300</sup> After the court first tried the claims against Evans Fruit, the jury returned a verdict "finding that none of the Plaintiffs-Intervenors established by a preponderance of the evidence that she was subjected to a sexually hostile work environment while employed at Evans Fruit."<sup>301</sup> The district court then dismissed the claims against Marin "on the basis of either claim or issue preclusion."<sup>302</sup> Citing Section 51, and framing the issue in terms of *privity* between employer and employee, the court ruled:

296. *Id.* at 145 (citations omitted).

297. *Id.* (emphases added).

298. *See Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976) (citing *Spector*, 263 F.2d at 143)

299. *EEOC v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2013 U.S. Dist. LEXIS 102677 (E.D. Wash. July 22, 2013).

300. *Id.* at \*2-3 (citation omitted).

301. *Id.* at \*3 (citation omitted).

302. *Id.* at \*13.

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Because of the verdict in the trial against Evans Fruit, the Plaintiffs–Intervenors are precluded from pursuing in a separate trial what is, for all intents and purposes, the same WLAD claim against Marin. The employer–employee relationship between Evans Fruit and Marin is sufficient to establish ‘*privity*’ between them. Plaintiffs–Intervenors sought to impose *vicarious liability* on Evans Fruit for alleged sexual harassment by its employee, Marin.<sup>303</sup>

In *Davis Wright & Jones v. National Union Fire Insurance Co. of Pittsburgh*,<sup>304</sup> an insurance company sued the bank to which it had issued a policy, asserting a vicarious liability claim against the bank that alleged that the bank had fraudulently induced the company to issue the policy.<sup>305</sup> After trial, judgment was entered for the bank based on a jury verdict that “absolved [the bank] of the charge that it had made misrepresentations in the insurance application with intent to deceive National Union.”<sup>306</sup> In a subsequent declaratory judgment action by the bank’s attorneys, *Davis Wright & Jones*, “requesting [the] court to declare that, pursuant to the doctrines of *res judicata* and collateral estoppel, all cognizable claims which National Union alleges against *Davis Wright* are barred by the orders and judgments entered in [the prior lawsuit].”<sup>307</sup> The district could have applied nonmutual *claim* preclusion to conclude that “the identity of interests between [the Bank] and [its law firm] is sufficient to preclude [the insurance company] from relitigating against [the law firm] the case it lost against [the Bank].”<sup>308</sup> This outcome made sense, the court reasoned, because:

At the end of the trial, the jury absolved [the bank] of the charge that it had made misrepresentations in the insurance application with intent to deceive [the insurance company]. In doing so, the jury must necessarily have concluded that *Davis Wright* had not committed the alleged insurance fraud either. Otherwise, based on the jury instruction that any [of the Bank’s] agent’s knowing misrepresentations to [the insurance company] during the insurance application process were to be imputed to [the Bank], the jury would have held [the Bank] liable based on *Davis Wright*’s wrongful behavior.<sup>309</sup>

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303. *Evans Fruit*, 2013 U.S. Dist. LEXIS 102677, at \*7 (emphases added). “WLAD” is short for Washington Law Against Discrimination, WASH. REV. CODE ANN. §§ 49.60.030, 49.60.180 (West 2008).

304. *Davis Wright & Jones v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 709 F. Supp. 196 (W.D. Wash. 1989).

305. *Id.* at 197.

306. *Id.* at 203.

307. *Id.* at 197.

308. *Id.* at 202.

309. *Id.* at 203 (footnote omitted).



Concluding that “sufficient ‘*privity*’ or identity of parties does exist between [the Bank] and Davis Wright with regard to the previously litigated claims concerning [the Bank’s] application for excess insurance,”<sup>310</sup> the court expressly applied claim over issue preclusion, finding “that [the insurance company] is precluded by the doctrine of *res judicata* from bringing claims against Davis Wright based on its participation in [the Bank’s] application for excess insurance from National Union. Given this result, *the court need not consider the applicability of collateral estoppel.*”<sup>311</sup>

*Eleventh Circuit:* In *Citibank, N.A. v. Data Lease Financial Corp.*,<sup>312</sup> the Eleventh Circuit addressed, for the first time, “claim preclusion in a case in which the party seeking its benefit is related by vicarious liability or respondeat superior to a defendant in a prior lawsuit or, as here, is so related to a defendant in the same lawsuit against whom claims have been dismissed with prejudice.”<sup>313</sup> In a suit by Citibank against Data Lease to foreclose on collateral for a loan, Data Lease counterclaimed against the bank and seven directors alleged to have acted as the banks agents.<sup>314</sup> After the directors settled with Data Lease, Citibank moved to dismiss the remaining counterclaim based on claim preclusion.<sup>315</sup> Noting that “Data Lease, in its counterclaim, is seeking damages against Citibank only under the theory of respondeat superior or vicarious liability,”<sup>316</sup> the Eleventh Circuit, citing Section 51 of the Second Restatement of Judgments, concluded that “the third element of claim preclusion, i.e., *privity*, is met herein.”<sup>317</sup> Regarding the relative roles of claim preclusion and issue preclusion, the court observed: “When claim preclusion does not apply to bar an entire claim or set of claims, the doctrine of collateral estoppel, or

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310. *Id.* (emphasis added).

311. *Id.* (emphasis added).

312. *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498 (11th Cir. 1990). *See also Pelletier v. Zweifel*, 921 F.2d 1465, 1501–02 (11th Cir. 1991). In *Pelletier*, the Court of Appeals, citing *Citibank, N.A.*, held that Pelletier’s claim against Zweifel was precluded by *res judicata* based on a finding of derivative *privity* between Zweifel and Culpepper, the defendant in Pelletier’s previous shareholders’ derivative suit. *Id.* at 1501 (“Although Zweifel was not a party in the [previous] shareholders’ derivative suit, Zweifel and Culpepper’s relationship, as described by Pelletier, is one of *privity*. . . . Zweifel’s liability is grounded on Culpepper’s execution of the conspiracy as Zweifel’s agent: the liability is derivative.” (emphasis added) (footnote omitted)).

313. *Citibank, N.A.*, 904 F.2d at 1502.

314. *Id.* at 1499.

315. *Id.* at 1500.

316. *Id.* at 1502 (footnote omitted).

317. *Id.* at 1503 (emphasis added).

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issue preclusion, may still prevent the relitigation of particular issues which were actually litigated and decided in a prior suit.”<sup>318</sup>

*B. Should Courts Apply Nonmutual Claim Preclusion in the First Instance (or Only Where Issue Preclusion Is Not Applicable)?*

The above survey of caselaw, both state and federal, reveals that a very substantial number of jurisdictions recognize nonmutual claim preclusion. However, Professor Clermont, while acknowledging that courts apply nonmutual claim preclusion, comments that this doctrine is only available to a limited extent, that is when issue preclusion is unavailable. As mentioned earlier, he disagrees with the NCBE’s suggested answer to MBE Question 9, that the issue preclusion defense “will be utilized only if claim preclusion is unavailable,” expressing the view that “[e]very court I have seen goes the standard nonmutual IP [issue preclusion] route if it is available.”<sup>319</sup>

*I. Why Does It Matter?*

The United States Court of Appeals for the Eleventh Circuit articulated the generally-recognized relationship between claim preclusion and the supplemental doctrine of issue preclusion: “When claim preclusion does not apply to bar an entire claim or set of claims, the doctrine of collateral estoppel, or issue preclusion, may still prevent the relitigation of particular issues which were actually litigated and decided in a prior suit.”<sup>320</sup> Section 51 of the Second Restatement of Judgments marks a forward-looking evolution of the law away from the first Restatement’s embrace of, by then, outdated mutuality of estoppel’s formalism and toward a functional approach based on the reality that *the claim* against the primary obligor (i.e., the indemnitor) and the persons vicariously responsible for his conduct (i.e., the indemnitee) are “[i]n an important sense . . . only a *single claim*.”<sup>321</sup> Significantly, Section 51 does not

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318. *Id.* at 1501 (citations omitted). Compare the court’s analysis in *Pelletier*:

The preclusive effect of a dismissal with prejudice, an unlitigated matter, thus is examined under the requirements for claim preclusion. Since such a judgment is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial.

*Pelletier*, 921 F.2d at 1501 (citations omitted).

319. Patricia W. Moore, *supra* note 25.

320. *Citibank*, 904 F.2d at 1501 (citations omitted). *But see Pelletier*, 921 F.2d at 1501.

321. RESTATEMENT (SECOND) OF JUDGMENTS § 51 cmt. b (AM. LAW INST. 1982) (“The same loss is involved, usually the same measure of damages, and the same or nearly identical issues of fact and law. . . . The optional additional security thus afforded by the

confine nonmutual claim preclusion to judgments based on procedural dispositions. This is consistent with the general approach to claim and issue preclusion, which treats issue preclusion as supplemental to claim preclusion.

In elaborating upon Illinois's so-called *Towns* doctrine, the Seventh Circuit noted the broad application of Section 51 to include the application of nonmutual claim preclusion even in cases where the issue of the primary obligor's liability was actually and necessarily decided by the judgment in the first suit:

So if you are hit by a truck and sue the truck company and lose, you cannot resuscitate your claim by suing the truck driver unless the company's successful defense in the suit against it was a defense personal to the company. If the company won its case because the jury determined that the driver had not been negligent and therefore his employer was not liable under the doctrine of respondeat superior, that would extinguish the claim against the driver because the previous suit had exonerated him.

One might suppose that the principle which drove the result in *Towns* was not *res judicata* (claim preclusion) but collateral estoppel (issue preclusion)—the driver was relying on the issue of his liability having been resolved in the suit against his employer. But then he would have to show that the issue had been resolved in a full and fair hearing, whereas if the suit against him is deemed a case of claim splitting all he has to show is that the liability unsuccessfully asserted against his employer in the previous suit was derivative from liability of himself. As the *Restatement* explains (elaborating on the reasoning in the *Towns* opinion), the courts rightly treat the second suit as an attempt at claim splitting . . . .<sup>322</sup>

The national survey reveals a split among jurisdictions, with some courts applying nonmutual claim preclusion only where the prior suit was dismissed on procedural grounds, and others doing so even where issue preclusion might have been an applicable alternative ground, consistent with Section 51. Applying nonmutual claim preclusion to all situations embraced by Section 51 (rather than as a fallback if issue preclusion is not available) is hardly a radical transformation of the law. It is, rather, the next logical step in the law's development, which has released preclusion law from the tether of the outdated mutuality principle (and, with it, the so-called narrow and broad exceptions to nonmutual issue preclusion which flowed from the mutuality principle). Consistency in approach to

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rules of vicarious responsibility should not . . . afford the injured person a further option to litigate successively the issues upon which his claim to redress is founded. He is ordinarily in a position to sue both obligors in the same action and may justly be expected to do so.”)

322. *Muhammad v. Oliver*, 547 F.3d 874, 879 (7th Cir. 2008) (citations omitted).

nonmutual claim preclusion across jurisdictions would further promote coherence in this corner of preclusion law.

Furthermore, applying nonmutual claim preclusion, over issue preclusion, saves both the court and litigant time and expense by eliminating the time-consuming task of probing the record of the prior proceeding to establish that the issue of nonliability had been fully and fairly resolved.

## 2. *The Split Among Jurisdictions*

The survey reveals that a significant number of decisions, involving vicarious liability relationships, have either (1) applied claim preclusion over available issue preclusion, (2) stated in dictum that claim preclusion should be applied first if applicable, or (3) consistent with Professor Clermont's view, applied nonmutual claim preclusion only where issue preclusion was unavailable.

A substantial number of courts cited in the survey apply nonmutual claim preclusion in cases where issue preclusion might have been applicable.<sup>323</sup>

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323. *St. Jude Med. S.C., Inc. v. Cormier*, 745 F.3d 325, 330 (8th Cir. 2014); *Gonzales v. Hernandez*, 175 F.3d 1202, 1206 (10th Cir. 1999); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1275 (10th Cir. 1995) (judgment in favor of corporation's subsidiary based on jury verdict held to preclude claim against parent corporation); *Fiumara v. Fireman's Fund Ins. Cos.*, 746 F.2d 87, 90 n.1 (1st Cir. 1984); *Cognate Bioservs., Inc. v. Smith*, No. CCB-13-1797, 2016 U.S. Dist. LEXIS 30649, at \*21 (D. Md. Mar. 10, 2016); *LaMie v. Wright*, No. 1:12-cv-1299, 2014 U.S. Dist. LEXIS 92191, at \*3 (W.D. Mich. July 8, 2014); *U.S. ex rel Paul v. Parsons, Brinkerhoff, Quade & Douglas*, 860 F. Supp. 370, 374 (S.D. Tex. 1994); *Davis Wright & Jones v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 709 F. Supp. 196, 203 (W.D. Wash. 1989); *Peppmeier v. Murphy*, 708 N.W.2d 57, 64 (Iowa 2005); *Ford v. New Mexico Dep't of Pub. Safety*, 891 P.2d 546, 555 (N.M. Ct. App. 1994); *Ensley v. Pitcher*, 22 P.3d 99, 106–07 (Wash. Ct. App. 2009); *Kuhlman v. Thomas*, 897 P.2d 365, 369 (Wash. Ct. App. 1995). *See also Garver v. Brown & Co. Sec. Corp.*, 96 Civ. 2507 (JGK), 1998 U.S. Dist. LEXIS 1454, at \*10–11 (S.D.N.Y. Feb. 6, 1998) (applying claim preclusion, rather than issue preclusion, despite its finding that “the ‘issue of the proper allocation of the stocks and bonds in the plaintiff’s brokerage account was clearly litigated during the divorce action.’” (quoting *Garver v. Garver*, 96 Civ. 2507 (JGK), 1997 U.S. Dist. LEXIS 1113, at \*11 (S.D.N.Y. Feb. 5, 1997))). The *Garver* court observed in a footnote:

The defendant [Brown] argues in its brief that this Court previously granted summary judgment in favor of John Garver [the ex-husband] on the basis of collateral estoppel, and that Brown is entitled to summary judgment on the same basis. However, the Court granted John Garver's motion under the *res judicata* doctrine.

*Id.* at \*7 n.1 (citations omitted). *Accord EEOC v. Evans Fruit Co.*, No. CV-10-3033-LRS, 2013 U.S. Dist. LEXIS 102677, at \*12 (E.D. Wash. July 22, 2013). In *Evans Fruit*, the court observed:

Other courts considered issue preclusion only after first determining that nonmutual claim preclusion was inapplicable or, on the other hand, unnecessary to reach issue preclusion after first finding nonmutual claim preclusion applicable.<sup>324</sup>

Finally, consistent with Professor Clermont's view, a significant body of caselaw cited in the survey considered, and then rejected, issue preclusion before addressing claim preclusion.<sup>325</sup> Three other decisions not cited above, out of the District of Columbia Circuit,<sup>326</sup> the Supreme Court

Plaintiffs–Intervenors' WLAD claims against Marin are barred by the doctrine of claim preclusion, but even assuming the WLAD claims against him and Evans Fruit are somehow materially distinguishable, the doctrine of collateral estoppel would nonetheless preclude relitigation in a trial against Marin of the issue of whether he subjected any of the Plaintiffs–Intervenors to a sexually hostile work environment. That precise issue was actually litigated and decided in the trial against Evans Fruit, and it was essential to the verdict rendered in that trial.

*Id.*

324. *See* Wayne Cty. Hosp. v. Jakobson, 567 F. App'x 314, 321 (6th Cir. 2014) (examining claim preclusion first, although the issue of the doctor's negligence had been determined by the jury, and finding that the hospital and the doctor were not "in privity," thereafter examining issue preclusion which, under Kentucky law, was not required); Turner v. Crawford Square Apartments, 449 F.3d 542, 549 n.15 (3d Cir. 2006) (applying claim preclusion while noting that "collateral estoppel, known as issue preclusion, also likely bars Turner's action."); Michelson v. Exxon Research & Eng'g Co., 808 F.2d 1005, 1007 (3d Cir. 1987); deLeon v. Slear, 616 A.2d 380, 385 (Md. 1992); Soto v. Phillips, 836 S.W.2d 266, 270 (Tex. Ct. App. 1992) (while it is unclear whether the same issue asserted against the employer was decided in the prior suit against the employer, the court considered claim preclusion first, and then addressed issue preclusion on a different claim after concluding that "[t]hat claim could not have been made in the first suit."); Landess v. Schmidt, 340 N.W.2d 213, 222 (Wis. Ct. App. 1983). *See also* Jeanes v. Henderson, 688 S.W.2d 100, 103 (Tex. 1985) ("The effect of the prior federal court judgment on the present cause must be examined in terms of res judicata first, and then if necessary, collateral estoppel. While courts are prone to confuse these two doctrines and use them interchangeably, it is important to distinguish the two and consider them separately because a ruling that res judicata bars these claims will eliminate our need to analyze collateral estoppel." (citations omitted)).

325. *See* Krepps v. Reiner, 377 F. App'x 65, 67 (2d Cir. 2010); Falbaum v. Pomerantz, 19 F. App'x 10, 13 (2d Cir. 2001); Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1287 (5th Cir. 1989); Xu v. City of New York, 08 Civ. 11339 (DLC), 2010 U.S. Dist. LEXIS 78404 (S.D.N.Y. Aug. 3, 2010); Index Fund, Inc. v. Hagopian, 677 F. Supp. 710, 717 (S.D.N.Y. 1987); Tamari v. Bache & Co., 637 F. Supp. 1333, 1336 (N.D. Ill. 1986) (considering issue preclusion first because defendant in the current suit "first moved to dismiss Tamari's action in this case on grounds of collateral estoppel."); Sorrells Constr. Co. v. Chancler Armentrout & Roebuck, P.C., 447 S.E.2d 101, 102 (Ga. Ct. App. 1994); Creech v. Addington, 281 S.W.3d 363, 374 (Tenn. 2009).

326. *Lober v. Moore*, 417 F.2d 714 (D.C. Cir. 1969). An injured passenger's negligence suit against the cab company resulted in a jury verdict finding the driver not negligent. *Id.* at 715. In a subsequent suit by the injured passenger against the cab driver, the court,

of Arkansas,<sup>327</sup> and the Colorado Supreme Court,<sup>328</sup> applied issue preclusion over claim preclusion.

C. *Nonmutual Claim Preclusion as an Extension of Privity or an Exception to Privity: The Case for Recognizing Nonmutual Privity in Vicarious Liability Relationships*

Although privity is just a conclusion that a nonparty should be bound by a judgment, the concept is central to claim preclusion doctrine. As noted in *Moore's Federal Practice*, “[a]lthough the courts have not succeeded in articulating a rule that defines those relationships that are sufficient to create privity, the concept of privity is still deeply embedded in claim preclusion doctrine.”<sup>329</sup> It is, therefore, worth asking: where nonmutual claim preclusion is available, is it doctrinally justified as an *exception* to privity, similar to the broad and narrow exceptions to mutuality of collateral estoppel, or as an *extension* of privity to include yet another substantive legal relationship under that label? As mentioned in this Article’s introduction, Professor Clermont agrees with Wright, Miller, and Cooper’s view that nonmutual claim preclusion is justified, not as an extension of privity concept, but as an exception to privity.<sup>330</sup> Rejecting the concept of nonmutual privity as promoting doctrinal *incoherence*, Wright, Miller, and Cooper comment:

One means adopted to accomplish nonmutual claim preclusion is to state that the party invoking preclusion is in privity with a party to the earlier action although the circumstances would not support a finding of privity to invoke preclusion against the new party. Although the results may be laudable, there is a price to be paid for this approach. *Bogus findings of*

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although using the term *res judicata*, appeared to have applied collateral estoppel in holding that “negligence issue on which [the injured passenger] was proclaimed the loser by the adjudication there could not be subject to relitigation here.” *Id.* at 718.

327. *Crockett & Brown, P.A. v. Wilson*, 864 S.W.2d 244 (Ark. 1993). There, the court declined to address the *res judicata* issue of whether privity existed based on its decision that collateral estoppel applied. *Id.* at 247 (“Additional defendants are named in the [current] suit . . . . In response to this argument it is contended that these parties are privies to the original parties for purposes of *res judicata*. We need not address this argument, as the doctrine of collateral estoppel bars the issues presented in [plaintiff’s] lawsuit against the additional parties.”).

328. *Carpenter v. Young*, 773 P.2d 561, 569 (Colo. 1989) (“Generally, a summary judgment exonerating an employee of negligence which is not appealed is a dismissal on the merits and bars a subsequent respondeat superior action against the employer. Such a bar arises by virtue of collateral estoppel and consequently applies only if the judgment is final.” (citations omitted)).

329. 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][a].

330. Patricia W. Moore, *supra* note 25.

*privity* may cloud reasoning as later courts confront *real privity questions*, and may prevent the court from considering and articulating the factors that make it appropriate to allow nonmutual claim preclusion.<sup>331</sup>

Taking the opposite view, *Moore's Federal Practice* observes that “[g]enerally, an employer-employee or agent-principal relationship will provide the necessary privity or other close relationship for claim preclusion with respect to matters within the scope of the relationship, no matter which party is first sued.”<sup>332</sup> The issue whether nonmutual claim preclusion is an extension of, or an exception to, privity is not merely a useless academic exercise in doctrinal hair-splitting, but has been recognized by the Fifth Circuit in *Lubrizol*:

[W]e make no broad pronouncements about the doctrines of mutuality or privity in this circuit. It is enough for present purposes to decide that, *whether considered an “exception” to mutuality, or an “extension” of privity*, the vicarious liability relationship between Exxon and its employees Evans and Lower, which forms the only asserted basis for Exxon’s liability for the computer dispute, justifies claim preclusion.<sup>333</sup>

The goal of doctrinal coherence in the area of nonmutual claim preclusion is served by extending the concept of privity to include indemnitor-indemnitee relationships in the context of vicarious liability, thus adding them to the categories of substantive legal relationships that are currently recognized as justifying nonparty preclusion. In the formalist heyday of the mutuality rule, the traditional concept of privity was narrowly defined<sup>334</sup> to apply to a limited set of substantive legal relationships.<sup>335</sup> The mutuality principle “established a pleasing symmetry—a judgment was binding only on parties and persons in privity with them, and a judgment could be invoked only by parties and their

331. WRIGHT, MILLER & COOPER, *supra* note 9, § 4464.1, at 713 (emphasis added) (footnote omitted).

332. 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][f].

333. *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1289 (5th Cir. 1989) (emphasis added) (footnote omitted) (citations omitted).

334. WRIGHT, MILLER & COOPER, *supra* note 9, § 4449, at 351.

335. *See, e.g.*, *Jackson v. Dow Chem. Co.*, 902 F. Supp. 2d 658 (E.D. Pa. 2012). The court observed:

Claim preclusion bars the re-litigation of claims against both the parties to the prior suit and those in privity with them. The traditional concept of privity was limited to a set of substantive legal relationships, like bailor and bailee. But the concept has been pragmatically expanded, and claim preclusion may now be applied whenever “there is a close or significant relationship between successive defendants.”

*Id.* at 670 (citations omitted) (quoting *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991)).

privies.”<sup>336</sup> Traditionally, therefore, privity was linked to, and therefore circumscribed by, the mutuality principle so that indemnitors and indemnitees who invoked nonmutual preclusion in an attempt to bind a plaintiff with a favorable judgment in a prior proceeding could not be considered in privity because they could not have been bound by an unfavorable judgment in that proceeding.<sup>337</sup>

The privity concept has evolved from its formalist roots, firmly planted in the soil of the mutuality principle, into a legal conclusion, supported by a functional,<sup>338</sup> “independent analysis” that “look[s] directly to the reasons for holding a person bound by a judgment”<sup>339</sup> and to the “totality of the circumstances.”<sup>340</sup> This “elusive and manipulable concept” is currently determined by inquiring whether “the relationship between the one who is a party on the record and the non-party is *sufficiently close* to afford application of the principle of preclusion.”<sup>341</sup> However, to provide a “framework”<sup>342</sup> to guide this case-by-case functional mode of privity analysis, courts and the Second Restatement of Judgments have adopted a modified categorical approach that recognizes a variety of substantive legal relationships that justify the conclusion of privity.<sup>343</sup> As noted in *Moore’s*

336. WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 677.

337. *Id.* § 4448, at 326 (“In traditional terminology, it has been said that a judgment is binding only on parties and persons in “privity” with a party. Under traditional rules of the not-so-distant past, it was said that the principle of mutuality conferred the preclusion benefits of a favorable judgment only on persons who would have been bound by an unfavorable judgment . . . .” (footnote omitted)).

338. *Id.* (“Both the privity label and the mutuality rule are losing their former capacity to deter functional analysis.”); 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][a] (“Concept of Privity is Defined Functionally.”).

339. WRIGHT, MILLER & COOPER, *supra* note 9, § 4448, at 326–27 (“As to privity, current decisions look directly to the reasons for holding a person bound by a judgment. This method should be adopted generally, so that a privity label is either discarded entirely or retained as no more than a convenient means of expressing conclusions that are supported by independent analysis.” (footnote omitted)).

340. *Criterion 508 Sols., Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078, 1089 (S.D. Iowa 2009) (“To determine whether a person is an employee or an independent contractor, the court must look at the totality of circumstances surrounding the employment.”).

341. *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990) (emphasis added) (quoting *Sw. Airlines v. Tex. Int’l Airlines*, 546 F.2d 84, 95 (5th Cir. 1977)).

342. *Taylor v. Sturgell*, 553 U.S. 880, 893 n.6 (2008) (“The list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy.”).

343. *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996) (“Moreover, although there are clearly constitutional limits on the ‘privity’ exception, the term ‘privity’ is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.” (citing RESTATEMENT (SECOND) OF JUDGMENTS (AM.



*Federal Practice*: “[Privity] does not serve well as a touchstone for determining whether a particular relationship with a party to litigation will result in preclusion. Rather, it describes those relationships that the courts have *already* determined will qualify for preclusion.”<sup>344</sup>

The suggested approach would, in effect, be a general rule that privity exists between indemnitor and indemnitee sufficient to support the application of nonmutual claim preclusion in derivative liability relationships, subject to an exception in those cases where it would be unfair to the claimant as, for example, where “[t]here may have been good reasons for the party-joinder decisions made in the first action.”<sup>345</sup>

Most courts cited in the survey in Section II.A that have applied nonmutual claim preclusion do so based on the determination that there is a sufficiently close relationship between parties to an indemnity relationship to support the conclusion that they are in privity. Eighteen state jurisdictions out of the twenty-six surveyed framed their nonmutual claim preclusion analyses in terms of privity. Of the eight federal circuits surveyed, all of which apply nonmutual claim preclusion, six do so explicitly on the basis of privity.<sup>346</sup>

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LAW INST. 1982))). See also *Taylor v. Sturgell*, 553 U.S. 880, 894 n.8 (2008). That footnote provides:

The substantive legal relationships justifying preclusion are sometimes collectively referred to as “privity.” [See, e.g., *Richards v. Jefferson Cty.*, 517 U.S. 792 (1996); RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW INST. 1982) § 62 cmt. a.] The term “privity,” however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. [See 18A WRIGHT, MILLER & COOPER, *supra* note 9, § 4449, at 351–53 & n.33] (collecting cases). To ward off confusion, we avoid using the term “privity” in this opinion.

*Id.* Accord *Criterion 508 Sols., Inc. v. Lockheed Martin Servs., Inc.*, 806 F. Supp. 2d 1078, 1093 (S.D. Iowa 2009). The court in *Criterion* explained:

In the traditional context, claim preclusive effects of a judgment were limited to parties who would have been bound by a judgment, otherwise known as the “rule of mutuality.” There is increasing authority, however, in favor of extending claim preclusion to derivative liability relationships because the party asserting preclusion should have been joined in the original litigation. Courts have embraced a litmus test for extending claim preclusion to non-original parties depending largely on the degree of privity between the affected parties; where there is insufficient privity between parties, courts have rejected extending claim preclusion.

*Id.* (footnotes omitted) (citations omitted) (quoting WRIGHT, MILLER & COOPER, *supra* note 9, § 4463 at 677).

344. 18 MOORE’S FEDERAL PRACTICE, *supra* note 24, § 131.40[3][a].

345. WRIGHT, MILLER & COOPER, *supra* note 9, § 4464.1 at 730.

346. If the First Circuit is also included as recognizing nonmutual privity, the number would increase to seven. See *Russell v. SunAmerica Sec.*, 962 F.2d 1169, 1174 (5th Cir.

## CONCLUSION

So what is the “correct” answer to the sample MBE Question 9: Choice (A) claim preclusion or choice (B) issue preclusion? As noted earlier, Professor Clermont concluded: “A court would go [with] answer 2 [i.e., (B)]. But I think an academic could construct an argument for Answer 1 [i.e., (A)].”<sup>347</sup> This Article suggests that nonmutual claim preclusion *should be* the correct answer for the sake of doctrinal coherence and *is* the correct answer based on the above survey of applicable caselaw.

The varied responses by civil procedure scholars to this multiple-choice question demonstrate the need to provide a measure of doctrinal coherence to this area of preclusion law. The law of preclusion has moved progressively away from the formalist rule of mutuality that had traditionally served as the basis for the so-called narrow and broad exceptions to the doctrine of collateral estoppel. As a consequence of the erosion of mutuality, most courts now, in effect, apply those exceptions to claim preclusion but do so by expanding the concept of privity to include vicarious liability relationships.

Research set forth in this Article also reveals that a substantial number of American jurisdictions apply nonmutual claim preclusion in the first instance, even where issue preclusion would have otherwise been available. Adding derivative liability relationships to the recognized categories of substantive legal relationships that “are sometimes collectively referred to as ‘privity’”<sup>348</sup> and applying nonmutual *claim* preclusion, *rather than issue preclusion*, is—and as a matter of policy should be—the next logical step in the evolution of preclusion law. As noted by Wright, Miller, and Cooper, “[c]laim preclusion often provides the simplest means of avoiding successive actions against the indemnitor and then against the indemnitee.”<sup>349</sup> Claim preclusion spares litigants and the courts the burden of probing the record of proceedings in the prior action to search for issues that were actually and necessarily determined. This simpler, more direct, approach would also add some measure of coherence to preclusion doctrine. The continued erosion of the symmetrically pleasing doctrine of mutuality has created space for expanding the privity concept to include nonmutual privity.

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1992) (“Several circuits [citing the First, Seventh, Eleventh, and D.C. Circuits] have considered whether a vicarious liability relationship constitutes sufficient privity to merit the application of claim preclusion.”).

347. Patricia W. Moore, *supra* note 25.

348. Taylor v. Sturgell, 553 U.S. 880, 894 n.8 (2008).

349. WRIGHT, MILLER & COOPER, *supra* note 9, § 4463, at 684.