California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine

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I. AN INTRODUCTION TO CLAIM AND ISSUE PRECLUSION

A. Introduction

The doctrine of res judicata describes a set of rules which determine the preclusive effects of a final judgment on the merits. The California doctrine has two familiar components: A primary aspect, "res judicata" or claim preclusion; and a secondary aspect, "collateral estoppel" or issue preclusion.[1] Under the claim preclusion aspect, a prior judgment bars the parties or their privies from relitigating the "same cause of action" in a subsequent proceeding.[2] Under the issue preclusion aspect, although a second suit between the same parties on a different cause of action is not wholly barred by a prior judgment, the first judgment

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1. Court decisions and legal commentators often do not distinguish between the two aspects of the doctrine, and refer generally to them as "res judicata." *See* People v. Sims, 651 P.2d 321, 326 n. 6 (Cal. 1982) (noting this observation). In this Article, "res judicata" will be used as a reference to the overall doctrine encompassing both preclusion aspects, and "claim preclusion" will be used in its obvious narrow sense. No such confusion attends "collateral estoppel" and "issue preclusion," and these terms are used interchangeably in this Article.

2. *See, e.g.*, Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979); Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975).

operates as a conclusive adjudication as to such issues in the second action as were "actually litigated and determined" in the prior proceeding.[3]

This Article discusses two related problems regarding the scope of the collateral estoppel doctrine applied by the California courts. Both problems concern the determination of whether issues were "actually litigated and determined" by a prior judgment. Both implicate the tension between the desire to achieve judicial economy on the one hand, and the right of a party to a fair opportunity for a full adversary hearing on an issue on the other. The next section of Part I examines the policies underlying the preclusion doctrines, and explains how clear issue preclusion rules applied in an underinclusive manner further these policies. Part I then briefly describes California's current claim preclusion doctrine as background to the collateral estoppel problems discussed in Part II.[4]

Part II begins with an explanation of the basic requirements of California collateral estoppel doctrine, as well as the impact of public policies and fairness concerns on these basic requirements. Part II then examines various judicial interpretations of what issues are precluded under this seemingly straightforward "actually litigated and determined" rule, and demonstrates how they are facially inconsistent and confusing. Part III concludes with some suggestions to correct the confusing and unpredictable nature of California's current issue preclusion doctrine. The main recommendations are that the California Supreme Court must adhere more faithfully to the issue preclusion standards of the Restatement (Second) of Judgments, and must apply collateral estoppel in an underinclusive manner.

B. Judicial Economy and the Need for Clear Issue Preclusion Rules Applied in an Underinclusive Manner

The California doctrine of res judicata is largely the product of judge-

3. *See Sims*, 651 P.2d at 331; Lucido v. Superior Court, 795 P.2d 1223, 1225 n. 3 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991).

4. In a related article entitled *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559 (1998) [hereinafter Heiser, *Res Judicata*], Professor Heiser discusses the uncertain and unpredictable claim preclusion rules currently applied by the California courts, and recommends that the California Supreme Court jettison these rules and replace them with those of the RESTATEMENT (SECOND) OF JUDGMENTS (1982). The instant Article contains a very basic description of California's claim preclusion doctrine, and of the primary rights theory upon which the current doctrine is based, as background to the problems of issue preclusion discussed herein. For an extended discussion of the problems associated with California's claim preclusion doctrine, see Heiser, *Res Judicata*, *supra* this note.

made law.[5] In developing this doctrine, the courts have sought to promote various efficiency notions, commonly referred to as judicial economy. The California Supreme Court has offered two related reasons for the claim preclusion aspect of res judicata: "(1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by re-litigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action."[6] More specifically with respect to issue preclusion, the Court has identified the public policies underlying collateral estoppel as "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation."[7] Although the policy reasons for these two preclusion doctrines sound similar, they play a much more direct role in issue preclusion determinations than they do in claim preclusion decisions.[8]

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5. The California Supreme Court developed the claim and the issue preclusion components of res judicata over the course of several years. *See, e.g.*, *Lucido*, 795 P.2d at 1225-32 (identifying threshold requirements and defining public policy considerations for issue preclusion); *Sims*, 651 P.2d at 326-30 (extending res judicata principles to administrative proceedings); Bernhard v. Bank of America, 122 P.2d 892, 894-95 (Cal. 1942) (rejecting the mutuality doctrine as a requirement of collateral estoppel); *Slater*, 543 P.2d at 594-97 (distinguishing primary rights from theories of recovery for claim preclusion purposes).

Although the basic res judicata doctrine has never been codified, a few statutes do help define the rules. *See e.g.*, CAL. CIV. PROC. CODE §§ 99 (Deering 1991) (limiting the collateral estoppel effect of municipal court judgments to other litigation between the same parties); *Id.* § 1047 (Deering 1996) (authorizing successive actions on same contract); *Id.* § 1049 (Deering 1996) (providing that an action is deemed pending until final determination on appeal); *Id.* § 1062 (Deering 1996) (providing that a declaratory relief judgment shall not preclude a party from obtaining additional relief on the same facts); *Id.* §§ 1908-1912 (Deering 1996) (defining various effects of a final judgment); *Id.* §§ 426.10 & 426.30 (Deering 1995) (defining compulsory cross-complaints).

6. *See* Wulfjen v. Dolton, 151 P.2d 846, 848 (Cal. 1944). *See also* Panos v. Great W. Packing Co., 134 P.2d 242, 243 (Cal. 1943). For a thorough discussion of the various policies underlying res judicata, see Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 910-23 (1992) [hereinafter *Unforeseeable Preclusion*]. *See also* Heiser, *Res Judicata*, *supra* note 4.

7. *Lucido*, 795 P.2d at 1227.

8. *See infra* notes 74-86 and accompanying text. The courts refer to the policy reasons for claim preclusion as background justification for that doctrine's sometimes harsh effect. *See, e.g.*, *Wulfjen*, 151 P.2d at 848; *Panos*, 134 P.2d at 243; *Slater*, 543 P.2d at 596. In contrast, the courts utilize the public policies underlying issue preclusion as an integral component of that doctrine. *See, e.g.*, *Lucido*, 795 P.2d at 1229-32, and

A successful res judicata doctrine furthers judicial economy in both a substantive and an administrative manner. The substantive goal of the claim preclusion component, for example, is to define what rights are extinguished by a final judgment such that parties are barred from pursuing multiple lawsuits to resolve disputes which could have been resolved in one proceeding. Substantive efficiency is achieved through the definition of the "claim" foreclosed by a prior judgment. A definition broad in scope as to what rights are extinguished obviously furthers the goal of barring subsequent litigation more effectively than a less inclusive one. The California courts, by employing the primary rights theory of claim preclusion, have opted for a narrow view of what substantive rights are extinguished by a judgment.[9] Consequently, by definitional design the California claim preclusion doctrine contains a fundamental diseconomy—one which sometimes permits parties to litigate aspects of a unitary controversy in two or more lawsuits even though they could have otherwise presented their entire dispute in one.

This substantive inefficiency, curious in a time of great concern over excessive litigation and limited judicial resources, has caused many commentators to strongly criticize California's claim preclusion doctrine and call for its revision.[10] As will be discussed later in this Article, this substantive inefficiency in California's claim preclusion doctrine may have influenced the manner in which the California courts apply the issue preclusion doctrine.

With respect to the rules of issue preclusion, the opportunity to achieve substantive efficiency is limited because their application occurs

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infra text accompanying notes 74-86.

9. For a brief description of the primary rights theory see *infra* notes 22-48 and accompanying text. For a more complete discussion, see Heiser, *Res Judicata*, *supra* note 4.

10. Robin James, Comment, *Res Judicata: Should California Abandon Primary Rights*?, 23 LOY. L.A. L. REV. 351 (1989) [hereinafter *Abandon Primary Rights*], contains an excellent discussion of the ambiguities in California's claim preclusion doctrine and of its substantive diseconomies, and concludes that California should abandon it reliance on the primary rights doctrine. Additional analysis and a similar recommendation, with emphasis on the administrative as well as the substantive inefficiencies of California's current claim preclusion doctrine, appear in Heiser, *Res Judicata*, *supra* note 4.

As early as 1947, legal scholars have discussed the problems associated with the definition of a cause of action based on the primary rights theory, and have advocated adoption of a less vague and more economical standard for res judicata purposes. *See, See See e.g.*, CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 130-40 (2d ed. 1947); Comment, *Cause of Action Broadened in California*, 1 STAN. L. REV. 156 (1948); Arlo E. Smith, Comment, *Res Judicata in California*, 40 CAL. L. REV. 412, 414-19 (1952); Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1970); RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982).

only when consecutive litigation is permitted by the rules of claim preclusion. In other words, collateral estoppel is a less significant vehicle for attaining judicial economy than is claim preclusion because, by definition, collateral estoppel only applies when claim preclusion does not wholly bar subsequent litigation between parties.[11] Nevertheless, the rules of issue preclusion are important to parties because they define the scope of the factual and legal matters that may be relitigated in subsequent proceedings.

Courts may achieve some measure of substantive efficiency through collateral estoppel by a broad view of what constitutes an issue "actually litigated and determined" in a prior proceeding. But even this potential substantive efficiency is limited. If a court's view is too broad, it may be contrary to the other efficiency goals of collateral estoppel. For example, if the definition of issues "actually litigated" were broad enough to include issues which could have been but were not actually raised, then parties may feel compelled to over-litigate issues in the first action.[12] Any potential savings in judicial time and resources

11. In Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 35 U. FLA. L. REV. 422, 445-51 (1983), Professor Perschbacher examines the policy rationales typically stated for claim preclusion—finality of judicial decisions, protection of litigants from the expense and vexation of multiple suits, and conservation of judicial resources—and concludes they do not support expansive applications of issue preclusion. Professor Perschbacher reasons that whereas the goal of judicial economy is a main justification for claim preclusion, it has only partial application to issue preclusion:

> By banning relitigation of a claim regardless of new evidence, new theories of recovery or defense, or arguments that the first suit was wrongly decided, res judicata enforces finality in the judicial system. Collateral estoppel, on the other hand, has never prevented relitigation in this wholesale way. By definition, a second action on a different claim has already begun. The issues in the first action must actually have been litigated and determined. Since only the number of issues, not necessarily the number of cases, is reduced, any time savings is on a smaller scale.

Id. at 448-49 (footnotes omitted).

12. This potential for inefficient over-litigation is recognized in the comments to the RESTATEMENT (SECOND) OF JUDGMENTS. The Introductory Note to the sections on issue preclusion discusses some of the problems associated with an overly-broad application of the issue preclusion doctrine, and advises "if a party is aware of the potential (and perhaps not wholly foreseeable) preclusive effects of a judgment, he may feel compelled to over-litigate an issue, or to pursue an appeal that might not otherwise be taken, out of fear of the consequences in later litigation." RESTATEMENT (SECOND) OF JUDGMENTS § 27, intro. note (1982). If preclusive effect were given to issues not actually litigated, "the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to

attributable to an overly-broad preclusion rule may therefore be offset by similar expenditures by over-litigation.

The administrative goal of any res judicata doctrine is to provide clear rules, predictable in their application and foreseeable in their consequences, which will eliminate unnecessary litigation and do so in a fair manner. Regardless of whether the chosen preclusion standard is a substantively broad or narrow one, both the claim and the issue preclusion rules should be easy to understand and to administer.

Clear, predictable collateral estoppel rules promote efficient judicial administration in a variety of related ways. First, they inform parties as to what matters they must pursue in their initial lawsuit or forever be foreclosed, and thereby assure the litigants that the resolution of these matters will be final and conclusive.[13] Clear issue preclusion rules provide a degree of predictability which allow parties to structure their litigation conduct with some assurance as to when that conduct will and will not foreclose presentation of issues in a subsequent proceeding.

Conversely, uncertain rules may be both inefficient and unfair. Unfair

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intensify litigation." *Id.* at § 27 cmt. e. A similar observation appears in Alan N. Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954): "[A]ny tendency to extend the conclusive effects of matters previously adjudicated might easily tend to intensify the effort expended in the initial litigation and might increase the probability of resort to appeal . . . ." *Id.* at 220.

Other commentators have noted this over-litigation phenomenon as well. In *Unforeseeable Preclusion*, *supra* note 6, at 917, the author discusses unnecessary litigation as a cost of overly-broad res judicata rules which force litigants into a wasteful "use it or lose it" mentality: "[I]f litigants fear that courts will apply issue preclusion to any tangential issue mentioned at trial, they might contest even trivial matters that they would otherwise only mention in passing. Litigation of these collateral matters may be especially costly, since it can greatly increase the complexity of the suit." *Id.* at 918. Professor Perschbacher astutely observes:

> In many situations, no time or expense will be saved through application of collateral estoppel. If collateral estoppel effects are foreseeable in advance, the parties will likely litigate the first action with an eye towards related future actions. Hence, impending application of collateral estoppel encourages the parties to expend more resources litigating the issue in the first action. In every instance, additional time and expense must be invested in litigating the new question of whether to apply collateral estoppel in the second action . . . .

Perschbacher, *supra* note 11, at 449 (footnotes omitted).

13. For an excellent discussion of the problems caused by unpredictable preclusion rules generally, see *Unforeseeable Preclusion*, *supra* note 6; *see also* Heiser, *Res Judicata*, *supra* note 4; *Abandon Primary Rights*, *supra* note 10, at 407-10. In *Unforeseeable Preclusion*, the author discusses the costs associated with unforeseeable preclusion in light of the various policies underlying res judicata—fairness to litigants, repose through finality of judgments, reliance on and accuracy of judgments, and efficient allocation of judicial resources. *See id.* at 910-27. From this, the author concludes that to be more foreseeable, the preclusion laws must be both clear and underinclusive: "[T]he proper model of res judicata law is, whenever possible, to establish clear rules, with some flexible exceptions used in rare cases, that serve only to block, but never to invoke, preclusion in unforeseeable situations." *Id.* at 927.

because they may discourage some parties from presenting issues in an initial proceeding in the mistaken belief that these matters may be pursued in subsequent litigation. Inefficient because they may compel other parties to over-litigate an issue or to pursue an appeal that might not otherwise be taken, or to forgo compromise or stipulation, out of fear of the consequences in later litigation.[14] In this regard, unclear issue preclusion rules create the same problems of over-litigation as do overly-broad definitions of the issue foreclosed by prior litigation.[15] Parties cannot know what issues they must raise to avoid preclusion unless they know what the preclusion rules require them to raise.

Second, a predictable collateral estoppel doctrine will not only bar relitigation of issues in successive proceedings, but should also minimize disagreements over what issues are barred. Uncertain preclusion rules undermine this efficiency goal, and may embroil the court and the parties in protracted litigation over the issue preclusive effects of a prior judgment that clearer rules would have discouraged.[16] Litigation over the question of whether a prior judgment has an issue preclusive effect, caused by unclear rules, may consume more time and resources in a subsequent proceeding than will be saved by the preclusive effect of the rules once determined applicable.[17]

Balanced against the goals of substantive and administrative efficiency is, of course, a party's right to be heard on the merits of her claims. Due process safeguards a litigant's right to a full and fair opportunity to procedurally, substantively, and evidentially pursue an issue; but collateral estoppel does not afford a litigant more than one opportunity for such judicial resolution.[18] The tension between the

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14. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 intro. note & cmt. e (1982).
15. *See supra* note 12 and accompanying text.
16. *See Unforeseeable Preclusion*, *supra* note 6, at 917-18 & 923.
17. *See id.* at 917-918; Perschbacher, *supra* note 11, at 449. As explained in *Unforeseeable Preclusion*, unclear res judicata rules impose an unnecessary litigation cost concerning the very issue of preclusion:

> Res judicata must be administrable without a long and expensive inquiry into the nature of the prior suit, because having a trial to avoid a trial would be senseless. Similarly, if a formulation of res judicata invites litigants to file preclusion motions with little chance of success, the cost of unsuccessful motions for preclusion may outweigh the trial time saved by the successful motions.

Unforeseeable Preclusion, *supra* note 6, at 917 (footnotes omitted).
18. *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329-33 (1971); Montana v. United States, 440 U.S. 147, 153 (1979); Hansberry v. Lee, 311 U.S. 32, 40 (1940); *see also* People v. Sims, 651 P.2d 321, 329 (Cal. 1982) (ruling

desire to achieve judicial economy and the party's right to one full and fair adversary hearing on an issue is implicit whenever a court determines a collateral estoppel question. This tension comes to the forefront, however, when the proper application of the doctrine is not readily apparent because the issue preclusion rules are unclear.

In such circumstances the concern for fairness, as well as for the goal of efficient judicial administration, should win out over the desire for substantive efficiency.[19] In other words, for example, where the proper application of the issues "actually litigated and determined" rule is unclear, a court should apply this rule in an underinclusive manner. Underinclusion in this context means that when the proper application of this issue preclusion rule is in doubt, the court should decline to invoke the rule in a manner that would bar litigation of matters not clearly precluded. An underinclusive approach in such circumstances not only safeguards a party's right to a full and fair hearing, but also conserves judicial and litigant resources which otherwise would be expended in the resolution of close questions of issue preclusion. The optimal definition of the issue "actually litigated and determined" for collateral estoppel purposes, therefore, is one whose scope is both clear and underinclusive.

C. A Brief But Necessary Summary of California's Claim Preclusion Doctrine

1. The Primary Rights Doctrine

The doctrine of res judicata precludes parties or persons in privity[20]

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that party to be collaterally estopped by prior agency decision must have been provided an adequate opportunity to fully present claims during administrative hearing); Vella v. Hudgins, 572 P.2d 28, 31 (Cal. 1977) (quoting In re Crow, 483 P.2d 1206, 1213 (Cal. 1971)) (ruling that the doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, "rests upon the sound policy of limiting litigation by preventing a party who has had *one fair adversary hearing* on an issue from again drawing it into controversy").

19. When preclusion rules are unclear and therefore preclusion is unpredictable, the goals of fairness and efficiency are undermined. *See Unforeseeable Preclusion*, *supra* note 6, at 923. "Penalizing someone for failing to follow unforeseeable rules of preclusion is fundamentally unfair, because penalties are unjustified unless the doctrine 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* at 922-23 (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). Moreover, if the circumstances under which a court will apply preclusion are unclear, two kinds of inefficient litigation will result: First, threshold litigation over the propriety of preclusion will increase substantially; and second, risk-adverse litigants will overlitigate collateral issues for fear of being precluded later. *See id.* at 923.

20. The concept of "privity" refers to certain limited circumstances where a person, although not a party, is bound by a judgment because of some specific

with them from relitigating the same cause of action that has been finally determined by a court of competent jurisdiction. In other words, a single "cause of action" cannot be split and made the subject of separate lawsuits.[21] Of central importance to any doctrine of claim preclusion, therefore, is the definition of "cause of action."

The California courts define a "cause of action" by reference to the primary rights theory developed by Professor John Norton Pomeroy in the nineteenth century.[22] According to Pomeroy, a "cause of action" consists of a "primary right" possessed by the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty.[23] The California Supreme Court

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relationship with the party and where the nonparty's interests were adequately represented by the party. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 34-61 (1982); CAL. CIV. PROC. CODE § 1908(a) & (b) (Deering Supp. 1998); Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978) (expanding concept of privity beyond traditional applications to any relationship between the party to be precluded and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of res judicata). *See infra* note 73 for additional discussion of the California doctrine of privity.

21. *See* Wulfjen v. Dolton, 151 P.2d 846, 848 (Cal. 1944); RESTATEMENT (SECOND) OF JUDGMENTS §§ 18 & 19 (1982).

22. *See, e.g.*, Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979); Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975); Holmes v. David H. Bricker, Inc., 452 P.2d 647, 649 (Cal. 1969).

John Norton Pomeroy (1828-1885) was a professor at the Hastings College of Law during the nineteenth century, and a prolific legal scholar. In addition to his influential multi-volume treatise on equity jurisprudence and equitable remedies, in which he explained at length the primary rights theory of a cause of action, s*ee infra* notes 23 and 30; Professor Pomeroy also published treatises on a wide variety of topics, including the civil procedure in California and other states, code pleading and remedies, constitutional law, municipal law, wills and trusts, and western water law.

23. *See* JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS § 453, at 487 (Little, Brown, & Co. 1876) [hereinafter POMEROY, REMEDIES]; JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 91 at 76 (A.L. Bancroft & Co. 1881) [hereinafter POMEROY, EQUITY]. Professor Pomeroy observed that although the American courts had repeatedly distinguished a "cause of action" from the relief demanded in a case before them, "they have not attempted to define the term 'cause of action' in any general and abstract manner, so that this definition might be used as a test in all other cases." POMEROY, REMEDIES, *supra*, § 452, at 486. Pomeroy then undertook to define the correct meaning of the term "cause of action," apparently relying on natural law concepts. *See id.* at 486-87.

Professor Pomeroy also undertook the onerous task of identifying all the rules which constitute "private civil law" and assigning them to mutually exclusive classes of primary rights and duties. POMEROY, EQUITY, *supra*, §§ 89-95, at 75-79. According to Pomeroy, all such rights fell naturally into two grand divisions: those relating to "Persons" and those concerned with "Things." *Id.* at 77. The first of these divisions comprised "only those rules the exclusive object of which is to define the *status* of persons." *Id.* at 77.

adopted the primary rights approach to claim preclusion as early as 1887,[24] and still adheres to that approach today.[25]

Under the California primary rights theory, the invasion of one primary right gives rise to a single cause of action.[26] The most salient characteristic of a primary right is that it is indivisible: The violation of a single primary right gives rise to but one cause of action which cannot be split and made the subject of separate lawsuits.[27] However, a single wrongful act which violates two (or more) primary rights gives rise to two (or more) causes of action. Moreover, where a plaintiff has more than one cause of action against a defendant, the plaintiff *may* join them in one lawsuit but is not required to do so either by the rules of joinder or of res judicata.[28] In other words, a plaintiff who has two (or more)

Pomeroy separated the grand division of "Things" into two principal classes—"Real rights" and "Personal rights." *Id.* at 77-8. Real rights embraced three distinct subclasses:

> 1. Rights of property of every degree and kind over lands or chattels, things real or things personal; 2. The rights which every person has over and to his own life, body, limbs, and good name; 3. The rights which certain classes of persons, namely, husbands, parents, and masters, have over certain other persons standing in domestic relations with themselves, namely, wives, children, and servants and slaves.

Id. at 78. The second class, "Personal rights," included two subclasses: "1. Rights arising from contract;" and 2. Quasi contract and fiduciary rights arising "from some existing relation between two specific persons or groups of persons, which is generally created by the law." *Id.* at 79.

Pomeroy viewed these general classifications as embracing "all primary rights and duties, both legal and equitable, which belong to the private civil law." *Id.* at 79.

24. *See* Hutchinson v. Ainsworth, 15 P. 82, 84 (Cal. 1887) (citing Pomeroy and holding that the facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts that make up the defendant's wrong, constitute a cause of action); *see also* McCarty v. Fremont, 23 Cal. 196 (1863) (holding that the plaintiff was not permitted to plead causes of action for injury to person, injury to real property, and injury to personal property in one complaint because clear violations of the Practice Act's permissive joinder restrictions); McKee v. Dodd, 93 P. 854, 855 (Cal. 1908) (referring to Pomeroy for the proposition that a primary right and a duty combined constitute the cause of action for purposes of pleading).

25. *See* cases cited *supra* note 22; *see also* Crowley v. Katleman, 881 P.2d 1083, 1090-91 (Cal. 1994) (discussing the primary rights theory and concluding it was inapplicable to determination of whether probable cause existed to defeat a malicious prosecution action); Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., 855 P.2d 1263, 1265-66 (Cal. 1993) (ruling that in determining the meaning of the word "claim" in a malpractice insurance policy, the fact that the claimant had only one cause of action under the primary rights theory, although not controlling, was illustrative).

Recent court of appeal decisions applying the primary rights theory include Weikel v. TCW Realty Fund II Holding Co., 65 Cal. Rptr. 2d 25 (Ct. App. 1997); Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc., 35 Cal. Rptr. 2d 348 (Ct. App. 1994); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314 (Ct. App. 1994); Takahashi v. Board of Education, 249 Cal. Rptr. 578 (Ct. App. 1988), *cert. denied*, 490 U.S. 1011 (1989).

26. *See Slater*, 543 P.2d at 594.

27. *See id*. *See also Crowley*, 881 P.2d at 1090.

28. With the exception of certain cross-complaints, joinder of causes of action is permissive, not mandatory. *See* CAL. CIV. PROC. CODE §§ 427.10 (complaints) and

causes of action against a defendant may pursue them in two (or more) separate lawsuits. A judgment in one lawsuit will have no claim preclusive effect on the other.[29]

Although the genesis of the primary rights theory is found in Pomeroy's writings, the historical evolution of the primary rights theory is intertwined with California's nineteenth century pleading and joinder rules.[30] The primary rights theory was first reflected in the permissive joinder of claims provisions of the California Practice Act of 1851.[31] This 1851 Act, which was later codified in former Section 427 of the *California Code of Civil Procedure*, divided all claims into seven specific categories.[32] Claims falling within separate categories could not

428.10 & 428.30 (cross-complaints) (Deering 1995). A plaintiff may, if she desires, bring a separate lawsuit on each cause of action even though permitted to join all of them in one complaint. *See e.g.*, Realty Constr. & Mortgage Co. v. Superior Court, 132 P. 1048, 1049 (Cal. 1913) (holding that a plaintiff who is authorized to unite two different causes of action in a single complaint is not required to do so; the right of joinder may be exercised at the plaintiff's option, and the defendant has no ground to object if the plaintiff brings a separate lawsuit as to each cause of action); Sanderson v. Niemann, 110 P.2d 1025, 1029 (Cal. 1941) (ruling that joinder of two separate causes of action was permissible but not mandatory); Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398, 405 (Ct. App. 1981).

29. *See* cases cited *supra* note 28. The prior judgment may, of course, have issue preclusive effects in subsequent litigation between the parties. *See, e.g.*, Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 923 (Cal. 1986); Bernhard v. Bank of America, 122 P.2d 892 (Cal. 1947); Sutphin v. Speik, 99 P.2d 652 (Cal. 1940); Todhunter v. Smith, 28 P.2d 916 (Cal. 1934).

30. *See* Heiser, *Res Judicata*, *supra* note 4, at 572-76; *Abandon Primary Rights*, *supra* note 10, at 372-385; Holmes v. David H. Bricker, Inc., 452 P.2d 647, 649-50 (Cal. 1969). The restrictive claim joinder statutes were in effect when Pomeroy published his treatises defining the primary rights theory. *See Abandon Primary Rights*, *supra* note 10 at 359-60; POMEROY, EQUITY, *supra* note 23; Pomeroy, Remedies *supra* note 23. Pomeroy analyzed the permissive joinder provisions of the codes as adopted in several states, POMEROY, REMEDIES §§ 438-41, at 476-79; and specifically referred to section 427 of the CALIFORNIA CODE OF CIVIL PROCEDURE (1872), which he then quoted in a footnote. *Id.* § 439, at 477 n.3. Pomeroy linked his extensive analysis of misjoinder of causes of action to his attempt to ascertain "the true meaning of the term 'cause of action,'" and discussed both concepts expressly in the context of the restrictive categories of permissibly joinable claims under the various state codes. *Id.* §§ 442-505, at 479-533.

31. 1851 CAL. STAT. 51, 59-60, ch. 5, § 64, codified as amended at CAL. CIV. PROC. CODE § 427 (repealed 1972). The Act of 1851 was based on the original Field Code. *See Holmes*, 70 Cal. 2d at 788; *see also* Heiser, *Res Judicata*, *supra* note 4, at 572-73; *Abandon Primary Rights*, *supra* note 10, at 380; Friedenthal, *supra* note 10, at 1; J. H. Toelle, *Joinder of Actions—With Special Reference to the Montana and California Practice*, 18 CAL. L. REV. 459, 465 (1930).

32. 1851 CAL. STAT. 51, 59-60, ch. 5, § 64, codified at CAL. CIV. PROC. CODE § 427 (repealed 1972).

be joined in the same complaint, and therefore had to be pleaded in separate actions. For example, the original version of Section 427 permitted a plaintiff to join all claims for injuries to her person against a defendant in one complaint, or certain claims for injuries to her property, but prohibited plaintiff from pursuing both her personal injury and property damage claims in one lawsuit.[33]

Viewed in this historical context, Pomeroy's primary rights theory made sense when adopted by the courts in the 19th century. If, for example, the joinder rules prohibited a plaintiff from pleading claims for tortious injury to person and to property against a defendant in one lawsuit, a personal injury judgment in the first lawsuit should not extinguish plaintiff's claims for property damages in a second action.[34] Such a claim preclusive effect would have been fundamentally unfair to the plaintiff, particularly one who had established the defendant's liability in the first action. Moreover, issue preclusion was available to minimize any unfairness to a defendant who had successfully defended against liability in the first lawsuit.[35]

Over time, the California courts viewed the categories of permissibly joinable claims designated in the original version of former Section 427 as synonymous with Pomeroy's classifications of primary rights.[36] Although frequently amended, former Section 427, with its restricted categories of joinable claims, remained in effect until 1971.[37] Effective 1972, the California legislature repealed Section 427 and replaced it with a modern joinder of claims statute. Recognizing that the former permissive joinder categories were arbitrary and inefficient, the legislature eliminated such restrictions in favor of a standard which

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33. CAL. CIV. PROC. CODE § 427 (6) & (7) (repealed 1972).

34. The court in *Schermerhorn v. Los Angeles Pacific R.R. Co*., 123 P. 351 (Ct. App. 1912), one of the few appellate decisions to consider this question in the context of a res judicata determination, employed precisely this reasoning in a simple car crash case. The court held that a prior judgment for property damage did not preclude plaintiff's instant suit for personal injuries, although caused by the same negligent act of the defendant. The court reasoned that the second suit was not barred because under former § 427 the plaintiff could not have sought recovery for injuries to person and injuries to property in one action. *Id*. at 456.

35. In *Todhunter v. Smith*, 28 P.2d 916 (Cal. 1934), for example, the Court held that although res judicata did not completely bar the plaintiff's second action to recover damages for personal injuries sustained in an automobile collision with the defendant, a prior judgment whereby plaintiff unsuccessfully sought recovery for damage to his car collaterally estopped the plaintiff from relitigating the issue of negligence.

36. *See* Heiser, *Res Judicata*, *supra* note 4, at 572-76 (discussing relationship between claim joinder and primary rights categories); *Holmes*, 452 P.2d at 649 (referring to former § 427 to explain distinctions among primary rights).

37. Through frequent amendments between 1907 and 1931, the legislature attempted to liberalize the restrictive categories of former Section 427. *See* Friedenthal, *supra* note 10, at 3-4 (1970).

permits a plaintiff to join together any causes of action which she has against a defendant.[38] This unlimited joinder of claims standard remains in effect today.[39]

Despite the legislative endorsement of unrestricted joinder of claims since 1972, the California Supreme Court has continued to employ the primary rights theory as the basis of California's res judicata doctrine. In current res judicata determinations, the court typically defines the scope of a primary right by reference to the "harm suffered," by the litigant, as opposed to the particular theory of recovery asserted or remedy sought.[40] Moreover, the possibility remains that a single wrongful act by a defendant may invade more than one primary right, and therefore create more than one cause of action.[41] Consequently, even in modern applications of the primary rights theory, a unitary occurrence may give rise to two (or more) causes of action and thereby permit the plaintiff to maintain two (or more) separate lawsuits against the same defendant.

By focusing on the "harm suffered" by the plaintiff, the primary rights theory provides an ambiguous and unpredictable test for determining

38. 1971 CAL. STAT. 380, ch. 244, § 23 (operative July 1, 1972). The California Law Revision Commission had viewed the restricted permissive joinder of claims provisions of former § 427 as undesirable, and recommended the adoption of unlimited joinder as a significant improvement in California procedural law. *See* RECOMMENDATIONS OF THE CALIFORNIA LAW REVISION COMMISSION RELATING TO COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION, AND RELATED PROVISIONS, 10 CAL. L. REVISION COMM'N REP. 501, 510 (1970). The legislative committee comment to new § 427.10 noted that it superseded former § 427 and "eliminated the arbitrary categories set forth in that section." COMMENT ON CODE OF CIV. PROC. §427.10, J. SENATE 887 (Cal. April 1, 1971).

39. *See* CAL. CIV. PROC. CODE § 427.10 (a) (Deering 1995).

40. In *Slater v. Blackwood*, 543 P.2d 593, 594 (Cal. 1975), the court ruled that a "cause of action" is based upon the "harm suffered," as opposed to the particular legal theory asserted by the litigant, and therefore a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the "same injury" to the same right, even though plaintiff presents a different legal ground for relief. *See also* Busick v. Workmen's Compensation Appeals Bd., 500 P.2d 1386, 1391 (Cal. 1972) (observing that there is but one cause of action for one personal injury caused by reason of one wrongful act, even though mutually exclusive remedies are available to the plaintiffs); Panos v. Great W. Packing Co., 134 P.2d 242, 244 (Cal. 1943) (holding that a prior judgment was a bar to prosecution of the instant action against the same defendant for the "same injuries," even though instant action based on negligence grounds not previously known to plaintiff).

41. *See*, *e.g.*, Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 322 (Ct. App. 1994); Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398, 403 (Ct. App. 1981).

whether a defendant's conduct creates one or more causes of action.[42] This abstract approach to claim preclusion requires further judicial interpretation of what categories of harms are "primary" harms. Unfortunately, the California Supreme Court has not developed clear guidelines for the classification of harms for the purpose of primary rights distinctions.[43]

The lower courts have been more active in providing some general classifications. For example, decisions of the court of appeal have recognized tortious injury to one's person as distinct from injury to one's property, and classified each such harm as a violation of a separate primary right.[44] The California Supreme Court endorsed, in dicta, this general primary rights classification in its 1969 opinion in *Holmes v. David H. Bricker, Inc*.[45] In one other decision, the court of appeal classified injury to real property as a primary right distinct from injury to personal property.[46] These categorical primary rights distinctions by the lower courts are no longer dictated by restrictions on permissive joinder of claims and may be suspect under a logical interpretation of the "harm suffered" approach, but they have not been disapproved by the

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42. For a more extensive analysis of the problems caused by the ambiguity and unpredictability of the primary rights doctrine applied by the California Supreme Court, see generally Heiser, *Res Judicata*, *supra* note 4 and *Abandon Primary Rights*, *supra* note 10.

43. *See* Heiser, *Res Judicata*, *supra* note 4, at 576-84 (discussing the lack of clear and meaningful guidance with respect to primary rights distinctions by the California Supreme Court).

44. *See, e.g.*, Schermerhorn v. Los Angeles Pac. R.R. Co., 123 P. 351, 352 (Ct. App. 1912); Arlo E. Smith, Comment, *Res Judicata in California*, 40 CAL. L. REV. 412, 416 (1952) (citing cases); *cf.* Weisshand v. City of Petaluma, 174 P. 955, 957 (Ct. App. 1918) (applying this distinction when construing permissive joinder of claims statute).

45. 452 P.2d 647 (Cal. 1969). However, the court in *Holmes* also limited this distinction to tortious injury to person and property, and declined to extend it to such injuries caused by breach of contractual warranty. *Id*. at 650.

Prior to its *Holmes* opinion, the Supreme Court had simply assumed, usually in the context of a misjoinder of claims discussion, that a defendant's single wrongful act injuring plaintiff's person and property violated two primary rights and therefore created two causes of action. *See, e.g.*, Todhunter v. Smith, 28 P.2d 916, 917 (Cal. 1934) (dicta); Bowman v. Wohlke, 135 P. 37, 39 (Cal. 1913) (holding that under former section 427 causes of action for injuries to property and to person could not be united in one lawsuit); Lamb v. Harbaugh, 39 P. 56, 57 (Cal. 1895) (ruling that allegations of injuries to person and property constituted two distinct causes of action which were misjoined in complaint); Thelin v, Stewart, 34 P. 861, 862 (Cal. 1893) (holding that causes of action for injury to property and to person could not be joined, under former section 427, in one complaint).

46. *See* McNulty v. Copp, 271 P.2d 90, 98 (Ct. App. 1954). The court in *McNulty* ruled that plaintiff's prior action for recovery of possession of real property involved a different primary right than the instant action to recover damages for wrongful detention of personal property located on the real property, even though both injuries were caused by the same wrongful conduct. *Id.* at 97-98.

California Supreme Court.[47] In other decisions, the court of appeal has made numerous primary rights distinctions, on an ad hoc basis, and held that a defendant's conduct gave rise to more than one cause of action.[48]

2. A Brief Comparison of the Inefficient Primary Rights Doctrine with the More Efficient Second Restatement of Judgments

California's primary rights approach to claim preclusion is a distinctly minority view. The vast majority of states, as well as the federal courts, have adopted the transactional approach of the *Restatement (Second) of Judgments* as their claim preclusion doctrine.[49] A comparison of these two approaches to claim preclusion illustrates the inefficiencies of California's continued reliance on the primary rights theory.

On a general level the doctrine set forth in the second *Restatement* is similar to the California doctrine prohibiting claim-splitting. Under both doctrines, a valid and final judgment operates as a bar to the maintenance of a second suit between the same parties or their privies on the "same cause of action."[50] Likewise, both doctrines bar a second suit

47. *See* Heiser, *Res Judicata*, *supra* note 4, at 578-84. Even after the enactment of the unrestricted joinder of claims statute in 1972, the California Supreme Court has continued to rule that a unitary wrongful conduct by a defendant may violate multiple primary rights and therefore create multiple causes of action. *See* Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979).

48. *See, e.g.*, Brenelli Amedeo S.P.A. v. Bakara Furniture, Inc., 35 Cal. Rptr. 2d 348 (Ct. App. 1994) (holding that a prior judgment against defendant corporation based on contractual obligations involved a different primary right, and did not bar a second action for tortious conveyance of assets preventing plaintiff from collecting on his judgment); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314 (Ct. App. 1994) (holding that the denial of statutory indemnity to plaintiff in a prior action involved a different primary right than the instant action for contractual indemnity); Craig v. County of Los Angeles, 271 Cal. Rptr. 82 (Ct. App. 1990) (holding that prior mandamus judgment, which ordered defendant to hire plaintiff, involved the primary right to employment; whereas the instant action involves the primary right to recover damages because of the denial of that employment right); Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398 (Ct. App. 1981) (holding that prior action for breach of contract involved a different primary right than the instant action for tortious conduct destroying the value of the contract).

49. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24, apps. 4 & 5 (1982). *See also Abandon Primary Rights*, *supra* note 10, at 353 n.11 (indicating that at most nine states, including California, do not follow the transactional standard as their claim preclusion doctrine), and at 408 n. 542.

50. Section 17 of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) explains the effects of a former adjudication as follows:

> A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

on the same cause of action even though the plaintiff is prepared in the second suit to present evidence, issues, grounds for relief, or legal theories different than those presented in the first action; or to seek new forms of relief not demanded in the first action.[51] Under both doctrines, if the cause of action asserted in the prior litigation is not the same as that in the second proceeding, the judgment in the prior litigation does not constitute a bar to the subsequent proceeding.[52]

Of primary importance to both res judicata doctrines, therefore, is the definition of the same "cause of action." Here the California Supreme Court and the second *Restatement* part company. The *Restatement* defines the "claim"[53] extinguished by a prior judgment to include "all

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> If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (see § 18);
>
> If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim (see § 19);
>
> A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment. (see § 27).

See id. § 17. Section 18 further defines the general rule of merger and provides that a judgment rendered in favor of the plaintiff precludes another action by the plaintiff on the original claim, although not an action upon the judgment. Section 19 reiterates the general rule of bar and provides that a judgment rendered in favor of the defendant on the merits bars another action by the plaintiff on the "same claim."

51. *See* Restatement (Second) of Judgments § 25 (1982); Panos v. Great W. Packing Co., 134 P.2d 242 (Cal. 1943) (holding that judgment for defendant in prior suit barred second suit to recover for same injuries even though based on an entirely different factual basis of negligence); Slater v. Blackwood, 543 P.2d 593 (Cal. 1975) (holding that a prior defense judgment based upon statutory negligence barred a second action against the defendant for the same personal injuries even though based upon a different theory of ordinary negligence); Wulfjen v. Dolton, 151 P.2d 846 (Cal. 1944) (holding that judgment for defendant in prior fraud action for recision of contract precluded second fraud action for damages).

52. In *Agarwal v. Johnson*, 603 P.2d 58 (Cal. 1979), the court observed that "[u]nless the requisite identity of causes of action is established, however, the first judgment will not operate as a bar." *Id*. at 72.

53. The second Restatement uses the term "claim" to describe the scope of the matter extinguished by a judgment; California uses the older cognate term "cause of action" for the same purpose. These terms are used in many ways for many purposes, and have various meanings in different contexts, which make their use for res judicata purposes even more confusing. *See* Restatement (Second) of Judgments § 24 intro. note (1982); Bay Cities Paving & Grading, Inc., v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993) (construing "cause of action" as used in a malpractice insurance policy to determine coverage); Lilienthal & Fowler v. Superior Court, 16 Cal. Rptr. 2d 458 (Ct. App. 1993) (distinguishing "cause of action" in the summary adjudication statute, where it means theory of liability, from the res judicata context, where it means the invasion of a primary right); *Slater*, 543 P.2d at 595 (observing that the phrase "cause of action" is "often used indiscriminately to mean what it says and to mean *counts* which state differently the same cause of action"). In this article, "claim" and "cause of action" are used interchangeably and, for the most part, only in the res judicata sense.

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."[54] By contrast, as already explained, the California Supreme Court adheres to a definition of "cause of action" based on the primary rights theory.[55]

Under the second *Restatement* a valid and final judgment precludes subsequent litigation of all rights of the parties to relief with respect to the transaction out of which the action arose.[56] The *Restatement* approach is unconcerned with whether an out-of-court event violates one or more separate primary rights, or vests the parties with multiple substantive theories of recovery or forms of relief. Instead, the *Restatement* instructs the parties to litigate all rights to remedies which arise from the factual transaction that gave rise to the lawsuit, regardless of the number of primary rights that may have been invaded during the transaction. Any such rights to relief, and any issues raised or which could have been raised, will be extinguished by the judgment.[57]

The following hypothetical illustrates the difference between the primary rights and the transactional approaches to claim preclusion. Assume that defendant's car collides with plaintiff's car on the freeway. Both parties were seriously injured, and their respective vehicles destroyed. Plaintiff wishes to recover damages for the injuries to her person and property caused by the defendant's negligence. Must the plaintiff pursue her claims for personal injuries and property damages in one lawsuit, or will she be permitted to pursue them in more than one action?

Under established California primary rights precedent, the defendant's wrongful act invaded two of plaintiff's primary rights—the rights to be

54. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Section 24(2) provides the following additional explanation of this transactional approach: "What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* § 24(2).

55. *See supra* notes 22-48 and accompanying text.

56. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

57. *See id.* §§ 24 & 25. Section 25 (1) states that the rule of claim preclusion stated in section 24 extinguishes a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action to "present evidence or grounds or theories of the case not presented in the first action." *Id.* § 25.

free from tortious injury to person and to property.[58] Plaintiff therefore has two causes of action against the defendant, and may pursue them in two separate lawsuits.[59] Under the *Restatement*'s approach, however, the plaintiff must pursue all rights to remedies against the defendant with respect to the factual transaction—the car crash—in one lawsuit. Plaintiff therefore must seek recovery for injuries to her person and to her car in one lawsuit; the *Restatement* doctrines of merger and bar prevent her from maintaining separate actions for the injuries to her person and to her property.[60]

Under both the California doctrine and the second *Restatement*, a "claim" is never broader than the transaction to which it relates.[61] Both view the "transaction" as marking the outer limits of the "claim"—a judgment in a prior action does not preclude a second action unless both actions derived from the same transaction.[62] But unlike the *Restatement*'s use of "transaction," the California primary rights approach does not make a "cause of action" coterminous with the

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58. *See supra* notes 44-45 and accompanying text.

59. *See supra* notes 28-29 and accompanying text.

60. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 (merger), § 19 (bar), and § 24, cmt. c, illus. 1 (1982).

61. RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. a (1982). *See, e.g.*, Louis Stores, Inc. v. Department of Alcoholic Beverage Control, 371 P.2d 758, 762 (Cal. 1962) (holding that a 1953 agency decision refusing to revoke the plaintiff store's liquor license did not bar the agency's second revocation proceeding because the second proceeding was based on events occurring after 1953 and therefore presented a cause of action different from the one determined in 1953); Abbott v. 76 Land & Water Co., 118 P. 425, 428 (Cal. 1911) (noting that a continuous breach of contract by a defendant who has a continuous duty to perform gives rise to a new cause of action for as long as the breach continues); Swartzendruber v. City of San Diego, 5 Cal. Rptr. 2d 64, 73 (Ct. App. 1992) (holding that plaintiff's sex discrimination cause of action was not barred by prior judgment which found plaintiff's termination not wrongful because instant action alleges discriminatory conduct that arguably occurred before and was not necessarily part of her termination from employment); Eichman v. Fotomat Corp., 197 Cal. Rptr. 612, 616 (Ct. App. 1983) (citing cases for the proposition that a judgment does not bar subsequent lawsuits based on illegal conduct by the defendant occurring after the date of the judgment).

62. For example, although a plaintiff may have suffered the same type of harm on two occasions as the result of the defendant's misconduct, the plaintiff will have two causes of action if the harm arose from two separate transactions. *See, e.g., Louis Stores*, 371 P.2d at 762; Frommhagen v. Board of Supervisors, 243 Cal. Rptr. 390, 394 (Ct. App. 1987) (holding that the plaintiff's suit challenging the defendant county's calculation of service charges for fiscal year 1985-1986 was not barred by the plaintiff's prior action which unsuccessfully challenged the calculation for 1984-85); Zingheim v. Marshall, 57 Cal. Rptr. 809, 814 (Ct. App. 1967) (holding that the plaintiff, who had already recovered accrued monthly payments due under an installment sales contract, was not barred from seeking recovery of unpaid installments accruing subsequent to the prior judgment); CAL. CIV. PROC. CODE § 1047 (Deering 1996) (providing that "[s]uccessive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom"). *See also* authorities cited *supra* note 61.

transaction itself. A unitary transaction or occurrence, under the California doctrine, gives rise to more than one cause of action if it violates more than one primary right.[63] By contrast, under the *Restatement* view a unitary transaction or occurrence by definition constitutes a single claim.[64] Consequently, as compared to the *Restatement*'s transactional approach, California's narrow use of the definition of a "cause of action" barred by a prior judgment is a less inclusive, therefore a substantively inefficient, approach to claim preclusion.

An understanding of the niceties of the primary rights theory, which are many, or of the *Restatement*'s transactional standard, is not really necessary for purposes of the issue preclusion problems discussed below. What is important to know about California's use of the primary rights theory, however, is that it is a substantively inefficient claim preclusion doctrine. A single wrongful act by a defendant may violate multiple primary rights and thereby vest the plaintiff with multiple causes of action. Moreover, neither the rules of claim preclusion nor of claim joinder compel the plaintiff to pursue all her causes of action in one lawsuit. Consequently, California's claim preclusion doctrine is substantively inefficient—it sometimes permits a plaintiff to maintain multiple lawsuits to redress injuries caused by a defendant's unitary conduct.

California's claim preclusion doctrine is not, perhaps, directly relevant to the problems with the issue preclusion doctrine addressed in this Article. These two doctrines seemingly operate in mutually exclusive spheres—the issue preclusive effects of a prior judgment only become relevant when the claim preclusive effect does not totally bar the subsequent litigation. However, as will be discussed later, the narrow and therefore substantively inefficient definition of the "cause of action" barred by claim preclusion may have influenced the California courts to recoup some efficiencies by broadly defining the scope of the "issues"

63. *See, e.g.*, Holmes v. David H. Bricker, Inc., 452 P.2d 647, 647 (Cal. 1969) (endorsing the view that a single tortious act causing injury to person and to property constitutes violations of two primary rights and therefore creates two causes of action); Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979) (ruling that different primary rights may be violated by the same wrongful conduct). Professor Pomeroy emphasized this point in his treatise defining the primary rights theory: "The same primary right may be broken by many kinds of wrong-doing; and the same wrongful act or default may invade many different rights." POMEROY, EQUITY, *supra* note 23, § 91, at 103.

64. RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. a (1982).

foreclosed by collateral estoppel. At any rate, a basic understanding of California's claim preclusion doctrine is useful background to the issue preclusion discussion which is the focus of the remainder of this Article.

II. CALIFORNIA'S CONFUSING ISSUE PRECLUSION DOCTRINE

A. California's Collateral Estoppel Doctrine is Based on the Second Restatement

Under the collateral estoppel aspect of res judicata, a party is barred from raising an issue of fact or law if that issue was "actually litigated and determined" in a prior proceeding involving a different cause of action.[65] Unlike claim preclusion, where the California courts apply their own primary rights theory, the California courts usually rely on the *Restatement (Second) of Judgments* when resolving questions of issue preclusion. Court opinions quote extensively from relevant blackletter sections of the second *Restatement*, as well as from the explanations contained in the various section comments. [66] Courts also state that this doctrine rests upon the sound policy of limiting litigation by preventing a party who has had "one fair adversary hearing" on an issue from again drawing it into controversy.[67]

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65. *See, e.g.*, Lucido v. Superior Court, 795 P.2d 1223, 1225-28 (Cal. 1990); People v. Sims, 651 P.2d 321, 331 (Cal. 1982); Todhunter v. Smith, 28 P.2d 916, 918-919 (Cal. 1934).

66. *See, e.g.*, County of Santa Clara v. Deputy Sheriffs' Ass'n, 838 P.2d 781, 784 n.7 (Cal. 1992) (citing comment h to § 27 in determining that trial court's findings in previous action were unnecessary to the judgment); *Lucido*, 795 P.2d at 1225 *cert. denied*, 500 U.S. 920 (1991) (citing § 27); George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., 783 P.2d 749, 755 n.7 (Cal. 1989) (citing § 27, quoting § 13 and § 83, and noting that res judicata is especially appropriate for a RESTATEMENT); *In re* Nathaniel P., 259 Cal. Rptr. 555 (Ct. App. 1989) (quoting § 28(4)); Barker v. Hull, 236 Cal. Rptr. 285, 288 (Ct. App. 1987) (quoting § 27 and comment d for the purpose of determining whether an issue had been "actually litigated" in a prior action); Sandoval v. Superior Court, 190 Cal. Rptr. 29 (Ct. App. 1983) (relying on § 29 and comments thereunder). *See also* cases cited *supra* note 73.

67. *See, e.g.*, *Sims*, 651 P.2d at 329 (ruling that the party to be collaterally estopped by prior agency decision must have been provided an adequate opportunity to fully present the issue during administrative hearing); Vella v. Hudgins, 572 P.2d 28, 31 (Cal. 1977) (holding that a prior unlawful detainer action did not provide plaintiff a full and fair opportunity to litigate issue of fraud, and therefore collateral estoppel inapplicable); Bernhard v. Bank of America, 122 P.2d 892, 894 (Cal. 1942) (rejecting doctrine of mutuality and noting that due process requires that party to be collaterally estopped must have an opportunity for one fair trial of an issue); Long Beach Grand Prix Ass'n v. Hunt, 31 Cal. Rptr. 2d 70 (Ct. App. 1994) (collecting cases); RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982) (providing for relitigation of an issue where party sought to be precluded did not have an adequate opportunity to obtain a full and fair adjudication in the initial action).

1. Threshold Requirements for Collateral Estoppel Distinguished from Public Policy Considerations

Recently, in *Lucido v. Superior Court*,[68] the California Supreme Court restated the threshold requirements of the doctrine, which are essentially the same as those stated in section 27 of the second *Restatement*,[69] and distinguished them from the public policy considerations of collateral estoppel:[70]

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding.[71] Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding.[72] Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same

68. 795 P.2d 1223 (Cal. 1990).

69. Section 27 of the second RESTATEMENT states the blackletter general rule of issue preclusion as follows:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

Section 28 (1)-(5) states several blackletter exceptions to this general rule. Even though the requirements of section 27 are satisfied, relitigation of an issue is not precluded in a variety of circumstances, including where there are differences in the quality of the procedures followed in the two proceedings, where there is an intervening change in the applicable legal context, where there is a convincing need for a new determination because of the adverse impact on the public interest, where there was a lack of opportunity or incentive to obtain a full and fair adjudication in the prior action, or "because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action." *Id*. § 28(5)(b).

70. *Lucido*, 795 P.2d at 1225.

71. The *Lucido* Court further noted that the "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *Id*.

72. *See id.* The *Lucido C*ourt defined the "necessarily decided" requirement to mean that the issue must not have been "entirely unnecessary" to the judgment in the prior proceeding. *Id.* at 1226; s*ee also Sims*, 651 P.2d at 331-33 (holding the issue "necessarily decided" because a determination of innocence by preponderance of evidence "necessarily" determined lack of proof beyond a reasonable doubt). One of the more interesting applications of this "necessarily decided" requirement is where a judgment is based on two or more alternative grounds and either ground, standing alone, could support the judgment. For a discussion of this application, see Adam Siegler, *Alternative Grounds In Collateral Estoppel*, 17 LOY. L.A. L. REV. 1085 (1984); RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmts. i and o (1982).

as, or in privity[73] with, the party to the former proceeding. The *Lucido* Court then stated that even where all these basic requirements are satisfied, the public policies underlying the doctrine must be examined before concluding that collateral estoppel should be applied in a particular setting.[74]

The *Lucido* Court identified the public policies underlying collateral estoppel as "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation;" and ruled that consideration of these public policies may influence "whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy."[75] The Court in *Lucido* refused to apply collateral estoppel to bar

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73. The concept of "privity" traditionally refers to a cluster of relationships under which the preclusive effects of a prior judgment extend beyond a party to the original action and apply to persons having specified relationships to that party, such as successors in interest, persons represented by a fiduciary, and persons who have a financial interest in and control of the conduct of the prior lawsuit. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 34-61 (1982); CAL. CIV. PROC. CODE § 1908(a) & (b) (Deering 1996); Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978) (collecting cases); Armstrong v. Armstrong, 544 P.2d 941, 946 (Cal. 1976) (extending privity to persons represented by a fiduciary). Although traditional applications of the concept were quite limited, the modern California doctrine of privity is much broader. In *Clemmer* the Court expanded the concept to apply to any relationship between the party to be precluded and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of res judicata or collateral estoppel. *Clemmer*, 587 P.2d at 1102; *see also Sims*, 651 P.2d at 332-33 (applying the "sufficiently close" standard to find the district attorney office and the county in privity).

The "sufficiently close" test for determining privity is, to put it mildly, imprecise and ambiguous. This flexible definition of privity is limited by the requirements of due process, whose parameters are equally vague. For example, the Court in *Clemmer*, 587 P.2d at 1102, observes that, in the context of collateral estoppel:

> due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.

As the *Clemmer C*ourt astutely acknowledged, "[p]rivity is a concept not readily susceptible of uniform definition." *Id*. In other words, the modern California privity doctrine is ambiguous. When compared to the more limited traditional doctrine, this modern view of privity does promote substantive economy. However, because the modern doctrine provides little guidance to litigants and courts, its application is unpredictable. The problems created by California's current privity doctrine merit extended analyses, but such treatment is beyond the scope of this Article.

74. *Lucido*, 795 P.2d at 1226-27.

75. *Id*. *Lucido* was not the first time the California Supreme Court had applied these public policy considerations in an direct and meaningful manner to a collateral estoppel determination. *See*, *e.g*., *Clemmer*, 587 P.2d at 1101-03; People v. Taylor, 527 P.2d 622, 628 (Cal. 1974) (ruling that policy considerations supported application of collateral estoppel in the instant case).

The Court in *Clemmer* considered whether a prior murder verdict collaterally estopped the victim's family, who had file a wrongful death suit seeking recovery from the

relitigation of an issue actually determined in a prior probation revocation proceeding, even though the threshold requirements were fulfilled, because it concluded that to do so in the particular circumstances of the case before it would be inconsistent with these public policies.[76]

As *Lucido* illustrates, the California Supreme Court intends some flexibility in the application of collateral estoppel such that relitigation of an identical issue will not be precluded. In addition to the flexibility introduced by the public policy considerations employed in *Lucido*, the California Supreme Court has refused to apply collateral estoppel, although all the basic requirements are met, because to do so would be inconsistent with the public interest[77] or because the prior proceeding was before an administrative agency as opposed to a court.[78]

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criminal defendant's liability insurer, from contending the killing was not willful and therefore not excluded from coverage. The court rejected the collateral estoppel defense and concluded that the requisite privity did not exist between the victim's family and the criminal defendant. *See Clemmer*, 587 P.2d at 1102-03. The *Clemmer* Court recognized the notion of privity had expanded to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify the application of collateral estoppel. However, the Court reasoned, in deciding whether to apply collateral estoppel, the Court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, "in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation." *Id*. at 1102.

76. *Lucido*, 795 P.2d at 1231-33.

77. These cases usually involve an issue of law, and frequently involve a government agency as the party in whose favor the exception is applied. *See*, *e.g.*, Kopp v. Fair Political Practices Com'n, 905 P.2d 1248, 115-116 (Cal. 1995) (ruling that the public interest requires that relitigation of the issue not be foreclosed); Arcadia Unified Sch. Dist. v. State Dept. of Educ., 825 P.2d 438, 440-42 (Cal. 1992) (ruling that state agency was not collaterally estopped from relitigating constitutionality of statute authorizing school districts to charge fees for pupil transportation); Chern v. Bank of America, 544 P.2d 1310, 1313-14 (Cal. 1976) (applying exception to permit relitigation of certain banking practices issues based on strong public interest to regulate banking evidenced by applicable statutes).

78. In *George Arakelian Farms, Inc., v. Agricultural Labor Relations Bd*., 783 P.2d 749, 755-56 (Cal. 1989), the California Supreme Court noted that although collateral estoppel rules are generally applicable to administrative orders, their enforcement is "more flexible" in that context. With respect to the application of collateral estoppel to administrative agency decisions, the courts have expressed concern with whether the agency proceeding was adjudicatory in nature and provided a full and fair opportunity to litigate an issue. *See*, *e.g.*, People v. Sims, 651 P.2d 321 (Cal. 1982) (applying collateral estoppel after finding that an agency hearing afforded the parties a fair adversary proceeding in which they could fully litigate the issue of welfare fraud); Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control, 361 P.2d 712, 714

This flexibility not to apply collateral estoppel is intentional and is not the unforeseen consequence of ambiguity in some doctrinal standard. Moreover, this flexibility is limited in application; it is available only in certain circumstances and even then may be exercised only in favor of underinclusion.[79] However, as discussed below, California's basic collateral estoppel doctrine is also flexible in another basic area due to doctrinal uncertainty. Unfortunately, this type of flexibility makes the doctrine confusing, facially inconsistent, and unpredictable.

2. Public Policy Considerations and the Need for Underinclusive Collateral Estoppel Determinations

The California Supreme Court's policy analysis in *Lucido* is instructive as to the appropriate judicial attitude toward collateral estoppel. The Court not only identified and explained the public policy considerations underlying collateral estoppel, but applied them as meaningful components of the doctrine. The Court first explained the "integrity of judicial determinations" factor. The Court observed that public confidence in the integrity of the judicial system is threatened whenever two tribunals render inconsistent judgments. However, the Court then reasoned that consistency is not the sole measure of the integrity of the judicial system: "We must also consider whether eliminating potential inconsistency . . . would undermine public confidence in the judicial system."[80]

Next, the *Lucido C*ourt considered the "judicial economy" factor. Obviously, the Court recognized that the application of collateral estoppel would promote judicial economy by precluding relitigation of issues already determined in a prior proceeding. Nevertheless, the Court

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(Cal. 1961) (noting that some administrative determinations differ from court decisions and therefore greater flexibility is required in applying res judicata to them). *See also* Perschbacher, *supra* note 11 (explaining why administrative determinations should not be given full collateral estoppel effect).

79. Underinclusion, when used in this context, means that the flexibility in the application of the broad rules of issue preclusion may only be exercised in favor of nonpreclusion, never in favor of preclusion. *See Unforeseeable Preclusion*, *supra* note 6, at 923-929, 953 (discussing the need for clear, but underinclusive, rules in res judicata such that preclusion will not apply in unforeseeable situations).

80. *Lucido*, 795 P.2d at 1229-30. The Court's concern here was with the public's confidence in the integrity of the *criminal* justice system if issues determined adverse to the prosecution in a probation revocation hearings were to displace full determination of factual issues in criminal trials. This concern for public confidence is clearly more evident in criminal as opposed to civil litigation, but the Court did not so limit its analysis. In fact, the Court utilized a civil case, *Vella v. Hudgins*, 572 P.2d 28 (Cal. 1977), wherein the Court refused to apply collateral estoppel to unlawful detainer decisions, to help support its integrity of judicial determinations reasoning. *Lucido*, 795 P.2d at 1231.

simply concluded without further discussion that such efficiencies were outweighed by the concern for the integrity of the judicial system. Finally, the Court addressed the "vexatious litigation" consideration. The Court noted that the application of collateral estoppel would certainly eliminate repetitive litigation.[81] But the Court fine-tuned this policy consideration by ruling that "[t]he essence of vexatiousness . . . is not mere repetition. Rather, it is harassment through baseless or unjustified litigation."[82]

Although *Lucido* involved the application of collateral estoppel in criminal litigation, the Court's policy analysis is not, by its terms, limited to criminal cases. However, the Court's view of the "integrity of the judicial system" as outweighing all other policy considerations may not be the same in the context of civil litigation. Nevertheless, the *Lucido C*ourt's policy analysis is highly instructive as to the proper application of collateral estoppel in civil cases. *Lucido* demonstrates that even where all the basic requirements of the collateral estoppel doctrine are satisfied, policy considerations may make application of the doctrine inappropriate in certain circumstances. Consequently, *Lucido* authorized relitigation of an identical issue previously litigated even though the Court expressed little doubt that the issue was "actually litigated" and "finally decided" in the prior proceeding.[83] The *Lucido C*ourt's willingness to hold collateral estoppel inapplicable in circumstances where the prerequisites were clearly met suggests that the Court would have been even more eager to avoid issue preclusion if the basic requirements had not been so clearly established in that case.

Lucido is also instructive as to the relative importance of "judicial economy" in a collateral estoppel determination. *Lucido* suggests that the obvious efficiencies to be derived from applying collateral estoppel in a particular case may be outweighed by other, more important policy concerns. The overriding policy concern in *Lucido* was the integrity of the criminal justice system as a whole. In the context of civil litigation, a similar overriding concern is the fundamental fairness of an opportunity for one full adversary hearing on an issue.[84]

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81. *See id.* at 1232.
82. *Id.*
83. *Id.* at 1225-26.
84. Of course, this due process concern is present in all litigation, whether criminal or civil in nature. But this concern is more likely the only one relevant to the "integrity of judicial determinations" factor in the context of civil litigation. In *Lucido*, the Court was concerned with public confidence in the criminal justice system if, due to the

Finally, *Lucido* recognizes that vexatious litigation is a less significant concern in a collateral estoppel determination than, for example, a claim preclusion determination. By definition, collateral estoppel may only come into play when res judicata permits the parties to maintain consecutive proceedings. Thus, as *Lucido* correctly observes, collateral estoppel is not designed to eliminate repetitive litigation between the same parties. Rather, collateral estoppel is intended to eliminate harassment through baseless or unjustified litigation. Certainly a party who raises an issue in a subsequent lawsuit that was at best arguably, but not clearly, "actually litigated and determined" in the prior proceeding should not run afoul of the policy against vexatious litigation as defined by *Lucido*.

The *Lucido* court's use of public policy considerations to depart from the broad issue preclusion rules suggests, and correctly so, a certain judicial attitude toward collateral estoppel determinations that is not evident in claim preclusion determinations.[85] *Lucido* suggests the proper judicial attitude is that the blackletter rules of collateral estoppel should be applied in an underinclusive manner. Underinclusion in *Lucido* meant that collateral estoppel would not bar relitigation of an issue, in

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application of collateral estoppel to an issue determined in a prior probation revocation hearing, the ultimate determination of a criminal defendant's guilt or innocence were not made in a criminal trial. Probation revocation hearings and criminal trials serve different public interests and functions, the court reasoned, and these differences justify permitting a criminal prosecution to relitigate issues determined adversely to the People in a prior probation revocation hearing. An analogous public interest concern is rarely evident in consecutive civil proceedings, but the concern for fairness to parties who may be foreclosed by unclear preclusion rules is evident in such circumstances. *See, e.g.*, *Vella*, 572 P.2d at 31-32 (declining to extend full collateral estoppel effect to unlawful detainer judgments because such summary proceedings do not provide parties a full and fair adversary hearing on all issues).

Unlike criminal cases, the integrity of the court system is unlikely to be implicated in civil litigation where one party seeks to relitigate an issue already fully and fairly litigated in a prior lawsuit between the same parties. *See, e.g.*, Younan v. Caruso, 59 Cal. Rptr. 2d 103, 110 (Ct. App. 1996) (holding that the application of collateral estoppel to bar relitigation of an ineffective representation issue in the instant malpractice action, based on adverse determination in prior habeas corpus proceeding, promotes integrity of the judicial system and judicial economy within the meaning of *Lucido*). Public confidence in the judicial system is a factor in civil cases, however, where confusing and unpredictable rules foreclose a party from litigating an issue in a subsequent proceeding. The public may view the judicial system's use of such rules, when applied to bar litigation of issues, as fundamentally unfair.

85. The California courts do not recognize any *Lucido*-type public policy exceptions to the operation of the primary rights doctrine. If the rules of claim preclusion are satisfied, a court may not reject that doctrine as a defense. *See* Slater v. Blackwood, 543 P.2d 593, 595 (Cal. 1975) (rejecting argument that courts have discretionary power to refuse to apply claim preclusion when to do so would constitute a manifest injustice); Robert J. v. Leslie M., 59 Cal. Rptr. 2d 905, 907-08 (Ct. App. 1997) (observing that public policy exceptions to claim preclusion are extremely narrow and have never enjoyed wide approval or frequent application).

the context of a criminal case, even though the blackletter rules of preclusion were clearly satisfied.

Underinclusion in the context of civil litigation may mean the same as it did in *Lucido*, as in the case of the "public interest" exception. More importantly, underinclusion also means that to accomplish the stated policies of issue preclusion, including that a party be provided one full and fair opportunity to litigate an issue, collateral estoppel should not be invoked in circumstances where issue preclusion could not have been predicted because the preclusion rules are confusing or their application is unclear. As in the analogous context of privity, where the rules are vague and limited by due process, collateral estoppel should not foreclose litigation of an issue unless "the circumstances . . . have been such that the party to be estopped should reasonably have been expected to be bound by the prior adjudication."[86] As discussed in the next section, California's issue preclusion rules are confusing and unpredictable in (at least) two related ways.

B. The California Supreme Court Has Provided Confusing Explanations of the "Issues Actually Litigated and Determined" Requirement

The most significant problems in applying the basic collateral estoppel doctrine involve two related determinations: (1) whether the issue sought to be litigated in the current lawsuit is "identical" to an issue previously litigated; and, (2) whether this issue was "actually litigated and determined" in the prior proceeding. The "identical issue" requirement creates difficulties when the issues are not totally identical in the literal sense of time, place, or occurrence, nor in the sense of precisely the same legal context. Courts sometimes must determine whether or not a party is seeking to relitigate an issue previously litigated even though the two proceedings involve different historical transactions[87] or changes in factual circumstances,[88] or raise the issue in a different legal context.[89]

86. Clemmer v. Hartford Ins. Co., 587 P.2d 1098, 1102-03 (Cal. 1978).

87. Courts sometimes find collateral estoppel inapplicable in a subsequent action involving parallel facts but concerning a different historical transaction. *See, e.g.*, Chern v. Bank of America, 544 P.2d 1310 (Cal. 1976). Other times, courts conclude the fact that issues previously determined in a prior judgment related to a different historical transaction does not "separate the issues or render them non-identical." County of Los Angeles v. County Assessment Appeals Bd., 16 Cal. Rptr. 2d 479, 483 (Ct. App. 1993).

88. *Compare, e.g.*, Evans v. Celotex Corp., 238 Cal. Rptr. 259 (Ct. App. 1987)

Such problems are inherent in any attempt to delineate the issues foreclosed by prior litigation where such issues do not arise in the context of the same cause of action, and are perhaps an inevitable byproduct of any collateral estoppel doctrine.[90]

The "actually litigated and determined" requirement would seem to be less troublesome to apply—an issue was either actually considered and

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(holding that a prior judgment which found that a relative's illness was not caused by asbestos exposure collaterally estopped instant wrongful death action despite new facts that relative died after prior judgments and autopsy revealed asbestos exposure was the cause of the relative's illness and death) *with* Melendres v. City of Los Angeles, 115 Cal. Rptr. 409 (Ct. App. 1974) (ruling that collateral estoppel did not bar police department's instant action to make salary adjustments that reflected the prevailing wage in private industry as provided by city charter, despite an earlier judgment that there was no corresponding job classification in private industry, because of new facts of changed circumstances in the form of consultant's plan which created a method of making such prevailing wage comparisons).

89. The courts sometimes conclude that collateral estoppel does not apply where the same issue arises in different legal contexts. *See, e.g.*, Lucas v. County of Los Angeles, 54 Cal. Rptr. 2d 655 (Ct. App. 1996) (ruling that collateral estoppel was inapplicable because determination that defendant acted "reasonably" in the context of qualified immunity defense in prior federal civil rights action not the same issue as "reasonable action" in context of defense of immunity in instant state law negligence claim); Ruffalo v. Patterson, 285 Cal. Rptr. 647 (Ct. App. 1991) (holding that determination in plaintiff's prior dissolution of marriage judgment that certain property was community property did not collaterally estop plaintiff from suing her former attorney for negligently instructing plaintiff to characterize the property as community property).

90. Comment c to § 27 of the second RESTATEMENT offers the following guidance on the "identical issue" problem:

> c. *Dimensions of an issue*. One of the most difficult problems in the application of the rule of this Section is to delineate the issue on which litigation is, or is not, foreclosed by the prior judgment. The problem involves a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute. When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether for purposes of the rule of this Section the "issue" in the two proceedings is the same, for example: Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings? . . .
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> Sometimes, there is a lack of total identity between the matters involved in the two proceedings because the events in suit took place at different times. In some such instances, the overlap is so substantial that preclusion is plainly appropriate . . . . In still other instances, the bearing of the first determination is so marginal because of the separation in time and other factors negating any similarity that the first judgment may properly be given no effect.

RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c. (1982).

resolved by the court in the prior action or it was not. The *Restatement* succinctly explains that a judgment is not conclusive in a subsequent action as to issues "which might have been but were not litigated and determined in the prior action."[91] However, the California courts have apparently taken a somewhat different approach in defining the "actually litigated and determined" requirement. As with the unique primary rights theory of claim preclusion, the California approach to the "actually litigated and determined" requirement introduces uncertainty and unpredictability into the issue preclusion analysis.

1. Sutphin v. Speik*: The California Supreme Court Employs Overly-Broad Language in Defining the "Actually Litigated and Determined" Rule*

The difficulties with the California definition of "actually litigated and determined" can be traced directly to the California Supreme Court's

91. RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982). Comments d and e provide the following additional explanation regarding when an issue is or is not actually litigated:

> d. *When an issue is actually litigated*. When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment . . . , a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.
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> . . . .
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> e. *Issues not actually litigated*. A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. . . . The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.
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> It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.

Id. at cmts. d, e.

1940 opinion in *Sutphin v. Speik*.[92] *Sutphin* involved two actions to recover royalties due under an assignment of a participating royalty interest in an oil and gas lease. One Cole leased two small lots in Huntington Beach, and assigned to plaintiff Sutphin a participating royalty interest of five per cent (5%) of the total production of all oil and gas sold from the existing or any substitute well on the property. Cole subsequently assigned his entire leasehold interest to defendant Speik. At the time of the assignment to plaintiff Sutphin in 1927, a well designated as #3 was being drilled, which later went into production. In 1932, well #3 was destroyed by fire, and defendant drilled another well (#3A) in its place, using the original hole and casing, and a second well (#4) some fifty feet away.

Plaintiff Sutphin brought his first action against defendant Speik in 1933 to recover royalties due under his 5% participating royalty interest. The trial court found that the plaintiff's participating royalty interest was valid, that defendant had knowledge of the plaintiff's interest when defendant received his assignment, and that well #4 produced from the same zone and pool as redrilled well #3. The court then declared that plaintiff Sutphin was the owner of 5% of the total production of oil and gas sold from the two lots even if more than one well was used on the premises. Judgment was rendered in 1934 for plaintiff in the sum of $ 6,388.82, and became final after being affirmed on appeal.

Plaintiff Sutphin filed a second action in 1936 to recover royalties accruing after entry of the 1934 judgment, grounded on the rights adjudicated by that prior judgment. Defendant Speik pleaded as his chief defense that well #4 does not produce oil from any deposit underlying the property but was drilled as a "whipstock well" diagonally into oil-producing sands under the Pacific Ocean, more that 2000 feet from the property, and that well #4 therefore produces from sands and oil deposits which do not extend beneath the two lots. Speik contended that plaintiff Sutphin had no interest in either well #3A or #4. Defendant offered to prove that a royalty was being paid to the State of California from the production of the wells in return for permission to produce from state lands under the ocean, but the trial court excluded this offered evidence. The trial court found that wells #3A and #4 produced from the same zone and pool, and that it was immaterial whether they were "whipstock wells" because of the doctrine of res judicata. The court rendered judgment for plaintiff Sutphin in the sum of $ 31,932.54, and defendant Speik appealed.

On appeal before the California Supreme Court, Speik first argued (a)

92. 99 P. 2d 652 (Cal. 1940), *reh'g. denied,* 101 P.2d 497 (Cal. 1940).

that the causes of action in the two lawsuits were different, and the judgment in the first is not res judicata on the second; and (b) that the issue of ownership of oil or oil rights therein produced from state lands by a "whipstock well" was not raised or decided in the first action, and was not barred by res judicata. The Court agreed with defendant that the severable installments of royalties due gave rise to separate causes of action, and that the prior judgment was not a complete bar in the second action. The Court also recognized, however, that the prior judgment operates as a conclusive litigation as to such issues in the second suit as were "actually litigated and determined" in the first action.[93]

The Supreme Court then addressed the following question: Under what circumstances is a matter to be deemed decided by a prior judgment? "Obviously," the Court observed, "if a matter was actually raised by proper pleadings and treated as an issue in the prior case, it is conclusively determined by the first judgment."[94] But, the Court reasoned, the issue preclusion rule goes further:

> If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. *A party cannot by negligence or design withhold issues and litigate them in consecutive actions*.[95] Hence the rule is that the prior judgment is res judicata on *matters which were raised or could have been raised*, on matters litigated or litigable.[96]

The Supreme Court then applied this rule to the facts of case. Because the defense now raised by defendant Speik, that the wells bottomed on state land, could have raised in the first action, the court concluded that collateral estoppel applied.[97] Plaintiff Sutphin was therefore entitled to

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93. *Id*. at 655 (quoting Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918 (Cal. 1934)).

94. *Id*. at 655.

95. *Id.* (emphasis added). The Supreme Court reasoned that "an issue may not be . . . split into pieces." *Id*. The *Sutphin C*ourt quoted from the earlier case of *Price v. Sixth District Agricultural Ass'n*., 258 P. 387 (Cal. 1927), in explaining this rule against issue-splitting. *Sutphin*, 99 P.2d at 655.

96. *Id.* 5 (emphasis added).

97. *Id*. at 656. Because the defendant knew or should have known of the source of the oil produced from wells #3A and #4 in 1932, the court viewed the "whipstock well" defense as available to defendant at that time and therefore could have been raised in the first action. The court further explained its "could have been raised" language as follows:

> If the asserted defense has merit, it was as good and available then as now. This being so, it can make no difference whether it was actually pleaded, or

his present judgment without any further consideration of the merits.[98]

Defendant Speik petitioned the Supreme Court for a rehearing. Defendant challenged portions of the opinion which he interpreted as meaning that any issue which could have been raised in the first suit is collateral estoppel in the second, even though not actually determined in the first.[99] Speik argued that the 1934 judgment cannot be collateral estoppel as to the "*new issue* of the title to oil from wells bottomed on state land, which title was acquired after the conclusion of the first action."[100] The Court denied defendant's petition, but rendered an additional opinion in an attempt to explain its reasoning.[101] The Court denied that it had extended collateral estoppel to any issue which could have been raised in the first suit even though not actually determined. Instead, the Court explained that the defendant had not in fact actually raised a "new issue" in the second suit.[102] The judgment in the first action, the court explained, awarded plaintiff Sutphin 5% of the total production from the lots in question whether produced from one or more wells, and did not limit the plaintiff to production from wells which bottomed under the land. Defendant's asserted "new issue," according to the Court, was simply another "legal theory by which the *same issue* might be differently decided."[103] The Court concluded by observing that the defendant should not be permitted to relitigate an issue determined in an earlier action "whenever defendant can discover a new theory upon which to attack" the prior determination.[104]

The *Sutphin C*ourt may be viewed as articulating two important pronouncements with respect to the "actually litigated and determined" criterion. First, the Court's main opinion suggests that collateral estoppel precludes relitigation of issues that were "raised or could have been raised" in a prior proceeding. Second, the Court's supplemental opinion denying a rehearing explains the distinction between "issues" and "theories," the latter apparently a component of the former. Collateral estoppel will not bar a party from raising a new "issue" in a subsequent proceeding, but will foreclose a party from merely presenting

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> whether evidence was introduced thereon or not . . . . *When we say that the issue could have been raised, we mean that it was relevant to or within the scope of the action*, and not that it was at the time a defense upon which the defendant might prevail.

Id. (emphasis added).

98. *Id*.
99. *Id*.
100. *Id*.
101. *See id*.
102. *Id*.
103. *Id*. (emphasis in original).
104. *Id*.

a new factual or legal "theory" with respect to the same "issue" previously litigated. As discussed below, both pronouncements have caused difficulties for courts applying California's collateral estoppel doctrine. Likewise, both make the doctrine more complex and less predictable.

2. Sutphin*'s Definition of Issues "Actually Litigated and Determined" Confuses the Claim and Issue Preclusive Effects of a Prior Judgment*

The problem with *Sutphin* is not so much its conclusion of issue preclusion, which may be justified as an example of a prior ruling on an ultimate fact precluding relitigation of lesser-included evidentiary facts.[105] Rather, the problem with *Sutphin* is the broad language the Court employed in reaching its conclusion.[106] That language, which suggests that a judgment is conclusive on issues that were actually raised or "could have been raised," is facially inconsistent with other judicial definitions of collateral estoppel as well as with that of the second *Restatement* upon which the California courts supposedly rely. For

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105. The second RESTATEMENT, section 27, comment c, provides that the issue on which litigation is foreclosed may be one of evidentiary fact or of ultimate fact:

> An issue on which relitigation is foreclosed may be one of evidentiary fact, of "ultimate fact" (i.e., the application of law to fact), or of law. Thus, for example, if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact.

RESTATEMENT (SECOND) OF JUDGMENTS, § 27, cmt. c (1982).

As an illustration, assume that a plaintiff sought to recover personal injuries for a car crash by establishing that the defendant was negligent in driving at an excessive speed. After trial, the verdict and judgment are for the defendant. In a subsequent action by plaintiff against defendant for property damages, the plaintiff will be precluded from attempting to again establish defendant's negligence, whether that assertion of negligence is based on excessive speed or on some different evidentiary basis. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c, illus. 4 (1982).

106. The *Sutphin* holding is not necessarily inconsistent with the result that would be reached if the facts had been analyzed under second RESTATEMENT rules. Indeed, the second RESTATEMENT utilizes a pared-down version of the facts in *Sutphin* as one of its illustrations regarding the dimension of an "issue," which the Reporter's Note to section 27 acknowledges is based on *Sutphin v. Speik*. RESTATEMENT (SECOND) OF JUDGMENTS §27, cmt. e, illus. 5 (1982). The RESTATEMENT does not provide a definitive answer as to the proper application of the "identical issue actually litigated and determined" rule to these *Sutphin*-like facts, but advises that preclusion should turn on application of the factors described in comment c, "particularly the relation between the evidentiary presentation, the applicable rule of law, and the claim involved in each of the two proceedings." *Id*. at § 27, cmt. c, illus. 5.

example, California Supreme Court decisions repeatedly state that the issue preclusive effect of a judgment is limited to "issues actually litigated" in a prior action.[107] Likewise, the *Restatement* clearly explains that a "judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in a prior action."[108]

A careful reading of *Sutphin*'s two opinions suggests that the offending language applies only to legal "theories" and factual "matters," and not to "issues," that could have been raised in the prior action.[109] Unfortunately, as discussed in detail in the next section of this Article, the *Sutphin* Court's distinction between "issue" and "theory" is quite subtle and is difficult to apply.[110] Too subtle and difficult, perhaps, for many of the courts that have applied *Sutphin*'s reasoning. The courts of appeal typically quote the "issues raised or could have been raised" language of *Sutphin*'s main opinion, not the "issues" versus "theories" reasoning of the supplemental opinion, when describing the circumstances in which a matter has been "actually litigated and determined" by a prior judgment.[111]

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107. *See, e.g.*, Lucido v. Superior Court, 795 P.2d 1223, 1225-26 (Cal. 1991) (stating basic requirement that collateral estoppel precludes relitigation of only those issues actually litigated, such as issues actually raised by presentation of evidence and decided, in a prior proceeding); People v. Sims, 651 P.2d 321, 331 (Cal. 1982) (defining when an issue is "actually litigated" by reference to comment d to section 27 of the second RESTATEMENT to mean an issue properly raised by the pleadings or otherwise, submitted for determination, and determined); Henn v. Henn, 605 P.2d 10, 13-14 (Cal. 1980) (ruling that collateral estoppel is limited to issues litigated and determined, and did not extend to issues which could have been adjudicated but were not actually raised).

108. RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982).

109. Several courts have emphasized this "issue\theory" distinction when discussing the doctrine of collateral estoppel, often stating some variant of the following observation, as made in *Lucas v. County of Los Angeles*, 54 Cal. Rptr. 2d 655, 662 (Ct. App. 1996): "The doctrine of collateral estoppel applies on issues litigated even though some factual matters or legal arguments which could have been raised were not." *See e.g.*, Mobilepark W. Homeowners Ass'n v. Escondido Mobilepark W., 41 Cal. Rptr. 2d 393, 403 (Ct. App. 1995); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 324 (Ct. App. 1994); Interinsurance Exch. of the Auto. Club v. Superior Court, 257 Cal. Rptr. 37, 39 (Ct. App. 1989).

110. Referring to *Sutphin*'s discussion of this distinction, the Court in *Clark v. Lesher*, 299 P.2d 865, 868 (Cal. 1956), remarked that the "actually litigated" rule "is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define . . . ." A more recent decision also echoed this sentiment. *See* Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc., 38 Cal. Rptr. 2d 612, 615 (Ct. App. 1995) (observing that the distinction between "issues" and "theories" is not always easy).

111. This language from *Sutphin* has been quoted extensively and applied by the courts of appeal in several recent cases. *See, e.g.*, Warga v. Cooper, 51 Cal. Rptr. 2d 684, 688 (Ct. App. 1996); Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639, 642-43 (Ct. App. 1993); Thibodeau v. Crum, 6 Cal. Rptr. 2d 27, 29-30 (Ct. App. 1992); *Interinsurance*, 257 Cal.Rptr. at 39. For citations to additional cases quoting this language from *Sutphin* in the context of claim preclusion, *see infra* note 114.

Although the Court in *Sutphin* clearly utilized this "issues raised or could have been raised" language in the context of issue preclusion, this language is actually more appropriate for a claim preclusion analysis. Under the claim preclusion aspect of res judicata, a prior judgment bars a second lawsuit on the same cause of action even though the plaintiff is prepared in the second action to present different evidence, legal theories, or grounds for relief than those presented in the first action.[112] In other words, the universally accepted premise of claim preclusion is that a prior judgment forecloses relitigation of the same cause of action, which in turn precludes relitigation of all issues which were raised or could have been raised as components of that cause of action.[113] Indeed, some of the courts that have quoted the "issues raised or could have been raised" portion of the *Sutphin* opinion have done so as part of a claim, not an issue, preclusion determination.[114]

By importing this broad claim preclusion language into its issue preclusion analysis, the Supreme Court has confused the preclusive

112. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982) and cases cited in *supra* note 51.

113. By employing this broad language, the court in *Sutphin* confused the preclusive effects of claim and issue preclusion. In *Krier v. Krier*, 172 P.2d 681 (Cal. 1946), for example, the California Supreme Court stated the settled rule that "a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved." *Id*. at 682. And in *Panos v. Great W. Packing Co*., 134 P.2d 242 (Cal. 1943), the court stated that a prior judgment is a complete bar to a second lawsuit on the same cause of action and is deemed to adjudicate, for purposes of the second action, "not only every matter which was, but also every matter which might have been urged in support of the cause of action or claim in litigation." *Id*. at 243. *See also* RESTATEMENT OF JUDGMENTS § 63 cmt. a (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982); note 51 *supra*, and accompanying text.

114. *See, e.g.*, Eichman v. Fotomat Corp., 197 Cal. Rptr. 612, 614 (Ct. App. 1983) (citing *Sutphin* for the proposition that if the same primary right is involved in two actions, the judgment in the first action bars consideration not only of all matters actually raised but also all matters which could have been raised); Kronkright v. Gardner, 107 Cal. Rptr. 270 (Ct. App. 1973) (quoting *Sutphin* and holding that a prior judgment barred the instant action because both presented the same claim although sought different forms of relief); *cf*. Henry v. Clifford, 38 Cal. Rptr. 2d 116, 119 (Ct. App. 1995) (quoting *Sutphin* and holding that prior judgment barred instant action because both involved same primary right although different issues of negligence); Takahashi v. Board of Education, 249 Cal. Rptr. 578, 589 (Ct. App. 1988) (quoting *Sutphin* at length in support of conclusion that prior mandamus judgment had claim preclusive effect and served "as a bar not only to the issues litigated but to those that could have been litigated at the same time"); DeHart v. Allen, 161 P.2d 453, 454 (Cal. 1945) (citing *Sutphin* for the proposition that a judgment is res judicata as to issues expressly presented or could have been raised).

effects of the two doctrines. The temptation for the court to have done this in 1940 is understandable. At the time of the *Sutphin* decision, California utilized the primary rights theory (as it does now) to define a cause of action for claim preclusion purposes. As discussed in Part I of this Article, that approach sometimes meant that a single wrongful act of a defendant would give raise to two or more causes of action.[115] Moreover, California's then-operative permissive joinder of claims statute restricted the types of causes of action that could be joined in one lawsuit to certain categories.[116] This combination of narrowly defined claim preclusion and restricted claim joinder often *required* a plaintiff to pursue multiple lawsuits to seek redress for injuries caused by a defendant's single wrongful act.[117] Perhaps these inefficiencies induced the court in *Sutphin* to broadly define the issue foreclosed by collateral estoppel, and to employ the "raised or could have been raised" test for issue preclusion, as a counter to the claim preclusion and claim joinder rules.[118] Although the inefficient claim preclusion and claim joinder doctrines may permit a plaintiff to maintain multiple lawsuits regarding the unitary conduct, *Sutphin*'s issue preclusion rule would prevent the plaintiff from raising any new factual or legal matters in the subsequent lawsuits.

Most courts utilize this language from *Sutphin* as it was intended—as part of a collateral estoppel analysis of whether an issue was "actually litigated and determined" in a prior proceeding on a different cause of action.[119] Some of these courts sought to ascertain the preclusive effect of a prior judgment by determining whether a particular issue, although not previously litigated, *could* have been litigated in the prior proceeding.[120] Others have applied the rationale of *Sutphin*'s language

115. *See supra* notes 22-48 and accompanying text.

116. *See supra* notes 30-37 and accompanying text.

117. *See supra* notes 24-37 and accompanying text.

118. This use of collateral estoppel was advocated in Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952). For cases which involve multiple causes of action arising from the same transaction, such as automobile accidents, claims for successive installments on a contract, or periodic claims of rent or interest: "[t]he first judgment should be conclusive not only as to issues litigated, but also as to issues which might have been litigated." *Id*. at 841.

119. *See, e.g.*, cases cited *supra* note 111 and *infra* note 120.

120. *See, e.g.*, Neil Norman, Ltd. v. William Kasper & Co., 197 Cal. Rptr. 198 (Ct. App. 1983); Insurance Co. of N. Am. v. Liberty Mutual Ins. Co., 180 Cal. Rptr. 244, 247 (Ct. App. 1982) (finding collateral estoppel inapplicable because issue "was neither litigated nor could it have been raised and litigated" in a prior action between the same parties on a different cause of action); Kingsbury v. Tevco, Inc., 144 Cal. Rptr. 773, 774-75 (Ct. App. 1978) (ruling that a prior in boundary line litigation was collateral estoppel on issue of improperly conducted court-ordered survey because issue could have been brought to the attention of the court in the prior action); Kelley v. Kelley, 141 Cal. Rptr. 33, 35 (Ct. App. 1977) (holding that prior dissolution of marriage judgment adjudicated

to justify the extension of collateral estoppel to a default judgment,[121] a stipulated judgment,[122] or a voluntary dismissal with prejudice.[123] Such

community property issues which were raised or could have been raised by the parties), *disapproved by* Henn v. Henn, 605 P.2d 10, 14 n.6 (Cal. 1980); *cf.* Goldberg v. Frye, 266 Cal. Rptr. 483 (Ct. App. 1990) (ruling that legatees of estate weere foreclosed from seeking damages from estate administrator for fraud because legatees failed to raise issue of fraud at time of prior final accounting); Interinsurance Exch. of the Auto. Club v. Superior Court, 257 Cal. Rptr. 37 (Ct. App. 1989) (finding collateral estoppel applicable because plaintiff's "theory" of fraud could have been raised in the prior proceeding).

In *Neil Norman*, for example, the court determined whether a prior lawsuit between the merchant parties for breach of contract for shipment of defective wool sweaters precluded the instant action for breach of the same contract for shipment of defective acrylic sweaters. The court relied on *Sutphin* and noted that preclusion occurred in *Sutphin* "because the issue in question *could* have been litigated in the prior action." *Neil Norman*, 197 Cal. Rptr. at 202 (emphasis added). The court then concluded that, unlike *Sutphin*, the plaintiff could not have raised the issue of the defective acrylic sweaters during the first lawsuit because plaintiff could not reasonably have known of the defects in the shipped but uninspected acrylic sweaters during the pendency of the first lawsuit. *Id*. The court concluded that the plaintiff had not negligently withheld the issue from the first lawsuit and then attempt to litigate it later. *Id.*

121. Some California courts have held that a default judgment has a collateral estoppel effect as to material issues raised by the complaint and necessary to uphold the default judgment. *See, e.g.*, English v. English, 70 P.2d 625 (Cal. 1937); Four Star Electric Inc. v. Feh Constr., 10 Cal. Rptr. 2d 1 (Ct. App. 1992); County of San Diego v. Hotz, 214 Cal. Rptr. 658 (Ct. App. 1985); Mitchell v. Jones, 342 P.2d 503, 506-07 (Cal. 1959). By contrast, the RESTATEMENT view is that in the case of a judgment entered by default, none of the issues are actually litigated and therefore the judgment has no collateral estoppel effect. RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982); *see also infra* note 124.

122. *See, e.g.*, California State Auto. Ass'n Interinsurance Bureau v. Superior Court, 788 P.2d 1156, 1159 n.2 (Cal. 1990) (collecting cases and ruling that a stipulated judgment may properly be given a collateral estoppel effect as to all issues of liability, unless scope of such issue preclusion restricted by the parties); Wittman v. Chrysler Corp., 245 Cal. Rptr. 20, 22-24 (Ct. App. 1988) (ruling that consent judgment had collateral estoppel effect on issues raised in pleadings although abandoned by party); *In re* Marriage of Buckley, 184 Cal. Rptr. 290, 294 (Ct. App. 1982) (ruling that a stipulated judgment determines all matter put into issue by the pleadings, and has a collateral estoppel effect on such issues unless the parties agree otherwise); *cf.*, Warga v. Cooper, 51 Cal. Rptr. 2d 684 (Ct. App. 1996) (quoting *Sutphin* and holding that stipulated judgment had a res judicata effect, but not clearly indicating whether applying claim or issue preclusion); *but see* Landeros v. Pankey, 46 Cal. Rptr. 2d 165 (Ct. App. 1995) (relying on comment e to § 27 of the second RESTATEMENT and holding that a stipulated judgment in a prior unlawful detainer action did not preclude litigation of habitability issue in the instant action because the stipulated judgment contained no express language manifesting an intention of the parties to preclude litigation of this issue).

The second RESTATEMENT view is that a stipulated judgment by itself has no collateral estoppel effect but the parties may intend, by separate agreement, a preclusive effect as to certain issues. *See infra* note 124.

123. *See, e.g.*, Torrey Pines Bank v. Superior Court, 265 Cal. Rptr. 217, 220-224 (Ct. App. 1989) (concluding that a voluntary dismissal with prejudice of a prior action

extensions of collateral estoppel are inconsistent with the second *Restatement*, which views uncontested judgments as not "actually litigating" any issues.[124]

3. Sutphin*'s Distinction Between "Issues" and "Theories" Is Complex, Difficult to Apply, and Unpredictable*

The California Supreme Court in *Sutphin*, in its supplemental opinion denying a rehearing, sought to explain its rule against "issue-splitting" by distinguishing between "issues" and "theories," the latter apparently a component of the former. Collateral estoppel will not bar a party from raising a new "issue" in a subsequent proceeding, according to the court, but will foreclose a party from merely presenting a new factual or legal "theory" with respect to the same "issue" previously litigated.[125] Consequently, the *Sutphin* court's reasoning hinges on the distinction between "issues" and "theories." The problem is that these words have no universally agreed upon core meaning in the context of collateral estoppel.[126] Whether a party in a second action raises a "new issue" as opposed to the "same issue" but presented with a "new theory" depends on how broadly or narrowly a court chooses to define an "issue." The *Sutphin* opinion offers no general, objective guidelines on how to resolve this complex inquiry.

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barred the assertion of affirmative defense which raised the same issues in a subsequent action); *but see* Alhino v. Starr, 169 Cal. Rptr. 136, 144 (Ct. App. 1980) (ruling that a dismissal with prejudice of fraud action did not amount to factual determination that defendant was not guilty of fraud and therefore inappropriately given collateral estoppel effect).

124. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982). Comment e offers the following explanation as to when issues are not actually litigated:

> An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading; nor is it actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties. A stipulation may, however, be binding in a subsequent action between the parties if the parties have manifested an intention to that effect. . . .
>
> In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action. The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.

Id.

125. Sutphin v. Speik, 99 P.2d 652, 656 (Cal. 1940).

126. For a more complete discussion of the problems associated with attempts to distinguish "issues" from "theories" for purposes of collateral estoppel, see WALTER W. HEISER, ET AL., CALIFORNIA CIVIL PROCEDURE 445-446, 451(1996).

The line between "issues" and "theories" may be difficult to draw in some circumstances. Consider the following hypothetical. Assume that the defendant's large truck crashed into the rear of the plaintiff's car. Plaintiff's car was destroyed, and plaintiff suffered severe personal injuries. Plaintiff first sued defendant for the property damage, asserting negligence in operating a truck with defective brakes. Defendant was found not negligent in this regard, and judgment was entered for defendant. The plaintiff then files a second lawsuit to recover damages for personal injuries (a different cause of action) this time asserting two counts: (I) defendant was negligent in driving too fast; and (II) defendant intentionally battered the plaintiff by running into plaintiff's car. Are both counts barred by collateral estoppel?

Although contrary arguments could be made, the adverse determination of the issue of defendant's negligence in the first judgment would likely preclude relitigation of the negligence issue raised in count I of the second action. The "issue" of defendant's negligence is the same in both lawsuits, although the legal and factual "theory" of defendant's negligence has changed. But what about count II? Does it raise a different issue? This may depend on how broadly the issue determined in the first lawsuit is defined. If the issue previously determined is viewed broadly as whether the plaintiff's injury was caused by wrongful conduct of the defendant, then the intentional tort count in the second action simply alleges a new theory but the same issue. However, if the issue previously determined is viewed more narrowly as whether the defendant had engaged in negligent conduct, then the intentional tort count does not assert the same issue. The proper definition of issue here is not readily apparent; consequently, it is difficult to predict the likely resolution of this hypothetical collateral estoppel question by a court. Several actual cases, discussed below, demonstrate the unpredictability of the "issue" versus "theory" distinction.

In *Henn v. Henn*,[127] for example, the California Supreme Court considered the collateral estoppel effect of a prior dissolution of marriage judgment on a subsequent action to establish community property interest in a pension which was not specifically adjudicated in the final decree of dissolution. A superior court had entered a final judgment in 1971 which awarded Henry and Helen Henn specific items

127. 605 P.2d 10 (Cal. 1980).

of marital property as their separate property. Neither the pleading nor the judgment made any mention of Henry's retirement pension. Although both parties were fully aware of its existence at the time of the dissolution proceedings, the parties did not seek, and the court did not determine, the community property rights with respect to the pension. In 1973, Helen filed a second action to establish her community property rights in her ex-husband's pension. Defendant Henry raised the defense of res judicata. The Supreme Court ruled that the claim preclusion aspect did not completely bar Helen's action, and then considered the effect of the issue preclusion aspect.

Defendant Henry Henn argued that the issue of Helen's entitlement to the assets of the community had been "actually litigated and determined" by the prior judgment. Helen argued that the prior judgment had not adjudicated the specific issue of her community property interest in the pension.[128] The California Supreme Court determined that the "doctrine of collateral estoppel cannot be stretched to compel" the result urged by Henry. The Court explained that:

> [T]he rule prohibiting the raising of any factual or legal contentions which were not actually asserted but which were within the scope of prior action does not mean that issues not litigated and determined are binding in a subsequent proceeding on a new cause of action. Rather, it means that once an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise matters for or against it which if asserted may have produced a different outcome.[129]

The Court therefore concluded that the doctrine of collateral estoppel was not applicable because "Henry failed to demonstrate that Helen is relying upon some specific factual or legal contention which would have been relevant to the adjudication of the parties' rights to the property distributed in the 1971 decree if it had been raised."[130] In other words, the specific issue of Helen's interest in the pension was not "actually litigated and determined" by the prior adjudication of the parties' community property rights generally.

In *Henn*, the California Supreme Court choose to define the "issue" actually litigated and determined in the prior dissolution judgment in a

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128. Referring to *Sutphin*, the Court noted that Henry had not asserted that Helen is relying upon some factual or legal theory which was adjudicated in the prior litigation or which would have had to have been adjudicated if it had been raised at the time. *Henn*, 605 P.2d at 13. Precisely what the Court meant by this is unclear.

129. *Id*.

130. *Id*. In so ruling, the Court disapproved of *Kelley v. Kelley*, 141 Cal. Rptr. 33 (Ct. App. 1977), which had held that any judicial division of community property necessarily precluded the subsequent litigation of community property rights in an asset known to exist at the time of the earlier proceeding, and which could have been adjudicated at that time. *Henn*, 605 P.2d at 13 n. 6.

narrow manner so as not to include the parties' community property rights in the pension. The Court could have defined the "issue" previously litigated as "the division of the community property rights of the parties," of which each specific item of marital property was but a sub-issue.[131] Either definition would seem to be consistent with the reasoning of *Sutphin*. This point is illustrated by the recent court of appeal decision, in *Marriage of Mason*.[132]

In *Mason*, Marjorie and Raymond Mason's marriage was dissolved by a judgment entered in 1993. Prior to this judgment, Majorie had operated a residential care facility at home and closed the business due to ill health. The dissolution judgment allocated various amounts of marital property to the parties, as well as spousal support. Subsequently, Raymond commenced an attack on the prior judgment, claiming that the goodwill component of the business was an "omitted asset"[133] and worth $ 157,000. The trial court rejected Raymond's claim on the ground that the business was a known asset which was divided by the prior judgment, and commented that "if [husband] . . . didn't raise the goodwill issue that is his tough luck."[134] The court of appeal affirmed based on the doctrine of res judicata. The court observed that a "party cannot by negligence or design withhold issues and litigate them in consecutive actions."[135] The court continued by quoting language from *Sutphin*: "Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable."[136]

131. This was the approach taken by the Court of Appeal in *Kelley*, 141 Cal. Rptr. at 35. After quoting *Sutphin*, the court in Kelley concluded that the issue of the Kelleys' community property interest in retirement pay was adjudicated by the prior dissolution of marriage judgment because, although not expressly pleaded, it "could have been raised." *Id*. This reasoning in *Kelley* was specifically disapproved by the court in *Henn*. *See supra* note 130.

132. 54 Cal. Rptr. 2d 263 (Ct. App. 1996).

133. Raymond relied on section 2556 of the CALIFORNIA FAMILY CODE, which authorizes a party to a prior dissolution of marriage judgment to file an order to show cause "in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment." CAL. FAM. CODE § 2556 (Deering 1994). This statutory authority did not exist at the time of the *Henn* litigation. *See In re* Marriage of Umphrey, 267 Cal. Rptr. 218, 223-24 (Ct. App. 1990) (discussing history and purpose of FAMILY CODE § 2556, initially enacted in 1989 and formerly designated CIVIL CODE § 4353).

134. *Mason*, 54 Cal. Rptr. 2d at 265.

135. *Id*.

136. *Id*.

If the court in *Mason* was applying the claim preclusion aspect of res judicata, its reasoning was certainly correct and not remarkable.[137] But if it was applying the issue preclusion aspect, as the *Henn C*ourt did in a similar circumstance, the *Mason* court's holding would seem to conflict with the holding in *Henn*. For unlike the view in *Henn*, the specific community property interest sought to be asserted in *Mason*—the goodwill of the wife's business—was viewed as merely a component or sub-issue of the property already distributed by the prior dissolution judgment. In other words, the *Mason* court's definition of the "issue" actually litigated and determined in the prior action is much broader than that of the *Henn* court. Yet neither definition appears clearly and predictably incompatible with *Sutphin*'s reasoning.

Few recent cases demonstrate the unpredictability of the "issue" versus "theory" distinction better than the 1995 decision in *Wimsatt v. Beverly Hills Weight Loss Clinics International, Inc.*[138] The plaintiffs in *Wimsatt* were franchisees who first filed an action in a federal district court in California against the defendant franchisor, alleging false promises induced them to enter into the franchise contract. The defendant moved to dismiss for improper venue, seeking to enforce a forum selection clause in the franchise contract which required suit be brought in Virginia. The federal court found the clause was "valid and enforceable," and granted defendant's motion. Plaintiffs then filed a second action, this time in state court, and defendant again invoked the forum selection clause through a motion to dismiss for improper venue. The plaintiffs argued that the clause was invalid and unenforceable due to the antiwaiver provisions of California's *Franchise Investment Law*. The superior court found that the issue of the validity and enforceability of the forum selection clause had been fully litigated in the prior federal court action, and that plaintiffs were barred by collateral estoppel from relitigating that issue. Plaintiffs appealed.

The court of appeal in *Wimsatt* held that the plaintiffs were not foreclosed by collateral estoppel from relitigating the validity and enforceability of the forum selection clause, and reversed. The court stated that collateral estoppel is confined to identical issues actually litigated, but was inapplicable where the previous decision rests on a

137. The *Mason* court did not clearly state which aspect of res judicata it was applying. Raymond Mason had filed a motion to set aside the stipulated judgment on the ground that Marjorie had concealed income and was reopening her care facility. This motion was denied by the superior court and affirmed on appeal. *Id*. at 264. This could constitute claim preclusion. Nevertheless, the *Mason* court's treatment of Raymond's "omitted asset" argument as a new "theory" and as a matter which "could have been raised," suggests issue preclusion. *See id.*

138. 38 Cal. Rptr. 2d 612 (Ct. App. 1995).

"different factual and legal foundation" than the issue sought to be litigated in the case at bar.[139] "Of course," the court noted, "in determining whether the identity requirement is satisfied, courts must be mindful of the need to distinguish 'issues' from 'theories.'"[140]

The *Wimsatt* court then examined the exact "issue" previously decided by the federal court and the "factual and legal foundation" of the prior decision, and adopted a narrow view. "Styling that issue as whether the forum selection clause was 'valid and enforceable,'" the court ruled, "is unreasonably broad."[141] Instead, the court viewed the issue previously decided as limited to a determination that the forum selection clause was "valid and enforceable" under federal procedural law, but did not determine whether the clause was "valid and enforceable" under state substantive law.[142] Consequently, because the federal court did not actually determine the identical issue now presented, the *Wimsatt* court concluded that the prior federal court ruling did not collaterally estop the plaintiffs from again challenging the validity of the forum selection clause, this time under state law.[143]

The *Wimsatt* court's analysis graphically illustrates the unpredictability of the *Sutphin*'s distinction between "issues" and "theories." The court in *Wimsatt* could easily have viewed the plaintiffs in the state court action as raising the same "issue" (i.e., the validity and enforceability of the forum selection clause) as was actually determined in prior federal court action, and as merely presenting a new legal "theory" (i.e., state franchise law as opposed to federal procedural law) by which the same "issue" might be decided differently. The court could then have viewed the plaintiffs' state franchise law argument as a legal "theory" or matter which could, and probably should, have been raised in the prior federal lawsuit in support of plaintiffs' argument there on the "issue" of the validity of the forum selection clause.[144] If the

139. *Id*. at 615.
140. *Id*. The court also noted that this distinction "is not always easy," and "the best solution to the problem of making this distinction is to give the idea of 'issue' a 'reasonable meaning.'" *Id.*
141. *Id*.
142. *Id*. at 616-17.
143. *See id*. at 619.
144. A careful reading of the *Wimsatt* opinion suggests that the court may have viewed the question of the validity of the forum selection clause under the California Franchise Investment Law as a legal theory which could not have been raised in the prior federal court litigation. The *Wimsatt* court's understanding of the federal district court's order seems to be that the federal court viewed the state substantive law question as

Wimsatt court had applied the "issue\theory" distinction in that manner and had found that the plaintiffs were barred by collateral estoppel from relitigating the same "issue," the court's conclusion would certainly have been consistent with *Sutphin*'s analysis.

However, the *Wimsatt* court did not find the same "issue" was involved in the two actions, and therefore ruled collateral estoppel inapplicable. Yet this conclusion seems unobjectionable and no less consistent with *Supthin* than the contrary conclusion. How can this be? Because the "issue\theory" distinction is so vague and malleable that it can justify either result! In other words, this aspect of the "identical-issue-actually-litigated-and-determined" rule is unpredictable. Under such circumstances, what the *Wimsatt* court actually concluded was fair and appropriate. In cases where the application of collateral estoppel is unpredictable, a court should apply the doctrine in an underinclusive manner.[145] A court in such cases should not invoke preclusion so as to deprive the litigant of one fair and full opportunity to be heard on an issue.[146]

Three additional cases applying the *Sutphin* rationale to similar fact situations—*Corral v. State Farm Mutual Automobile Insurance Co*.,[147] *Rios v. Allstate Insurance Co*.,[148] and *Interinsurance Exchange of the Automobile Club v. Superior Court*[149] —illustrate the uncertainty and unpredictability of the "issues" versus "theories" distinction as well as the "raised or could have been raised" test. All three cases involved car crashes and bad faith claims against the plaintiff's insurer.

In *Corral*, the court considered the question of whether a prior

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irrelevant to the federal venue question. However, nothing prevented the plaintiff from raising this state substantive law theory of invalidity in the federal court; and the federal court certainly could have entertained this legal theory even if the court ultimately rejected it. *See* Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553, 574-582 (1993) (discussing the appropriate role of state contract law when a federal court determines the validity and enforceability of a forum selection clause). If the plaintiff believed that the federal court gave insufficient weight to the anti-waiver provision of the California Franchise Investment Law, the proper avenue by which plaintiff could challenge this ruling should have been an appeal and not a collateral attack.

145. *See supra* notes 12-19 and accompanying text.

146. Fundamental fairness dictates that issue preclusion be inapplicable unless the party against whom preclusion is sought has had one opportunity to fully and fairly litigate the issue. *See supra* notes 14-19 and accompanying text. Also, as discussed in Part I of this Article, concerns for efficiency as well as fairness counsel against over-inclusion in the application of collateral estoppel. *See supra* notes 11-19 and accompanying text.

147. 155 Cal. Rptr. 342 (Ct. App. 1979).

148. 137 Cal. Rptr. 441 (Ct. App. 1977).

149. 257 Cal. Rptr. 37 (Ct. App. 1989).

arbitration proceeding, instituted by the plaintiff insureds to recover benefits from defendant insurer under an uninsured motorist provision of an insurance policy, had a collateral estoppel effect on the plaintiffs subsequent action against the defendant for bad faith and fraud. The arbitrator had found that the driver of the other car involved in the collision was insured and that therefore the plaintiffs were not entitled to recover under the uninsured motorist provision. The plaintiffs then commenced a second action against the defendant insurance company for bad faith and fraud, alleging that the defendant had withheld certain evidence of the other driver's lack of insurance during the arbitration. The defendant insurance company raised the defense of collateral estoppel.

The court in *Corral* found that the issue of fraud and bad faith was not the same as the issues raised and determined in the prior arbitration proceeding, and therefore the arbitration decision did not have a collateral estoppel effect on the instant action. In so holding, the court in *Corral* declined to follow the decision in *Rios*, a prior case involving a remarkably similar fact situation. In *Rios*, as in *Corral*, the plaintiff insured had sought to establish through arbitration that the driver of the other car was uninsured and to collect benefits under the uninsured motorist provision of his policy with the defendant, but was unsuccessful in the arbitration proceeding. The plaintiff in *Rios* subsequently brought a second lawsuit against the defendant insurance company for bad faith and fraud, alleging that the defendant had introduced perjured testimony during the arbitration proceeding. The court in *Rios* concluded that collateral estoppel barred the second action against the defendant insurance company because the issues of bad faith and fraud by the insurance company could have been pursued in a motion to vacate the arbitration decision.

The *Corral* court refused to follow *Rios*, viewing *Rios* as an improper extension of collateral estoppel to issues that could have been but were not actually raised.[150] The *Corral* court noted that issues must be distinguished from factual matters or legal theories which could have been presented but were not, citing *Sutphin*.[151] However, the *Corral* court viewed the plaintiffs' allegations of bad faith and fraud on the part

150. Corral v. State Farm Mut. Auto. Ins. Co., 155 Cal. Rtpr. 342, 347 (Ct. App. 1979).
151. *Id.*

of the defendant insurance company as new "issues," not "theories."[152] By contrast, the *Rios* court apparently viewed the allegations of bad faith and fraud there as simply new theories, or perhaps even as new issues, which could have been raised in the prior proceeding and therefore as consequently barred.

In *Interinsurance*, plaintiff Packham was an insured of the defendant Automobile Club and was involved in an auto collision with one Belluni, another driver who was also insured by the defendant Auto Club. Packham had signed a release, tendered by the defendant, of all claims connected with the collision. After Packham signed the release, the defendant refused to renew Packham's insurance. Packham then sued Belluni for damages for negligence, and Belluni moved for summary judgment based on the release. Packham argued that she was confused when she signed the release and had not in reality assented to the provisions in the release. The trial court granted summary judgment for Belluni, which was affirmed on appeal.

Plaintiff Packham then sued the defendant Auto Club for breach of the covenant of good faith and fair dealing, alleging fraud and overreaching by the defendant with respect to the release. The defendant Auto Club argued that the plaintiff's action was barred by collateral estoppel, and the court of appeal agreed.[153] After quoting *Sutphin*'s language at length, the court in *Interinsurance* determined that the issue actually litigated in the first lawsuit was whether plaintiff Peckham had effectively assented to the release. The court concluded that the prior judgment foreclosed the instant bad faith action because both involved the same issue, although the plaintiff was using different legal theories (fraud and overreaching) in the instant action. The court reasoned that these theories could have been raised in the prior summary judgment litigation, and in fact that the plaintiff did raise them on appeal from the summary judgment although the appellate court declined to consider them because Packham had not raised them in the trial. The *Interinsurance* court also noted that its reference to plaintiff's fraud and overreaching theories as "issues" in its prior opinion did not make these theories "issues" for purposes of the instant appeal and collateral estoppel.[154]

A dissenting opinion in *Interinsurance* argued that collateral estoppel was inapplicable.[155] The dissent agreed with the distinction between "issues" and "theories" for purposes of collateral estoppel, but viewed

152. *Id*.
153. *Interinsurance*, 257 Cal. Rptr. at 39-40.
154. *Id*. at 40 n.2.
155. *Id*. at 41 (Wiener, J., dissenting).

the instant action as not relitigating the same fraud theory that could have been raised in the prior action between Packham and Belluni. Instead, the dissent viewed the instant action as litigating the new question of whether the defendant insurance company violated a different and enhanced set of fiduciary duties owed by an insurer to an insured. This theory, the dissent reasoned, could not have been raised in the prior litigation between the two insureds. Moreover, the dissent noted, where there is some doubt as to whether the theory could have been raised, the court should err on the side of giving the plaintiff her day in court.[156]

These three cases further illustrate the difficulties encountered by the courts in applying both pronouncements from *Sutphin*. *Corral* and *Rios* take different views of what is an "issue" as opposed to a "theory." Moreover, *Rios* may be read as an application of *Sutphin*'s language extending collateral estoppel to issues that could have been raised in the prior proceeding. *Interinsurance* illustrates that the distinction between "issues" and "theories" may cause courts to focus on the wrong inquiry. The proper inquiry, according to the dissent in *Interinsurance*, is whether the new "theory" could have been raised, and was relevant to, the prior proceeding. The dissent's analysis seems persuasive, but adds more complexity to the issue preclusion determination. The dissent in *Interinsurance* does provide some worthwhile and simple advice: When the application of collateral estoppel is not clear, the court should err on the side of underinclusion.[157] Concerns for basic fairness and efficient judicial administration, not to mention the due process right to an opportunity to be heard on the merits, would seem to dictate an underinclusive approach to collateral estoppel when its application is unpredictable.[158]

III. CONCLUSION

A. The California Supreme Court Should Disapprove Sutphin*'s Rhetoric and Reaffirm Reliance on the Second* Restatement

Whether the holding in *Sutphin* was correct or not, the language of the

156. *See id.* at 43 (Wiener J., dissenting).
157. *See id.*
158. *See supra* notes 11-19 and accompanying text.

Sutphin test has made California's issue preclusion doctrine confusing and unpredictable. Confusing because the *Sutphin* approach, on its face, is inconsistent with other California Supreme Court pronouncements regarding collateral estoppel, as well as with section 27 of the second *Restatement* standard upon which the California courts supposedly rely. Unpredictable because litigants cannot be sure whether a court will apply a broad or narrow definition of "issue", nor whether a court will extend collateral estoppel to issues that were not actually raised but could have been raised in the prior proceeding.

The California Supreme Court should revisit *Sutphin* and disapprove of the overly broad rhetoric employed in that 1940 opinion. Arguably, the Court has already done so through its more recent, and more carefully crafted, opinions defining collateral estoppel by reference to the second *Restatement*. However, because the language of *Sutphin* retains surprising vitality nearly 60 years later, the Court should clearly state what it means when it refers to the second *Restatement* and the requirement that an issue has been "actually litigated and determined." If the Court means the definition to be that of section 27 of the second *Restatement*, as explained by comments d and e, the Court should clearly say so and disown the contrary language of its *Sutphin* opinion. Concomitantly, if the California Supreme Court really intends that California's collateral estoppel doctrine is that of the second *Restatement*, then the court should also disapprove of those decisions that have extended collateral estoppel to default judgments, stipulated judgments, and voluntary dismissals with prejudice.[159]

Formal adoption of the second *Restatement* as California's collateral estoppel doctrine and disapproval of the overly broad language in *Sutphin* should make California issue preclusion doctrine more predictable. Courts will still encounter difficult questions of whether the "identical issue" is involved in two proceedings. Indeed, the *Restatement* acknowledges that determining the dimension of an "issue" is often difficult.[160] Faithful adherence to the second *Restatement* will not necessarily eliminated use of the "issue" versus "theory" distinction. As previously noted, that distinction appears to be consistent with the second *Restatement*'s observation that prior adjudication of an ultimate fact precludes relitigation of the evidentiary facts and theories which comprise the ultimate fact.[161] When used in that sense and applied in cases where the distinction between an ultimate fact and its lesser-

159. *See supra* notes 121-23 and accompanying text.

160. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982), reproduced *supra* note 90.

161. *See supra* note 105 and accompanying text.

included components are clear, the "fact\theory" dichotomy is unobjectionable.

However, as the several cases discussed above demonstrate, the "issue\theory" distinction can be very complex and unpredictable in less clear applications. The proper approach to the difficulty of applying this distinction in such circumstances is relatively simple. As the *Restatement*[162] and the dissent in *Interinsurance* advise, and the holdings in *Henn* and *Wimsatt* illustrate, when the proper application of the "issue\theory" distinction is unclear, the courts should err on the side of underinclusion and find issue preclusion inappropriate. An underinclusive approach in such circumstances not only safeguards a party's right to a full and fair hearing, but also conserves judicial and litigant resources which otherwise would be expended in the resolution of close questions of issue preclusion.[163]

The burden of proof is on the party asserting collateral estoppel to establish that the issue was actually litigated and determined in the prior action. [164] Consequently, a court may decide that issue preclusion is unavailable unless the party asserting it can prove that the issue previously litigated is the same as the issue raised now, or, in appropriate circumstances, that the issue previously litigated clearly encompassed the legal or factual "theory" now presented in the instant action.[165] In this manner, the desired underinclusive result may be achieved through use of the burden of proof as opposed to some new doctrinal standard or rule.

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162. The second restatement explanations of when issues are and are not "actually litigated and determined" counsel that the interests of predictability, uniformity, simplicity, and fairness weigh strongly in favor of non-preclusion in unclear cases. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 intro. note, cmts. c & e (1982).

163. *See supra* notes 11-19 and accompanying text.

164. *See, e.g.*, Vella v. Hudgins, 572 P.2d 28, 31 (Cal. 1977); Barker v. Hull, 236 Cal. Rptr. 285, 288-89 (Ct. App. 1987).

165. In *Jackson v. City of Sacramento*, 172 Cal. Rptr. 826 (Ct. App. 1981), the court utilized this burden of proof in a analogous situation to find collateral estoppel inapplicable. The court in *Jackson* concluded that the plaintiff city employee had failed to meet his burden of proof in establishing that the issue of whether his injury was work related, as determined in a prior workers' compensation hearing decision, was identical to the issue of his disability for purposes of the defendant city's retirement program. *Id.* at 828. *See also Vella*, 572 P.2d at 31 (holding that defendant had failed to sustain burden of proving requirements of collateral estoppel applicable to prior unlawful detainer judgment).

B. Adoption of the Second Restatement *as California's Claim Preclusion Doctrine May Improve California's Issue Preclusion Doctrine*

More faithful adherence to the second *Restatement* by the California Supreme Court should improve the predictability of California's issue preclusion doctrine. Additional improvement may also result from changes in California's *claim* preclusion doctrine. In a related article in this issue, Professor Heiser recommends that the California Supreme Court should replace the primary rights theory with the second *Restatement* as California's claim preclusion doctrine.[166] This recommendation is based on the substantive and administrative inefficiencies of the current primary rights definition of the "cause of action" (or "claim") foreclosed by a prior judgment.[167]

The Introductory Note to the second *Restatement*'s sections on issue preclusion makes the following observation:

> There is a close relationship between the definition of a "claim" and the sweep of the rule of issue preclusion. Courts laboring under a narrow view of the dimensions of a claim may on occasion have expanded concepts of issue preclusion in order to avoid relitigation of what is essentially the same dispute. Under a transaction approach to the concept of a claim, on the other hand, there is less need to rely on issue preclusion to put an end to the litigation of a particular controversy.[168]

The *Restatement*'s observation may well have been directed at California's narrow definition of a "claim" and, at times, overly-broad definition of "issue." Adoption of the *Restatement*'s transactional approach to claim preclusion, an approach that is more inclusive and predictable than the primary rights approach, may diminish the perceived (and understandable) need on the part of the courts to rely on collateral estoppel to achieve substantive economies.

166. *See* Heiser, *Res Judicata*, *supra* note 4.
167. *See id*.; *see also* authorities cited *supra* note 10.
168. RESTATEMENT (SECOND) OF JUDGMENTS § intro. Note (1982).