California's Unpredictable Res Judicata (Claim Preclusion) Doctrine

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I. INTRODUCTION

The doctrine of res judicata describes a set of rules that 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. Under the claim preclusion aspect, a prior judgment bars the parties (or those in privity with them) from relitigating the "same cause of action" in a subsequent proceeding.[1] Under the issue preclusion aspect, although a second suit between the same parties on a different cause of action is not precluded by a prior judgment, the first judgment operates as a conclusive adjudication as to such issues in the second action as were "actually litigated and determined" in the prior proceeding.[2]

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

2. *See* Lucido v. Superior Court, 795 P.2d 1223, 1225 n.3 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991); People v. Sims, 651 P.2d 321, 331 (Cal. 1982).

The California courts usually rely on the RESTATEMENT (SECOND) OF JUDGMENTS (1982) when resolving collateral estoppel questions. *See, e.g.*, *Lucido*, 795 P.2d at 1225 n.3 (citing § 27 of the RESTATEMENT and adopting its content); *Sims*, 651 P.2d at 331 (relying on RESTATEMENT § 27, comment d, to determine whether an issue was "actually litigated" in a prior proceeding); *see also* cases cited *infra* note 74. Although claim and issue preclusion are interrelated doctrines, *see infra* note 167, any extended discussion of

The California doctrine of res judicata is largely the product of judge-made law.[3] In developing this doctrine, the courts have sought to promote various efficiency notions, commonly referred to as judicial economy. More specifically, the California courts have identified two related reasons for res judicata: (1) "to curtail multiple litigation causing vexation and expense to the parties" and (2) to prevent "wasted effort and expense in judicial administration."[4] Res judicata is therefore intended to protect both the parties and the courts. Res judicata protects parties by eliminating the costs of multiple lawsuits, bringing an end to litigation, preventing inconsistent judgments, encouraging reliance on adjudication, and fostering repose through certainty, stability, and finality of judgments.[5] It protects the courts by conserving judicial

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California's collateral estoppel doctrine is beyond the scope of the instant Article. However, in a related article in this volume examining California's collateral estoppel doctrine, Professor Heiser discusses how the California courts have developed a confusing and seemingly contradictory approach to the definition of what issues are barred from relitigation because they were "actually litigated and determined" in a prior proceeding involving a different cause of action, and what may be done to improve that judicial approach. *SEE* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509 (1998) [hereinafter Heiser, *Collateral Estoppel*].

3. The California Supreme Court developed the claim and the issue preclusion components of res judicata over the course of several years. *See, e.g.*, *Slater*, 543 P.2d at 594-97 (distinguishing primary rights from theories of recovery for claim preclusion purposes); *Lucido*, 795 P.2d at 1225-32 (identifying threshold requirements and defining public policy considerations for issue preclusion); Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894-95 (Cal. 1947) (rejecting the mutuality doctrine as a requirement of collateral estoppel); *Sims*, 651 P.2d at 326-30 (extending res judicata principles to administrative proceedings).

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 § 1047 (Deering 1996) (authorizing successive actions on same contract); *Id.* § 1049 (providing that an action is deemed pending until final determination on appeal); *Id.* § 1062 (providing that a declaratory relief judgment shall not preclude a party from obtaining additional relief on the same facts); *Id.* §§ 1908-12 (Deering 1972) (defining various effects of a final judgment); and *Id.* §§ 426.10 & 426.30 (Deering 1995) (defining compulsory cross-complaints).

4. Nakash v. Superior Court of Los Angeles County, 241 Cal. Rptr. 578, 582 (Ct. App. 1987) (quoting 7 BERNARD E. WITKIN, CALIFORNIA PROCEDURE, JUDGMENT, § 188, at 621 (3d ed. 1985)) (emphasis deleted). In *Wulfjen v. Dolton*, 151 P.2d 846, 848 (Cal. 1944), the California Supreme Court offered the following two reasons for 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." *See also* Panos v. Great W. Packing Co., 134 P.2d 242, 243 (Cal. 1943).

5. Balanced against this strong policy to achieve judicial economy 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 a claim; but does not afford a litigant more than one opportunity for such judicial resolution. *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329-333 (1971); Montana v. United States., 440 U.S. 147, 153 (1979); Hansberry v. Lee, 311 U.S. 32, 40 (1940); *see also Sims*, 651 P.2d at 329 (ruling that party to be collaterally estopped by a prior

resources, promoting efficient judicial administration, and bringing an end to a case so that the court may allocate its limited judicial resources to the resolution of other matters.[6]

A successful res judicata doctrine furthers judicial economy in both a substantive and an administrative manner. The substantive goal of the claim preclusion component 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. A definition broad in scope as to what rights are extinguished obviously furthers this goal of judicial economy more effectively than a less inclusive one. The California courts, by employing the primary rights theory,[7] have opted for a narrow view of what substantive rights are extinguished by a judgment. By definitional design, therefore, the California claim preclusion doctrine contains a fundamental diseconomy—one which sometimes permits parties to litigate aspects of a unitary controversy in two 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, is a sufficient reason by itself to strongly criticize California's claim preclusion doctrine and call for its revision.[8] But it is not the only reason.

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 and avoidable litigation, and do so in a fair manner. Regardless of whether the chosen claim preclusion standard is a substantively broad or narrow one, the res judicata rules should be easy to understand and administer. An ideal

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agency decision must have been provided an adequate opportunity to fully present claims during the administrative hearing); Vella v. Hudgins, 572 P.2d 28, 31 (Cal. 1977) (quoting In re Crow, 483 P.2d 1206 (Cal. 1971) and stating that the doctrine of res judicata "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").

6. For a thorough discussion of the 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).

7. For a description of the primary rights theory see *infra* Part II.B.

8. Robin James, Comment, *Res Judicata: Should California Abandon Primary Rights?*, 23 LOY. L.A. L. REV. 351 (1989), contains an excellent discussion of ambiguities of the California res judicata doctrine and its substantive diseconomies, and concludes that California should abandon its reliance on the primary rights doctrine. The first part of the discussion of the primary rights theory in the instant article replows some of the same ground already tilled by that student comment.

doctrine would operate smoothly and foreseeably so that parties and judges do not spend time and resources litigating res judicata questions.

Clear, understandable res judicata rules promote efficient judicial administration in a variety of related ways. First, they inform parties as to what matters they must pursue in a single lawsuit or forever be foreclosed, and thereby assure the parties that the resolution of these matters will be final and conclusive. To accomplish this efficiency goal, and accomplish it fairly, any doctrine of res judicata should provide clear warning to parties as to which claims and issues they must present in initial litigation, and which ones they may legitimately reserve for resolution in a subsequent proceeding.[9] Clear res judicata rules provide a degree of predictability which allow parties to structure their litigation conduct with some assurance as to when that conduct will or will not foreclose presentation of claims and issues in a subsequent proceeding. Conversely, unpredictable standards may discourage parties from presenting certain claims and issues in an initial proceeding in the mistaken belief that these matters may be pursued in subsequent litigation. Parties cannot know what claims and issues they must raise to avoid preclusion unless they know what the preclusion rules require them to raise.

Second, a res judicata doctrine should not only bar relitigation of claims and issues in successive proceedings, but should also minimize disagreements over what claims and issues are barred. A successful res judicata doctrine, from an efficient judicial administration viewpoint, is one which achieves its intended substantive preclusive effects with little or no judicial enforcement. Uncertain preclusion rules undermine this efficiency goal. Ambiguous preclusion standards may encourage a plaintiff to commence subsequent litigation that clearer rules would have discouraged. Likewise, both parties in subsequent litigation may involve the court in threshold motions regarding the preclusive effects of a prior judgment which, under more precise rules, the parties would forgo as untenable.[10]

This Article discusses California's claim preclusion doctrine from the viewpoint of administrative judicial economy, and concludes that the

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9. For an excellent general discussion of the problems caused by unpredictable preclusion rules, see Ziff, *supra* note 6, and James, *supra* note 8, at 407-410. Ziff, *supra* note 6, at 910-26, 927, 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. He 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.*

10. *See* Ziff, *supra* note 6, at 917-18, 923.

doctrine as developed and applied by the California courts fails to achieve the basic goal of efficient judicial administration. Instead of clear, understandable, easy-to-administer rules, the California courts have developed a doctrine that is ambiguous, confusing, and complicated. The courts apply the doctrine in a manner which fails to provide litigants fair warning of what matters must be raised or forever barred. Even worse, the current claim preclusion doctrine actually misleads parties and invites tactical errors. The source of these problems is the California courts' failure to develop a clear and predictable definition of "cause of action" for claim preclusion purposes. Consequently, the overall res judicata doctrine is so unpredictable that it actually causes inefficient use of court and litigant resources by encouraging subsequent litigation over the preclusive effects of prior judgments.[11]

Part II of this Article begins with a general comparison of the California claim preclusion doctrine with that of the *Restatement (Second) of Judgments*. Part II then explains the historical development of California's claim preclusion doctrine and its reliance on the primary rights theory, and continues with an analysis of modern California Supreme Court decisions defining this claim preclusion standard. Part II next discusses the difficulties the lower courts have encountered when applying the primary rights theory, and focuses on some important lines of cases where the courts of appeal have reached conflicting conclusions when applying this res judicata standard to the same set of facts. Finally, Part III offers some suggestions to correct the unpredictable nature, as well as the attendant administrative and substantive inefficiencies, of California's current res judicata doctrine. The main recommendation is that the California Supreme Court should jettison the primary rights theory and formally adopt the *Restatement (Second) of Judgments* as California's claim preclusion doctrine.

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11. In addition to the unpredictable definition of "cause of action" for claim preclusion purposes, the various judicial interpretations of what issues are precluded under the seemingly straightforward collateral estoppel aspect are facially inconsistent and confusing. *See* Heiser, *Collateral Estoppel*, *supra* note 2. When the claim and issue preclusion components are combined, these respective problems are compounded rather than reduced. *See generally id.* Because there is a close relationship between the definition of a cause of action and the dimension of the issue precluded by collateral estoppel, improvements in the predictability of California's claim preclusion doctrine will likely mean improvements in the predictability of California's issue preclusion doctrine. *See id.* at 558; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) [hereinafter RESTATEMENT], quoted in relevant part *infra* note 167.

II. CALIFORNIA'S UNPREDICTABLE CLAIM PRECLUSION DOCTRINE

A. A Comparison of the California and the Restatement *Claim Preclusion Doctrines*

The doctrine of res judicata precludes parties or persons in privity[12] 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.[13] On this general level, the California doctrine prohibiting claim-splitting is similar to the doctrine set forth in the *Restatement (Second) of Judgments*.[14] 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."[15] Likewise, both doctrines bar a second suit on the same cause of action even though the plaintiff is prepared in the second suit to present different evidence, grounds for relief, or legal theories than those presented in the first action; or to seek new forms of relief not demanded

12. The concept of "privity" traditionally refers to certain limited circumstances where a person, although not a party, is bound by a judgment because of some specific relationship with the party and where the nonparty's interests were adequately represented by the party. *See* RESTATEMENT, *supra* note 11, §§ 34-61; CAL. CIV. PROC. CODE § 1908(a)-(b) (Deering Supp. 1998); Clemmer v. Hartford Ins. Co., 587 P.2d 1098, 1102 (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).

13. *See* Wulfjen v. Dolton, 151 P.2d 846, 848 (Cal. 1944); RESTATEMENT, *supra* note 11, §§ 18 & 19.

14. *See* authorities cited *supra* note 13.

15. The RESTATEMENT (SECOND) OF JUDGMENTS Section 17 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:
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> (1) 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);
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> (2) 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);
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> (3) 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).

RESTATEMENT, *supra* note 11, § 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. *See id.* § 18. 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." *Id.* § 19.

in the first action.[16] Under both doctrines, however, 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.[17]

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 *Restatement* part company. The *Restatement* defines the "claim"[18] extinguished by a prior judgment to include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[19] By contrast, the California Supreme Court adheres to a definition of "cause of action" based on a natural law construct known as

16. *See* RESTATEMENT *supra* note 11, § 25; Panos v. Great W. Packing Co., 134 P.2d 242, 244 (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, 594-95 (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. Dutton, 151 P.2d 846, 849 (Cal. 1944) (holding that judgment for defendant in prior fraud action for recission of contract precluded second fraud action for damages).

17. In *Agarwal v. Johnson*, 603 P.2d 58, 72 (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."

18. The RESTATEMENT (SECOND) OF JUDGMENTS uses the term "claim" to describe the scope of the matter extinguished by a judgment; California uses the older 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, *supra* note 11, § 23, at 195-96; Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., 855 P.2d 1263, 1265 (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, 460-61 (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.

19. RESTATEMENT, *supra* note 11, § 24(1). 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).

the "primary rights theory."[20]

Under the California primary rights theory, the invasion of one primary right gives rise to a single cause of action.[21] 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.[22] However, a single wrongful act which violates two primary rights gives rise to two causes

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20. *See, e.g.*, *Agarwal*, 603 P.2d at 72; *Slater*, 543 P.2d at 594.

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

22. *See id.*; *see also* Crowley v. Katleman, 881 P.2d 1083, 1090 (Cal. 1984). There are a few circumstances where claim-splitting is condoned; the first is where the parties have agreed that the plaintiff may split her claim, or where the court in the first action has expressly reserved the plaintiff's right to maintain a second action. *See, e.g.*, RESTATEMENT, *supra* note 11, §§ 20 & 26; United Bank & Trust Co. v. Hunt, 34 P.2d 1001, 1004 (Cal. 1934) (holding that party waived right to raise res judicata because conduct pursued by court and counsel in prior lawsuit was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues for future adjudication); *see also* Cason v. Glass Bottle Blowers Ass'n, 231 P.2d 6, 9 (Cal. 1951) (ruling res judicata inapplicable as to any matters which court in prior action refused to determine and which it directed should be litigated in another forum or action); Cohn v. Cohn, 59 P.2d 969, 971 (Cal. 1936) (ruling that defendant's failure to object to plaintiff's splitting of a single cause of action during trial or appeal constituted a waiver of defendant's right to object on that ground); Ferraro v. Southern Cal. Gas Co., 162 Cal. Rptr. 238, 244 (Ct. App. 1980) (ruling that the prohibition against splitting a cause of action is for the benefit of the defendant and he may waive or renounce it by agreement); Recent Decisions, *Actions: Res Judicata: Waiver Where Defendant Prevented Litigation of Entire Demand in Prior Action*, 23 CAL. L. REV. 205-206 (1934). A second circumstance is where a statute authorizes claim-splitting. *See e.g.*, CAL. CIV. PROC. CODE § 1062 (Deering 1996) (providing that a judgment of declaratory relief shall not preclude any party from obtaining additional relief based on the same set of facts).

A frequently encountered exception to the general rule prohibiting claim-splitting exists when the plaintiff was unable to rely on a certain theory of the case or seek a certain remedy in the first action because of limitations on the subject matter jurisdiction or the existence of other formal barriers to full presentation of the claim in the first action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief. *See* RESTATEMENT, *supra* note 11, § 26(c); *see, e.g.*, Vella v. Hudgins, 572 P.2d 28, 31 (Cal. 1977) (holding that the limited jurisdiction and summary nature of a prior unlawful detainer judgment had prevented defendant from fully litigating the issue of title to property); People v. Damon, 59 Cal. Rptr. 2d 504, 514 (Ct. App. 1996) (concluding that rule against splitting a cause of action was inapplicable where plaintiff was statutorily prohibited from seeking cumulative remedies in one proceeding); Gouvis Eng'g v. Superior Court, 43 Cal. Rptr. 2d 785, 790 (Ct. App. 1995) (holding that allocations of liability approved by a court at a good faith settlement hearing has no res judicata effect in a subsequent indemnity action because the scope of substantive inquiry and potential for development of evidence was much more restricted than the corresponding opportunity afforded in the indemnity action); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 323 (Ct. App. 1994) (quoting and applying § 26(1)(c) of the second RESTATEMENT); Merry v. Coast Community College Dist., 158 Cal. Rptr. 603, 610-11 (Ct. App. 1979) (observing that where the court in a prior action did not have jurisdiction to entertain an omitted legal theory or ground, res judicata does not preclude the presentation of the omitted theory or ground through a second action in a competent court).

of action. Moreover, where a plaintiff has more that 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 res judicata.[23] In other words, a plaintiff who has two causes of action against a defendant may proceed with two separate lawsuits. A judgment in one lawsuit will have no claim preclusive effect on the other.[24] The California doctrine therefore makes of central importance the definition of "cause of action" and, concomitantly, of "primary right." A clear definition with predictable applications is essential to guide parties and judges. As we shall see, however, the California courts have failed to articulate a clear definition.

Before discussing the California primary rights theory in any greater detail, additional comparison to the *Restatement* approach is useful. As explained above, under the *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.[25] 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 not raised will be extinguished by the judgment.

The following hypothetical illustrates the differences in the two

23. With the exception of certain cross-complaints, joinder of causes of action is permissive, not mandatory. *See* CAL. CIV. PROC. CODE §§ 427.10, 428.10, 428.30 (Deering 1995) (complaints and cross-complaints). 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, 403, 405 (Ct. App. 1981).

24. *See* cases cited *supra* note 23. 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 Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894 (Cal. 1947); Sutphin v. Speik, 99 P.2d 652, 655 (Cal. 1940); Todhunter v. Smith, 28 P.2d 916, 918 (Cal. 1934).

25. RESTATEMENT, *supra* note 11, § 24.

doctrines. Assume that plaintiff purchased a gas water heater directly from the defendant manufacturer. Shortly after installation, the water heater exploded, apparently due to a defective thermostat, and started a fire. Plaintiff's house and its contents were destroyed by the fire, and plaintiff suffered serious burns. Plaintiff wishes to sue the defendant manufacturer to recover money damages for his personal injuries and for his destroyed property. Under the relevant substantive law, the plaintiff may seek damages on several theories of recovery including breach of contract, breach of express and implied warranties, negligence, fraud, and strict products liability. Must plaintiff pursue all these theories of recovery in one lawsuit, or will the plaintiff be permitted to bring them in more than one action?

Under the *Restatement* standard the answer is reasonably clear. The plaintiff must allege all rights to remedies against the defendant manufacturer arising from the "transaction, or series of connected transactions," in one lawsuit. Accordingly, the plaintiff must seek damages for all his personal and property injuries relating to the exploding water heater, and must present all substantive theories of recovery in one lawsuit. Any such right to relief not raised will be barred by the judgment in the first action. By contrast, under the California doctrine, whether the plaintiff must raise all rights to relief in one lawsuit will not depend solely on whether they arise from the same transaction, but rather on whether the defendant's alleged misconduct invades one or more primary rights. If, for example, the injury to the plaintiff's person violates a different primary right than the injury to the plaintiff's property, the plaintiff may bring each such cause of action against the defendant manufacturer in a separate lawsuit. Likewise, if the injury to the plaintiff's real property violates a different primary right than the injury to her personal property, she may have the option of three lawsuits. Moreover, if injuries caused by the defendant's breach of contract constitutes a separate primary right than injuries due to tortious misconduct, the plaintiff may have four (or more) causes of action and hence the option of (at least) four lawsuits! The fact that the plaintiff's rights to relief arose from the a single factual transaction or occurrence—the water heater explosion—is not determinative.[26]

26. A typical car crash case provides another example of 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 were destroyed. Plaintiff wishes to recover damages for the injuries to his person and property caused by the defendant's negligence. Must the plaintiff pursue his claims for personal injuries and property damages in one lawsuit, or will he be permitted to pursue them in more than one action? Under established California primary rights precedent, the defendant's wrongful act invaded

By adhering to the primary rights theory, the California Supreme Court has not adopted the *Restatement*'s transactional standard.[27] Nevertheless, the court has implicitly incorporated a transactional notion as part of the California claim preclusion analysis. For example, although a plaintiff may have suffered the same type of harm on two occasions as the result of defendant's misconduct, the plaintiff will have two causes of action if the harm arose from two separate transactions.[28] Therefore, the California transactional approach, as a basis for finding that an injury was not part of the same cause of action because it was caused by a different transaction, has been used solely in an exclusive or negative manner.[29] The approach is not used in an inclusive or positive

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two of plaintiff's primary rights—the rights to be free from tortious injury to person and to property. Plaintiff therefore has two causes of action against the defendant, and may pursue them in two separate lawsuits. *See infra* text accompanying notes 43-45 and 55-59.

Under the RESTATEMENT approach, 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 his person and his car in one lawsuit; the doctrines of merger and bar prevent him from maintaining separate actions for the injuries to his person and to his property. RESTATEMENT, *supra* note 11, § 24 cmt. c, illus. 1.

27. The vast majority of states have adopted the RESTATEMENT's transactional approach to claim preclusion as their res judicata doctrine. *See* RESTATEMENT, *supra* note 11, § 24, apps. 4 (1988) & 5 (1996). *See also* James, *supra* note 8, at 353 n.11 & 408 n.542 (indicating that at most nine states, including California, do not follow the transactional standard as their claim preclusion doctrine).

28. *See, e.g.*, Louis Stores, Inc. v. Department of Alcoholic Beverage Control, 371 P.2d 758, 761-62 (Cal. 1962) (holding that a prior agency decision in 1953 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, rather than the events referred to in the earlier proceeding); 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 1984-1985 and stating that "[i]n the parlance of the 'primary right theory,' those paying charges have a primary right to have the charges properly calculated and imposed *each* year"); Zingheim v. Marshall, 57 Cal. Rptr. 809, 813-14 (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").

29. *See* authorities cited *supra* note 28; *see also* 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, 72-73 (Ct. App. 1992) (holding that plaintiff's sex discrimination cause of action was not barred by prior judgment

manner as a basis for finding that the cause of action alleged is the same as alleged in a prior lawsuit because they both arose from the same transaction or occurrence.

Under both the California doctrine and the *Restatement*, a claim is never broader than the transaction to which it relates.[30] 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.[31] But unlike the *Restatement*'s use of "transaction," the California primary rights approach does not make a cause of action coterminous with the 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.[32] By contrast, under the *Restatement* view, a unitary transaction or occurrence by definition constitutes a single claim.[33]

The California and *Restatement* doctrines both make the definition of "cause of action" (or "claim") of central importance. The *Restatement* defines "claim" by a black-letter formulation of the transactional standard, and then provides guidance for application of this standard through numerous comments and illustrations. The *Restatement*'s extensive explanations largely eliminate any ambiguities in the application of the transactional standard. By contrast, the California Supreme Court defines a "cause of action" by utilizing the primary rights theory. Under this theory, the invasion of one primary right gives rise to a single cause of action.[34] The key to the California doctrine, therefore, is the definition of "primary right." Problems with the California doctrine begin to materialize even at this definitional level. Unlike the *Restatement*, the court-made primary rights doctrine contains

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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).

30. RESTATEMENT, *supra* note 11, § 24, cmt. a; *see, e.g.*, *Louis Stores, Inc.*, 371 P.2d at 762; Eichman v. Fotomat Corp., 197 Cal. Rptr. 612, 615-16 (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); *see also, e.g.*, authorities cited *supra* note 28.

31. *See* authorities cited *supra* note 28.

32. *See, e.g.*, Holmes v. David H. Brickner, Inc., 452 P.2d 647, 649 (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: "[t]he same primary right may be broken by many kinds of wrong-doing; and the same wrongful act or default may invade many different rights." J. POMEROY, EQUITY JURISPRUDENCE § 91, at 103 (4th ed. 1918).

33. RESTATEMENT, *supra* note 11, § 24, cmt. a.

34. *See supra* notes 20-24 and accompanying text.

few explanations or illustrations to guide litigants and courts. Consequently, the key to predictability under the California doctrine is a clear judicial statement of the boundaries of a primary right. Unfortunately, unlike the *Restatement*, the only sources of explanations are vague treatises and erratic court decisions.

B. The Primary Rights Theory—Living History

The primary rights theory was developed by Professor John Norton Pomeroy[35] in the nineteenth century, and adopted by the California Supreme Court as early as 1887.[36] Under the primary rights theory advanced by 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.[37]

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35. 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; 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. *See infra* notes 37, 45, and 55.

36. *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 was based, and upon which the defendant's duty had arisen, coupled with the facts that made up the defendant's wrong, constituted 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 of 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).

37. *See* Crowley v. Katleman 881 P.2d 1083, 1090 (Cal. 1994); *see also* J. POMEROY, REMEDIES AND REMEDIAL RIGHTS, § 453, at 487 (1876) [hereinafter POMEROY, REMEDIES]; J. POMEROY, EQUITY JURISPRUDENCE §§ 89-95, at 75-79 (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, § 452, at 486. Pomeroy then undertook to define the correct meaning of the term cause of action, apparently relying on natural law concepts. *Id.* at 486-487.

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 §§ 89-95, at 119-24. According to Pomeroy, all such rights fell naturally into two grand divisions: those relating to "*Persons*" and those concerned with "*Things*." *Id.* at 121. The first of these divisions

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.[38] The primary rights theory was first reflected in the permissive joinder of claims provisions of the California Practice Act of 1851.[39] 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.[40] Claims falling within separate categories could not

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comprised "only those rules the exclusive object of which is to define the *status* of persons." *Id.*

Pomeroy separated the grand division of "Things" into two principal classes—"Real rights" and "Personal rights." *Id.* at 122-24. Real rights embraced three distinct subclasses:

> 1. Rights of property of every degree and kind over land and chattels, things real and 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 122-23.

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 law." *Id.* at 123.

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 124.

38. *See* James, *supra* note 8, at 372-385; Holmes v. David H. Brickner, Inc., 452 P.2d 647, 649 (Cal. 1969). The restrictive claim joinder statutes were in effect when Pomeroy published his treatises defining the primary rights theory. *See generally* James, *supra* note 8, at 359-360; POMEROY, EQUITY, *supra* note 37; POMEROY, REMEDIES, *supra* note 37. Indeed, Pomeroy's entire REMEDIES treatise is devoted to analyses of the Field Code as adopted in New York and by several other states, including California. *Id.* §§ 28-43, at 27-45 (discussing the reformed American system of procedure under the codes of civil procedure). More specifically, in his discussion of joinder of causes of action, Pomeroy analyzed the permissive joinder provisions of the codes as adopted in several states. *Id.* §§ 438-441, at 476-479. Pomeroy specifically referred to the California statute, CODE OF CIVIL PROCEDURE § 427 (1872), which he then quoted in a footnote. POMEROY, REMEDIES, *supra* note 37, § 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.

39. Law of April 29, 1851, ch. 123, tit. 4, § 64, 1850-53 CAL. STAT. 519, 529, *codified by* CAL. CIV. PROC. CODE § 427 but *repealed by* Act of July 1, 1972, ch. 244, § 23, 1971 CAL. STAT. 378. The Act of 1851 was based on the original Field Code. *See Holmes*, 452 P.2d 647; *see also* James, *supra* note 8, at 380; Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1970); J. H. Toelle, *Joinder of Actions—With Reference to the Montana and California Practice*, 18 CAL. L. REV. 459, 465 (1930).

40. The original version of former Section 427 (enacted in 1872) codified without change the permissive joinder provisions of the 1851 Act, and provided as follows:

> The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

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.[41]

Viewed in this historical context, Pomeroy's primary rights theory made sense when adopted by the courts in the nineteenth century.[42] 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.[43] 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.[44]

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1. Contracts, express or implied; or,
2. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; or,
3. Claims to recover specific personal property, with or without damages, for the withholding thereof; or,
4. Claims against a trustee, by virtue of contract, or by operation of law; or,
5. Injuries to character; or,
6. Injuries to person; or,
7. Injuries to property.

But the causes of action so united shall all belong to only one of these classes, and shall affect all parties to the action, and not require different places of trial, and shall be separately stated.

CAL. CIV. PROC. CODE § 427, *repealed by* Act of July 1, 1972, ch. 244, § 23, 1971 CAL. STAT. 378.

41. *Id.*

42. Pomeroy's classification of "primary" rights were similar, although not identical, to former § 427's categories of permissibly joinable claims. *See infra* note 45.

43. The court in *Schermerhorn v. Los Angeles Pac. R.R. Co.*, 123 P. 351 (Cal. 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 352.

44. In *Todhunter v. Smith*, 28 P.2d 916 (Cal. 1934), for example, the court held that

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.[45] However, through frequent amendments between 1907 and 1931, the Legislature attempted to liberalize the restrictive categories of former Section 427. Although many were poorly drafted and their meaning unclear, these revisions significantly modified the seven categories of the original Section 427.[46] For example, a 1915 amendment permitted a

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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.

45. Pomeroy's classification of rights that are primary did not completely coincide with the statutory categories designated in the original version of § 427. Pomeroy did not distinguish between rights granted in real and personal properties. *See* POMEROY, EQUITY, *supra* note 37, § 94, at 78. Under Pomeroy's classification all "[r]ights of property of every degree and kind over land or chattels, things real or things personal" constituted one primary right. *Id.* Former § 427, by contrast, assigned claims to recover specific real property and claims to recover specific personal property to separate categories. *See* CAL. CIV. PROC. CODE § 427(2)-(3) (repealed 1971). Consequently, although Pomeroy viewed injury to real and personal property as a violation of one primary right and creating one cause of action, former § 427 did not permit joinder of both types of property claims in one lawsuit. *See* James, *supra* note 8, at 360; Holmes v. David H. Brickner, Inc., 452 P.2d 647, 649 (Cal. 1969). Pomeroy also classified the "rights which every person has over and to his own life, body, limbs, and good name" as of the same essential nature, and therefore as constituting one primary right. POMEROY, EQUITY, *supra* note 37, § 94, at 78. By contrast, former § 427 assigned "[i]njuries to character" and "[i]njuries to person" to separate categories, and thereby prohibited joinder of both such claims in one complaint. CAL. CIV. PROC. CODE § 427(5)-(6) (repealed 1971).

Because of such differences, it is not surprising that the courts defined primary rights by reference to former § 427 rather than to Pomeroy's writings. If the courts had adhered to Pomeroy's primary rights classifications instead of the categories designated in former § 427, certain res judicata applications would have been fundamentally unfair to a plaintiff. Under former § 427's joinder restrictions, for example, a plaintiff could not seek recovery for injuries to real and to personal properties in one lawsuit, even though caused by the same wrongful act of the defendant. However, if the plaintiff elected to pursue recoveries in two lawsuits, the plaintiff would be splitting a single cause of action according to Pomeroy's primary rights theory. Consequently, under Pomeroy's view the first suit to produce a final judgment, even one favorable to the plaintiff, would be res judicata as to the second suit. The same unfairness to the plaintiff would occur where a defendant's tortious act injured both plaintiff's person and reputation.

46. In 1907, for example, the Legislature added a new eighth category to former § 427 which provided for permissive joinder of "claims 'arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.'" Friedenthal, *supra* note 39, at 3. The meaning of this new category was unclear from the outset. *Id.* The wording of this eighth category seemed to preclude joinder of any claim that fell within one of the first seven statutory categories of claims even if it arose out of the same transaction as the claim with which it was to be joined. *Id.* Since the first seven categories covered almost all possible causes of action, the utility of the new eighth was limited. *Id.*

plaintiff to join in the same complaint "causes of action for injuries to persons and injuries to property, growing out of the same tort . . . ."[47] This provision, along with several other revisions which remained in effect until the repeal of former Section 427 in 1971, meant that the statutory categories were no longer the same as Pomeroy's primary rights classifications. Consequently, the California Supreme Court sought to identify some unifying themes to assist the lower courts in applying the primary rights theory in cases where plaintiff's claims did not fall neatly into one of former Section 427's categories. This effort proved largely unenlightening. The best the court could do was to emphasize that a judgment in a prior action was a bar to a subsequent action based on the "same injuries," even though the second action raised new theories of recovery or requested new forms of relief.[48] Other than to continue to refer to the original version of former Section 427, the court did little to generally define what constituted the "same" as opposed to "different" injuries. Eventually, with the repeal of former Section 427, the court's explicit reliance on this joinder statute as an aid to defining primary rights came to an end.[49]

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 permits a plaintiff to join together *any* causes of action which she has

47. Act of April 10, 1915, ch. 28, sec. 1, § 427, 1915 CAL. STAT. 30 *codified at* CAL. CIV. PROC. CODE § 427(8) *repealed by* Act of July 1, 1972, ch. 244, § 23, 1971 CAL. STAT. 378.

48. In *Slater v. Blackwood*, 543 P.2d 593, 594-95 (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, 1390 (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 prior judgment was a bar to prosecution of the instant action against the same defendant for the same injuries, even though the instant action was based on negligence grounds not previously known to the plaintiff).

49. In defining primary rights, California courts continued to refer to the original version of former § 427. *See, e.g.*, *Holmes*, 452 P.2d at 649 n.2 (quoting the 1851 Act). The Legislature had, in fact, amended § 427 on several occasions, and had somewhat altered the categories of claims that could be joined in a complaint. *See supra* text accompanying notes 46-47.

against a defendant.[50] This unlimited joinder of claims standard, codified at Section 427.10(a), remains in effect today.[51] With the adoption of the unrestricted joinder of claims, the link between claim joinder and res judicata—the historical and philosophical justification for the primary rights theory—was now completely severed. The challenge for the California Supreme Court was whether, and if so how, to reformulate the court-made res judicata doctrine in response to this legislative change. To date, on the few occasions it has had to expound on the doctrine, the court has taken a cautious approach. The courts of appeal have been more adventuresome, but this effort has resulted in inconsistent and, therefore, less predictable results.

C. Modern Judicial Interpretations of Claim Preclusion

1. The California Supreme Court Provides Unclear Guidance Through Its "Harm Suffered" Approach

After 1971, the California Supreme Court has continued to apply the primary rights theory as the basis of California's res judicata doctrine. The court no longer refers to former Section 427, now repealed, but has not yet renounced its categorical scheme. In current res judicata determinations, the court typically defines a primary right by reference to the "harm suffered," as opposed to the particular theory of recovery asserted or remedy sought by the litigant.[52] A cause of action is conceived as the remedial right in favor of a plaintiff for the violation of one primary right. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to one cause of action.[53] The fact that several remedies may be available for the violation of one primary right does not create additional causes of action.

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50. Act of July 1, 1972, ch. 244, sec. 23, § 427, 1971 CAL. STAT. 380. 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* 10 CAL. L. REVISION COMM'N REP. 501, RECOMMENDATIONS OF THE CALIFORNIA LAW REVISION COMMISSION RELATING TO COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION AND RELATED PROVISIONS, at 510 (1970). The legislative committee comment to new § 427.10 noted that it superseded former § 427 and "eliminates the arbitrary categories set forth in that section." REPORT OF SENATE COMM. ON JUDICIARY ON SENATE BILL NO. 201, J. SENATE at 887 (Cal. April 1, 1971).

51. CAL. CIV. PROC. CODE § 427.10(a) (Deering 1995) (providing that "[a] plaintiff who in a complaint, alone or with coplaintiffs, alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with any coplaintiffs against any such defendants").

52. *See, e.g.*, *Slater*, 543 P.2d at 594.

53. *See id.*

However, it is also true that a single wrongful act by a defendant may invade more than one primary right and, therefore, create more than one cause of action.[54] Unlike the Restatement's transactional approach, a unitary occurrence may give rise to two causes of action and thereby permit the plaintiff to maintain two separate lawsuits against the same defendant.

By focusing on the "harm suffered" by the plaintiff, the primary rights theory presents a somewhat ambiguous but potentially workable test for determining whether a defendant's conduct creates one or more causes of action. Although definitions of which categories of harms are "primary" harms requires some judicial interpretation, such broad classifications would not be difficult to make. For example, personal injury could be classified as distinct from injury to property, and injury to real property as distinct from injury to personal property.[55] Although Pomeroy's abstractly stated primary rights theory may be inherently ambiguous, such ambiguity is not a fatal flaw in the doctrine. A few judicially-created, general classifications of harm could make the doctrine relatively easy to apply in most cases.[56] How a particular harm

54. *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).

55. These very distinctions have been made by the Court of Appeal in two cases. In *Schermerhorn v. Los Angeles Pac. R.R. Co.*, 123 P. 351 (Cal. Ct. App. 1912), the court held that a prior judgment for property damage did not bar a second action for personal injuries, although caused by the same negligent act of the defendant. *Id.* at 352. However, the *Schermerhorn* opinion does not mention either Pomeroy or the primary rights theory, but relied on former § 427. In *McNulty v. Copp*, 271 P.2d 90 (Cal. Ct. App. 1954), the court 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. *Id.* at 94-97.

Pomeroy did not have precisely these broad divisions in mind when he advanced his primary rights theory. *See* POMEROY, EQUITY, *supra* note 37, §§ 89-95, at 75-79. Pomeroy did classify injury to person as a separate primary right from injury to property, but did not distinguish between injury to real and personal property. *See supra* note 45. Moreover, Pomeroy classified all rights arising from a contract—which he referred to as "personal rights"—as a primary right distinct from all other primary rights, and did not further limit this class of "personal rights" by the nature of the injury sought to be remedied. *See* POMEROY, EQUITY, *supra* note 37, § 95, at 79. Presumably, under Pomeroy's view, a contract breach which caused injuries to both person and property violated only one primary right and constituted only one cause of action. Less clear is how Pomeroy would have classified a wrongful act which caused personal injury and which, under the applicable substantive law, constituted both a tort (*e.g.*, negligence) and a breach of contract (*e.g.*, breach of warranty).

56. In an excellent student note, James, *supra* note 8, at 387-402, the author argues that the primary rights theory is inherently ambiguous. Although this observation is accurate,

is classified may be somewhat arbitrary at times, but certainly clear distinctions are possible.[57] Unfortunately, the California Supreme Court has not developed clear guidelines for the classification of harms required for the purpose of primary rights distinctions.

Prior to 1972, judicial classification of which harms constituted separate primary rights had not been a total failure. The lower appellate courts recognized 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.[58] The California Supreme Court never directly endorsed this general primary rights classification until its 1969 opinion in *Holmes v. David H. Brickner, Inc.*,[59] but did so then in a manner that actually clouded the utility of the personal injury/property injury distinction.[60]

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the real problem with the administration of the primary rights doctrine is the failure of the California courts to make general distinctions among categories of harms. Instead, as will be discussed later, the courts have not always focused on the harm suffered in determining whether one or more primary rights have been violated. *See infra* notes 59-63 and 75-83 and accompanying text.

57. Of course, when compared to the RESTATEMENT's transactional approach, the primary rights doctrine is less effective in achieving the substantive economy goal of res judicata, that is, to preclude parties from pursuing multiple lawsuits to resolve controversies which could have been fully and fairly resolved in one proceeding. *See supra* text accompanying notes 22-33. But, with proper judicial classification of "harms," the primary rights theory could provide claim preclusion guidelines as clear and as predictable as those of the RESTATEMENT.

58. *See, e.g.*, Schermerhorn v. Los Angeles Pac. R.R. Co., 123 P. 351 (Cal. 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 (Cal. Ct. App. 1918) (applying this distinction when construing permissive joinder of claims statute). The courts further construed "injury to person" to include *all* personal injuries arising from a defendant's tortious conduct. *See* cases cited *infra* notes 70-71. A defendant's negligent act, for example, which injures a plaintiff's limbs and head, and causes consequential injuries such as emotional distress and loss of work, violates only one primary right. *See* cases cited *infra* notes 67, 70.

One court of appeal decision, *McNulty v. Copp*, 271 P.2d 90 (Cal. Ct. App. 1954), also recognized another general classification. *See supra* note 55. The *McNulty* court ruled that injury to real property involved a different primary right than injury to personal property, where both injuries were caused by the defendant's same wrongful conduct. *Id.* at 97-98.

59. 452 P.2d 647 (Cal. 1969). Prior to its *Holmes* opinion, the California Supreme Court had simply assumed, usually in the context of a misjoinder of claims discussion, that a defendant's single wrongful act injuring a 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, 918 (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).

60. In *Holmes*, the California Supreme Court specifically endorsed, in dicta, the

The plaintiffs in *Holmes* had purchased a used automobile from the defendant dealer. The contract of sale contained an express warranty that the used car was in good working condition. Less than one month later, the plaintiffs' car crashed causing personal injury to the plaintiffs and damage to their car. Plaintiffs' initially sued the defendant to recover damages for their personal injuries caused by defective brakes. Their complaint alleged breach of express and implied warranties, negligence, and fraudulent misrepresentation. The plaintiffs obtained a sizable money judgment. Subsequently, the plaintiffs filed a second action against the defendant to recover damages to their automobile, again alleging breach of express warranty. The trial court sustained the defendant's demurrer to the plaintiffs' complaint and dismissed their action as barred by res judicata. On appeal, the plaintiffs argued that injuries to property and to person constituted two separate causes of action which could be asserted in two separate lawsuits, citing established primary rights precedent. The California Supreme Court disagreed with the plaintiffs and upheld the dismissal. The court acknowledged its prior decisions that causes of action for injuries to persons and property are separate, but held that those prior decisions involved *tortious* injury to persons and property. The court then noted that the plaintiffs' present complaint, which alleged breach of warranty, was essentially contractual in nature, and as such was identical to the breach of warranty alleged in the prior personal injury action. The court then concluded that the judgment in the prior action barred the second action because "[u]nder these circumstances the applicable rule is that all damages for a single breach of contract must be recovered in one action."[61] The court offered no additional explanation for its holding.[62]

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general distinction that causes of action for injuries to person and to property are separate. *Holmes*, 452 P.2d at 649. Ironically, the *Holmes* court then limited this distinction to *tortious* injury to person and property, and declined to extend it to a contractual injuries. *See infra* text accompanying notes 61-63.

61. *Holmes*, 452 P.2d at 650.

62. The *Holmes* court did, however, discuss the primary rights theory with reference to the permissive joinder provisions of the 1851 Practice Act, the original version of § 427, which it quoted in a footnote. *Id.* at 649 n.2. The joinder provisions of the 1851 Act, the court observed, reflected the settled primary rights rule that "conduct that simultaneously causes harm both to the person and to the property of one individual gives rise to two separate and distinct causes of action, one for . . . interference with the integrity of the person and one for violation of the right to quiet enjoyment of property." *Id.* at 649. The court then reasoned that this "settled rule" was limited to tortious injury to person and property. The applicable rule to the instant case, the court ruled, was that all damages for a single breach of contract must be recovered in one action. *Id.* at 650.

Holmes represents a missed opportunity to provide a clear, general classification of primary rights. The *Holmes* court could have broadly defined all actions for personal injuries as a primary rights category separate from all actions for property damages, but choose not to do so. Instead, the *Holmes* decision added ambiguity to the "harmed suffered" method of determining primary rights. Injury to one's person was not necessarily (or always) a separate primary right from injury to one's property—only where the injuries were caused by the defendant's tortious act and not by breach of contract. Despite general pronouncements to the contrary, the nature of the "harm suffered" did not ultimately determine whether the defendant's wrongful act violated more than one primary right. The theory of the defendant's alleged liability was more determinative.[63] Not surprisingly, many of the current difficulties with California's primary rights analysis may be traced to the *Holmes* decision.

In its 1979 decision in *Agarwal v. Johnson*,[64] the California Supreme Court further compromised the "harm suffered" test. The plaintiff in *Agarwal* was terminated from his employment with the defendant construction company for insubordination. Prior to his termination, the plaintiff's supervisor used racial epithets to humiliate the plaintiff, and ultimately recommended his termination for reasons that were not true.[65] The plaintiff was not able to find work for 13 months thereafter, in part because of unfavorable statements made by defendant about him to prospective employers. The plaintiff suffered extreme emotional distress at the time of his termination, which he believed was motivated by racial discrimination, and sued the defendant company in state court seeking damages for defamation and intentional infliction of emotional distress. He also filed a second action against the defendant in federal court, this time seeking back pay and injunctive relief pursuant to Title VII of the federal Civil Rights Act of 1964. The plaintiff's federal action was based on the same underlying facts as the state court action, but it also alleged racially discriminatory employment practices by the

63. One way to conceptualize *Holmes* is that the court based its holding on the manner by which the defendant caused the plaintiff to suffer harm, as opposed to the nature of the harm suffered. *Holmes* indicates that all harm suffered due to a breach of contract constitutes one primary right and therefore one cause of action, and that contract injury is somehow distinguished from tort injury for primary rights purposes. This distinction appears totally arbitrary, and provides no logical basis for treating all contract injuries as creating one cause of action but not treating all tort injuries as creating one cause of action. This distinction does make sense, however, when viewed as a reflection of the permissive joinder categories of former § 427. *See supra* note 40. Likewise, this distinction is consistent with Pomeroy's abstract classifications of primary rights. *See supra* notes 37, 45, and 55.

64. 603 P.2d 58 (Cal. 1979).

65. *Id.* at 64-65.

defendant. The federal court concluded that the defendant's employment practices were not racially discriminatory, and that the defendant had not engaged in race discrimination when it terminated the plaintiff.[66]

The defendant in *Agarwal* then moved the state court to dismiss plaintiff's action as barred by res judicata. The defendant argued that the prior federal judgment was based on the same operative facts as the state action and involved the same cause of action. The California Supreme Court did not agree. The court observed "that the same facts are involved in both suits is not conclusive."[67] In addition, the court also stated that under the primary rights theory "the significant factor is the harm suffered. . . ."[68] The plaintiff's federal action, according to the court, sought monetary damages only for the harm caused by the defendant's alleged employment discrimination which, under Title VII, was limited to back pay. In contrast, the plaintiff's state court action sought damages to redress an entirely different harm—defamation and emotional distress. The court recognized that the state court claims "arose in conjunction with the alleged violation of Title VII," but held that the state court action sought "damages for harm distinct from employment discrimination."[69]

The *Agarwal* decision is difficult to reconcile with the "harm suffered" approach. The court apparently viewed the defendant's act of firing the plaintiff as subjecting him to two distinct categories of injury. In a narrow factual sense, the *Agarwal* court is probably correct—the harm of lost wages is different than the harm of emotional distress. But from a conceptual viewpoint, the court's primary rights analysis is

66. Prior to the federal district court's decision, a superior court jury in the state lawsuit had already returned a verdict for plaintiff Agarwal in the amount of $62,400 on the state law defamation and emotional distress allegations, and defendant appealed. While the state court appeal was pending before the California Court of Appeal, the federal district court entered its judgment finding defendant's treatment of plaintiff did not constitute employment discrimination under federal Title VII. Defendant then moved the state appellate court for a determination that the state court action was now barred by res judicata. *Id.* at 71. Defendant's motion took advantage of the federal rule under which a judgment once rendered is final for purposes of res judicata until reversed on appeal, modified or set aside in the court of rendition. *Id.* at 72 n.11. *See also* Calhoun v. Franchise Tax Bd., 574 P.2d 763, 766 (Cal. 1978). Under the California rule the superior court judgment, although entered before the federal one, was not final for purpose of res judicata during the pendency of and until resolution of the appeal. *Argawal*, 603 P.2d at 72 n.11; *see* Wood v. Herson, 114 Cal. Rptr. 365, 371 (Ct. App. 1974); CAL. CIV. PROC. CODE § 1049 (Deering 1996).

67. *Agarwal*, 603 P.2d at 72.

68. *Id.*

69. *Id.*

troublesome. Both lawsuits focused on the same conduct of the defendant which culminated in the plaintiff's termination. Although the court correctly reasoned that a unitary occurrence may violate more than one primary right, the court offers no explanation as to why *these* two categories of personal injuries are so different as to constitute two primary rights. Moreover, prior to *Agarwal*, the general rule was that where a defendant's tortious act caused multiple personal injuries to a plaintiff, such as missing work and suffering physical and emotional injuries, the primary rights doctrine required the plaintiff to seek redress for all her personal injuries in one lawsuit.[70] Consequential injuries caused by a defendant's tortious act did not constitute a second cause of action.[71] The *Agarwal* court seems to have rejected this general rule, but it has provided no explanation as to why the plaintiff's consequential injuries were so different from his previous injury that they constituted a separate cause of action.

Agarwal is the last California Supreme Court decision to directly rule on the definition of a cause of action, and therefore of a primary right, for the purpose of a res judicata determination.[72] The court in two recent

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70. The longstanding rule in California has been that "[a] single tort can be the foundation for but one claim for damages." Panos v. Great W. Packing Co., 134 P.2d 242 (Cal. 1943); *see, e.g.*, Hall v. Susskind, 41 P. 1012, 1014 (Cal. 1895) (ruling that all damages arising from a single wrong, although at different times, make but one cause of action); Savage v. Emery, 63 Cal. Rptr. 566, 568 (Ct. App. 1967) (holding that the plaintiff may not split a single tort cause of action, and therefore a second suit for damages was barred by res judicata, even though the plaintiff was not aware of the particular elements of damages, now sought, at the time of the prior action); DeRose v. Carswell, 242 Cal. Rptr. 368, 375-76 (Ct. App. 1987); *cf.* Sloane v. Southern Cal. Ry. Co., 44 P. 320 (Cal. 1896); Landeros v. Flood, 551 P.2d 389, 396 (Cal. 1976).

71. *See, e.g.*, Swartzendruber v. City of San Diego, 5 Cal. Rptr. 2d 64, 68 (Ct. App. 1992) (holding that res judicata effect of prior mandamus action barred plaintiff's instant action to recover emotional distress damages caused by alleged wrongful termination because "[c]onsequential damages do not support a separate cause of action"); Takahashi v. Board of Educ. of Livingston Union Sch. Dist., 249 Cal. Rptr. 578, 585 (Ct. App. 1988) (ruling that plaintiff's wrongful termination suit alleged an infringement of only one primary right although plaintiff sought lost wages and emotional distress damages based on wrongful discharge and employment discrimination); *cf.* Wood v. Currey, 57 Cal. 208, 210 (1881) (holding that, for purposes of the statute of limitations, subsequent damages which result from a tort do not constitute separate causes of action); Hawthorne v. Siegel, 25 P. 1114, 1116 (Cal. 1891) (ruling that damages which result subsequent to a tort, but are caused by the tort, are not separate causes of action but are part of the same tort cause of action). *See also* cases cited *supra* note 70.

72. *Agarwal*, along with *Slater v. Blackwood*, 543 P.2d 593 (Cal. 1975), are the *only* two California Supreme Court decisions to undertake a primary rights analysis for the purpose of a res judicata determination after the repeal of former § 427 and the adoption in 1972 of unrestricted permissive joinder of claims. The case of *Holmes v. David H. Bricker, Inc.*, 452 P.2d 647 (Cal. 1969), although viewed as a modern primary rights decision, was decided before the repeal of former § 427 and was clearly influenced by the original version of that statute. In a 1972 opinion, *Busick v. Workmen's Compensation Appeals Bd.*, 500 P.2d 1386 (Cal. 1972), the Court held that the plaintiff's

cases[73] has made references to its primary rights analysis in dicta and not in the context of res judicata, but has not squarely addressed the claim preclusion standard in the seventeen years since *Agarwal*. This particular period of time is significant. In 1982 the American Law Institute published the *Restatement (Second) of Judgments*. The California Supreme Court has not directly addressed the claim preclusion standard since that important pronouncement. The court has rendered some recent opinions on collateral estoppel—decisions that seem to follow the second *Restatement*'s issue preclusion doctrine[74]—

prior money judgment against the defendant employer precluded a worker's compensation proceeding to recover compensation for the same injuries. The Court found that the plaintiff had brought the same cause of action, which it defined as "the obligation sought to be enforced," in both proceedings. *Id.* at 1392. The violation of one primary right, the court observed, "constitutes a single cause of action even though two mutually exclusive remedies are available." *Id.*

The *Busick* court's brief discussion of primary rights broke no new ground, but simply reaffirmed the basic claim preclusion notion that there is but one cause of action for one personal injury by reason of one wrongful act. *Id.* Interestingly, the *Busick* court cited repeatedly to the first RESTATEMENT OF JUDGMENTS (1942) to support much of its general res judicata analysis. *See Busick*, 500 P.2d at 1390-91, nn.7-10. In *Slater*, the court held that the plaintiff's prior unsuccessful statutory negligence action to recover damages for personal injuries precluded her second action seeking the same damages but this time based on common law negligence. Although the two lawsuits sought relief under two different legal theories, the court concluded that both were based on the violation of the same primary right. *Slater*, 543 P.2d at 594-95. In holding that res judicata barred plaintiff's second action, the court relied on the established rule that a cause of action "is based upon the harm suffered, as opposed to the particular theory asserted by the litigant." *Id.* at 594.

73. *See* Crowley v. Katleman, 881 P.2d 1083, 1090-94 (Cal. 1994) (discussing the primary rights theory and concluding it was inapplicable to a 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, 1265-70 (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). For more discussion of *Bay Cities*, *see infra* text accompanying notes 88-92.

74. *See, e.g.*, County of Santa Clara v. Deputy Sheriffs' Ass'n, 838 P.2d 781, 784 n.7 (Cal. 1992) (citing § 27, comment h, of the second RESTATEMENT and finding no collateral estoppel effect of issue decided previously because the issue was unnecessary to prior judgment); Lucido v. Superior Court, 795 P.2d 1223, 1225 n.3 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991) (citing § 27 of the second RESTATEMENT and adopting its content); George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., 783 P.2d 749, 755 (Cal. 1989) (quoting § 27 and citing to § 13 and § 83 of the second RESTATEMENT in defining California's collateral estoppel doctrine); People v. Sims, 651 P.2d 321, 331 (Cal. 1975) (relying on the second RESTATEMENT § 27, comment d, to determine the whether an issue was "actually litigated" in a prior proceeding); *cf.* Gikas v. Zolin, 863 P.2d 745, 760-62 (Cal. 1993) (Mosk, J., dissenting) (quoting § 75, comments a and b, and § 41(1) (a) of the second RESTATEMENT as part of privity analysis).

but has left to the courts of appeal the task of defining the "harm suffered" claim preclusion standard.

2. Contradictory Primary Rights Decisions by the Courts of Appeal Further Increase Unpredictability

The California Supreme Court has provided the lower courts with scant modern primary rights precedent, and the little it has provided is unclear. The courts of appeal have been far more active in developing the primary rights analysis. Unfortunately, the lower courts' post-1971 opinions have often contradicted one another, have sometimes ignored the "harm suffered" approach entirely, and have generally decreased the predictive significance of primary rights analysis for litigants and trial judges. Left largely to their own doctrinal devices, the courts of appeal have further muddled the "harm suffered" test through a series of questionable applications. The most famous is the 1981 decision in *Sawyer v. First City Financial Corp.*.[75]

The *Sawyer* plaintiffs brought two separate lawsuits against essentially the same defendants arising from the same general set of facts. The plaintiffs, owners and sellers of undeveloped land, had sold their land to the defendants, purchasers and encumbrancer of the land who sought to develop it. The plaintiffs received partial payment from the defendants in cash, and a promissory note secured by a deed of trust for the remainder. Concurrently with this sale, the defendants borrowed a large development loan from a bank. As part of this transaction, the plaintiffs agreed to subordinate their deed of trust to this new encumbrance and specifically waived any deficiency judgment with respect to their note and deed of trust. Consequently, the plaintiffs' sole resource for collection of their note was foreclosure on their deed of trust, now subordinate to the bank's first deed of trust. The defendants-purchasers subsequently defaulted on their note to the defendant bank, and the bank foreclosed on the deed of trust. The bank then purchased the land at the foreclosure sale for less than the amount due the bank on its note. As a result, the plaintiffs' promissory note remained unpaid with no recourse against the land or the defendants-purchasers.

In their first action, the plaintiffs alleged that the contractual waiver of their right to a deficiency judgment was invalid, and, alleging breach of contract, sought recovery of the unpaid balance of their note from the defendants. The superior court ruled that the waiver of deficiency and subordination clause signed by the plaintiffs was valid, and entered judgment for the defendants. The plaintiffs then pursued a second action

75. 177 Cal. Rptr. 398 (Ct. App. 1981).

against the defendants, this time alleging fraudulent conspiracy among the defendants to cause a default in the bank's note and trust deed, to hold a sham foreclosure sale, and to take other action for the purpose of eliminating the obligation to the plaintiffs. The plaintiffs' second suit, grounded in tort instead of breach of contract, alleged the same monetary damages as unsuccessfully sought in their first suit. The defendants obtained a summary judgment based on res judicata, and the plaintiffs appealed.

The question for the *Sawyer* court was whether the plaintiffs had alleged a different cause of action or primary right in their second action than that alleged in their first unsuccessful suit against the defendants. The court reviewed the primary rights precedents and acknowledged that they were not purely logical. The court did, however, acknowledge that the "harm suffered" played a central role in determining whether the plaintiffs' two lawsuits split the same cause of action. Accordingly, it reasoned that the plaintiffs had not necessarily alleged two causes of action simply because their first action was based on breach of contract and the second on tort theories. But the court did find dispositive the differences in the factual structure of the plaintiffs' two lawsuits. The court noted that the case before it "is not one in which the same factual structure is characterized in one complaint as a breach of contract and in another as a tort."[76] The court viewed the plaintiffs' first action as solely on contract and based upon the note, the deed of trust, and the loan and the development agreement. The court also noted that there was no contention and no evidence presented in the first suit relating to a possible invalidation of the waiver on grounds of fraud or other tort. Although the court recognized that the second action had as its object the collection of the same promissory note which was the subject matter of the first lawsuit, the court viewed the basis of the claim as completely different and as resting upon a completely separate set of facts.[77] The court observed that "[s]urely one's breach of contract by failing to pay a note violates a 'primary right' which is separate from the 'primary right'

76. *Id.* at 405. Presumably, if the two cases had been based on the same factual structure, the *Sawyer* court would have found that the plaintiffs' had alleged two different legal theories but the same cause of action. *See, e.g.*, *Slater*, 543 P.2d at 594-95 (holding that even where there are multiple legal theories upon which recovery may be predicated, one injury gives rise to only one cause of action); Panos v. Great W. Packing Co., 134 P.2d 242 (Cal. 1943) (holding that prior judgment for defendant barred plaintiff's instant personal injury action even though based on an entirely different theory of negligence).

77. *See Sawyer*, 177 Cal. Rptr. at 405.

not to have the note stolen."[78] Although the monetary loss in the two lawsuits was measured by the same unpaid promissory note amount, the court viewed the plaintiffs as being harmed differently by tortious conduct destroying the value of the note than by the contractual breach of simply failing to pay it.[79]

From a "harm suffered" approach, the decision in *Sawyer* seems clearly wrong. The harm suffered—the loss of part of the purchase price as represented by the unpaid promissory note—is identical in both lawsuits. The plaintiffs' two cases may have involved different evidentiary bases and presented different theories of recovery, but they both sought recovery of the same unpaid monies. However, although the primary rights ruling in *Sawyer* has been questioned and distinguished, it has not been disapproved.[80] If *Sawyer* remains good law, precisely what law does its reasoning establish? Can a litigant safely rely on *Sawyer* for the proposition that an action based on tort involves a separate primary right from one based on contract, even though the relief sought in both actions is the same? This view seems contrary to the basic rule that a cause of action is based upon the harm suffered, instead of the particular legal theory asserted by the litigant.[81] Does *Sawyer* mean that a second action which seeks the same remedy as

78. *Id.*

79. *See id.*

80. *See, e.g.*, Weikel v. TCW Realty Fund II Holding Co., 65 Cal. Rptr. 2d 25 (Ct. App. 1997) (distinguishing instant case because *Sawyer* involved a breach of contract and a subsequent, separate tort); Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc., 35 Cal. Rptr. 2d 348, 351-53 (Ct. App. 1994) (relying on *Sawyer* to hold 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); Gamble v. General Foods Corp., 280 Cal. Rptr. 457, 467 (Ct. App. 1991) (distinguishing instant case from *Sawyer* "in that the Sawyers' first action was based on contract rights whereas their second action was grounded on fraud"); Jenkins v. Pope, 266 Cal. Rptr. 557, 561 n.3 (Ct. App. 1990) (viewing *Sawyer* as finding two separate primary rights violated by a breach of contract and acts of fraud arising from different sets of facts, whereas the instant case involved one primary right for failure to pay attorneys' fees because actions for fraud and negligent misrepresentation were based on same acts and misrepresentations); Wittman v. Chrysler Corp., 245 Cal. Rptr. 20, 24 n.3 (Ct. App. 1988) (expressing doubts about the correctness of the *Sawyer* court's reasoning, but distinguishing the instant case because the issue of fraud was tendered in the prior contract action).

From a historical primary rights perspective, as opposed to the modern "harm suffered" approach, the holding in *Sawyer* is defensible. According to Pomeroy, a right arising from contract was a separate primary right from the rights to enjoy property and to be free from injury to body and limb. *See supra* note 55. The *Sawyer* court, however, did not attempt to justify its holding by reference to Pomeroy's treatises.

81. *See, e.g.*, Slater v. Blackwood, 543 P.2d 593 (Cal. 1975) (holding that a prior judgment for the defendant based upon statutory negligence barred a second action against the defendant for the same personal injuries even though based on a different legal theory of ordinary negligence).

a prior action involves a different primary right when the facts alleged in the second action are related to, but different than, those of the prior action? This meaning seems contrary to the basic rule that a primary right is defined by the harm suffered, even though the plaintiff alleges a different factual theory for the recovery.[82] *Sawyer* provides no answer to these questions, and therefore adds more ambiguity to an already uncertain area.[83]

The *Sawyer* holding permitted prosecution of two lawsuits seeking recovery for the same injury, and thereby undermined judicial economy in both a substantive and administrative manner. The court's analysis has, however, produced some unexpected doctrinal results. The *Sawyer* court's focus on the factual bases to determine the "same cause of action" led to another line of appellate court decisions, beginning in 1987 with *Nakash v. Superior Court*,[84] which have further clouded the res judicata analysis. The court in *Nakash* was called upon to decide whether res judicata permitted successive suits between the same parties to rescind the same contract. The litigants in *Nakash* were two large clothing manufacturers who entered into a complicated fiduciary and business relationship structured to extend beyond any fixed termination point. As part of this arrangement, in 1983 the parties executed a written stock purchase agreement and a shareholders' agreement. Later that same year, the plaintiffs filed an action in federal court seeking rescission of the 1983 transaction based upon fraud and failure of consideration. This federal lawsuit ended in a settlement and release, and was dismissed with prejudice in early 1984. Several months later, the plaintiffs filed another action against the defendants in state court. This second suit also sought rescission of the 1983 transaction, once again alleging fraud and failure of consideration. The defendants moved for summary judgment based on res judicata. When the superior court denied this motion, the defendants sought appellate review.

Although the *Nakash* court cited California Supreme Court precedent

82. *See, e.g.*, Panos v. Great W. Packing Co., 134 P.2d 242 (Cal. 1943) (holding that the judgment for the defendant in a prior suit barred second suit to recover for the same injuries even though based on an entirely different factual basis of negligence).

83. Perhaps the *Sawyer* holding can be justified on a negative transactional basis—the facts relevant to the contract action arose from a different transaction than those relevant to the subsequent fraud action. *See supra* notes 28-33 and accompanying text. This would be an extremely narrow view of the "same transaction." At any rate, the court made no mention of this basis in its primary rights discussion.

84. 241 Cal. Rptr. 578 (Ct. App. 1987).

such as *Slater v. Blackwood*, the court eschewed reliance on the primary rights theory. Instead, the court stated that the analysis of what constitutes the same cause of action "has shifted from identification of a primary right upon which only one [action] is allowed to determination of the existence of a transaction involving a nucleus of facts upon which only one [action] is allowed."[85] The court in *Nakash* expressly adopted the transactional approach contained in the *Restatement (Second) of Judgments*;[86] which is an approach that is analytically different from the primary rights theory and in some applications would reach an opposite result. The *Nakash* court offered no controlling authority for

85. *Id.* at 583.

86. Because the prior judgment was from a federal court, choice of law analysis may have dictated that the *Nakash* court apply the RESTATEMENT's transactional standard instead of the California primary rights doctrine. This observation requires some elaboration. Pursuant to 28 U.S.C. § 1738 (1994), a federal court must apply state law—the res judicata law of the state of rendition—in determining the preclusive effect of a prior *state* court judgment. *See, e.g.*, Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731 (9th Cir. 1985) (en banc) (ruling that the federal court must apply the primary rights doctrine when determining the preclusive effect of a prior California state court judgment). However, a federal court applies federal law—the second RESTATEMENT's transactional standard—when determining the preclusive effects of an earlier federal court judgment. *See* Federated Department Stores, Inc. v. Moitie, 452 U.S 394, 404 (1981) (Blackmun, J., concurring); Allen v. McCurry, 449 U.S. 90, 94 (1980). Likewise, many state courts apply the federal standard when determining the preclusive effects of a prior federal court judgment in state court. *See* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 742-750 (1976); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 747-791 (1986).

Although the California courts are not unanimous on this point, most apply the federal transactional standard to determine the res judicata effect of a previous federal court judgment. *See, e.g.*, Levy v. Cohen, 561 P.2d 252, 257 (Cal. 1977), *cert. denied*, 434 U.S. 833 (1977) (ruling that a federal court judgment has the same effect in state court as it would have in federal court); Craig v. County of Los Angeles, 271 Cal. Rptr. 82, 84-85 n.4 (Ct. App. 1990) (applying federal law to determine the res judicata effect of a prior federal court judgment); Merry v. Coast Community College Dist., 158 Cal. Rptr. 603, 611-12 (Ct. App. 1979); Martin v. Martin, 470 P.2d 662, 668 n.13 (Cal. 1970). *But see* Gamble v. General Foods Corp., 280 Cal. Rptr. 457 (Ct. App. 1991) (applying the California primary rights doctrine to determine preclusive effect of prior federal court judgment).

A careful reading of the *Nakash* opinion lends some support to the argument that the court was simply following this choice of law rule when applying the federal transactional standard to determine the res judicata effect of the prior federal court judgment of dismissal. *Nakash*, 241 Cal. Rptr. at 583. However, the court never made this basis for its ruling clear when it eschewed reliance on the primary rights theory in favor of the RESTATEMENT's transactional approach. Moreover, the court's general res judicata analysis utilized primary rights precedent such as *Slater*, 543 P.2d 593, and CAL. CIV. PROC. CODE § 1908; and the court's ruling specifically relied on California cases such as *Sawyer v. First City Fin. Corp.*, 177 Cal. Rptr. 398 (Ct. App. 1981) and *Neil Norman, Ltd. v. William Kasper & Co.*, 197 Cal. Rptr. 198 (Ct. App. 1983). *Nakash*, 241 Cal. Rptr. at 583-84.

supplanting the primary rights theory but relied on the *Restatement*, a federal Ninth Circuit decision, and *Sawyer*.[87]

In the ten years since *Nakash*, the California Supreme Court has not had occasion to rule squarely on the issue of whether it has indeed shifted to the transactional standard. Recently in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*,[88] the Court suggested that the transactional standard may play some role in defining a "cause of action," at least when construing that term in the context of coverage under a malpractice insurance policy. The plaintiff in *Bay Cities* was a general contractor who was owed money for its work on a construction project. The attorney who had been representing the contractor in connection with the project recorded a mechanic's lien, but negligently failed to serve a stop notice on the lenders and thereafter negligently failed to file a complaint to foreclose the lien. As a result of the attorney's omissions, the contractor was unable to collect the amount it was owed. The contractor sued its attorney for legal malpractice. The attorney's professional liability insurance policy contained a provision limiting coverage to a maximum of $ 250,000 "for each claim." The narrow issue before the Court was whether the policy's $250,000 per claim limit applied to the attorney's two omissions. The California Supreme Court held that this limitation did apply.

The *Bay Cities* court ultimately determined the meaning of the word "claim" in the insurance policy by construction of the language of the policy, but noted that "[t]he reasoning as to proper pleading, though not controlling, is illustrative in the present case."[89] The court ruled that the plaintiff had not asserted two causes of action. Referring to primary rights theory, the Court reasoned that Bay Cities had a single injury and thus a single cause of action against its attorney. "Bay Cities had one primary right—the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained.

87. The court referred to the RESTATEMENT (SECOND) OF JUDGMENTS generally, and to comment a of section 24 specifically, as the source of its transactional standard. *Nakash*, 241 Cal. Rptr. at 583. After noting that this transactional approach had been approved in *Constantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087, the court then relied on *Sawyer*, *Neil Norman*, and a quote from 7 WITKIN, CALIFORNIA PROCEDURE, JUDGMENTS § 246 (3d ed. 1985), as California authorities for permitting successive suits between litigants who engaged in business transactions. *Nakash*, 241 Cal. Rptr. at 583-84

88. 855 P.2d 1263 (Cal. 1993).

89. *Id.* at 1266.

He allegedly breached that right in two ways, but it nevertheless remained a single right."[90] The court then noted that the attorney's two acts of alleged procedural negligence, failure to foreclose the mechanic's lien and failure to serve a timely stop notice, "arose from the same transaction" and were simply two omissions that resulted in a single injury.[91]

Although the California Supreme Court's dicta in *Bay Cities* made some reference to the transactional standard, it did so only in an exclusive or negative manner to rebut any argument that the defendant's later negligence was not part of the same cause of action because it was caused by a different transaction.[92] The Court's dicta still relied on the primary rights theory to illustrate that the plaintiff had but one "claim," based on a single injury, within the meaning of the insurance policy. The *Bay Cities* opinion made no mention of the *Nakash* court's use of the transactional standard.

The *Bay Cities* opinion represents another missed opportunity by the California Supreme Court to provide some much-needed guidance, and has permitted the lower courts to adopt contradictory positions concerning the proper res judicata standard. The transactional standard announced by the *Nakash* court has had a mixed reception among the courts of appeal. Two recent opinions have endorsed the *Nakash* standard;[93] but two others have expressly declined to follow this standard.[94] These contradictory opinions obviously have the potential to create even greater unpredictability in the application of res judicata. Hopefully, the California Supreme Court will recognize the need, in the next appropriate case, to resolve this developing conflict.

Ironically, *Branson v. Sun-Diamond Growers*,[95] one of the recent decisions to expressly reject the *Nakash* court's transactional standard,[96]

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90. *Id.*
91. *Id.*
92. See *supra* notes 27-33 and accompanying text for a discussion of California's use of a transactional notion in an exclusive or negative manner as opposed to the RESTATEMENT's use of the transactional standard in an inclusive or positive manner.
93. Mata v. City of Los Angeles, 24 Cal. Rptr. 2d 314, 319 (Ct. App. 1993); Hulsey v. Koehler, 267 Cal. Rptr. 523, 526 (Ct. App. 1990) (dicta); *cf.* Coca-Cola Bottling Co. v. Lucky Stores, Inc., 14 Cal. Rptr. 2d 673, 677-78 (Ct. App. 1992) (noting that in determining whether two proceedings involve the "same controversy," one factor is "whether the two suits arise out of the same transactional nucleus of facts").
94. Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 321 n.6 (Ct. App. 1994) (declining to apply the transactional "nucleus of facts" test because it was inconsistent with the controlling authority of California Supreme Court); Brenelli Amedeo v. Bakara Furniture, Inc., 35 Cal. Rptr. 2d 348, 351 (Ct. App. 1994) (ruling that the firmly settled rule in California is the primary rights theory, and therefore the trial court incorrectly applied the transactional test).
95. *Branson*, 29 Cal. Rptr. 2d 314.
96. *See supra* note 94.

also ignored the significance of the "harm suffered" standard. Branson, a former marketing manager of the defendant Sun-Diamond Growers, became an independent commodity food broker and took the Sun-Diamond Growers account away from the former exclusive broker, Plate Company. Plate Company sued Branson for intentional interference with its contract, which resulted in a verdict of $275,968 against Branson. Branson then filed a motion to compel statutory indemnification of the verdict by Sun-Diamond Growers pursuant to California Corporations Code Section 317, which requires a corporation to indemnify its agent against a judgment arising from the agent's good faith acts on behalf of the corporation. The court in this prior litigation held that Sun-Diamond Growers could not be ordered to indemnify Branson under Section 317 because Branson had not been sued by Plate for activity undertaken as an agent of Sun-Diamond Growers, but for activity taken entirely independently of Sun-Diamond Growers. In addition, Branson had not acted in good faith, a prerequisite for indemnification under the statute.[97]

Branson then commenced an action against Sun-Diamond Growers seeking indemnification for the prior judgment of $275,968 based on allegations of contractual and quasi-contractual rights of indemnity as opposed to statutory indemnity. The trial court ruled Branson's complaint was barred by res judicata, and Branson appealed. After an extensive review of the doctrine of res judicata, including discussions of Pomeroy, *Slater*, *Bay Cities*, and *Agarwal*, the Court of Appeal reversed. The court held that Branson's present complaint asserted a different primary right than that involved in the prior judgment, and therefore his contractual indemnity causes of action were not barred.[98] In reaching this holding, the court acknowledged the admonition from Pomeroy and *Slater* that a "'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant."[99] Nevertheless, the court focused on *Agarwal* and its progeny for the proposition that different primary rights may be violated by the same wrongful conduct.[100] Without further explanation as to how the "harm suffered"

97. *Id.* at 317-19. The appellate decision in this prior litigation is *Plate v. Sun-Diamond Growers*, 275 Cal. Rptr. 667 (Ct. App. 1990).

98. *Id.* at 322-23. The court also discussed some additional reasons why the judgment in the former case did not bar the present action, but these other reasons were secondary to its primary rights holding. *Id.* at 323-24.

99. *Id.* at 321.

100. *See id.* at 322.

by Branson was different in the two actions, nor why the statutory and contractual indemnity actions invoked separate primary rights as opposed to separate theories of recovery, the court concluded that the primary right to seek statutory indemnification was not the same cause of action as one seeking contractual indemnification.[101]

3. The Courts of Appeal Struggle with the California Supreme Court's Agarwal *Decision*

As *Branson* illustrates, the lower courts have also struggled with the legacy of *Agarwal v. Johnson*, the last California Supreme Court ruling on primary rights. In *Agarwal*, the plaintiff's first action was in federal court for back wages under the authority of the federal Civil Rights Act. The California Supreme Court determined that an adverse judgment in the federal action was no bar to a second suit in superior court for damages for defamation and intentional infliction of emotional distress. Although the same set of facts was presented in each action, the Court held that one primary right was created by the federal statute prohibiting discriminatory employment practices and a second primary right was grounded in the state common law of torts. Also, the "harm suffered" was deemed separable since damages for lost wages in the federal action were distinct from damages for injury to reputation and peace of mind in the state case.

Because the "harm suffered" analysis in *Agarwal* was at odds with established tort precedent,[102] some thought *Agarwal* stood for the general proposition that misconduct which violated both federal and state laws necessarily violated two primary rights.[103] However, the vast majority of decisions have held that a plaintiff's injuries caused by a defendant's misconduct which violates both a federal civil rights statute and state common law constitute but one primary right.[104] Attempts to

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101. *See id.* at 323.

102. *See* authorities cited *supra* notes 70-71.

103. For example, in *Johnson v. American Airlines, Inc.*, 203 Cal. Rptr. 638 (Ct. App. 1984), the plaintiff argued that a prior federal court class action judgment resolving a challenge to the defendant's mandatory pregnancy leave policy under *federal* civil rights statutes involved a different primary right than the instant state court lawsuit challenging the same policy under state civil rights statutes. *Id.* at 640-41. The court observed that the plaintiff's argument was not novel and found that the same primary right—the right to be free from employment discrimination based on sex—was asserted in both actions and that the instant state court action was barred by res judicata. *Id.*

104. The courts uniformly hold that where both laws are intended to redress the same harm only one primary right is involved. *See, e.g.*, Mattson v. City of Costa Mesa, 164 Cal. Rptr. 913, 916-17 (Ct. App. 1980) (holding that plaintiff's state court action seeking damages for unlawful arrest based on state negligence law involved the same primary right as plaintiff's claim for damages under a federal civil rights statute unfavorably determined by a prior federal court jury verdict); *Johnson*, 203 Cal. Rptr. at

pursue the state and federal violations in two lawsuits have been held barred by res judicata because the second action was "simply a different way of expressing an invasion of the same primary rights or the assertion of a different legal theory of recovery."[105] Nevertheless, the *Agarwal* opinion continues to produce unpredictable consequences when applied in similar factual circumstances, as illustrated by the two areas of recent appellate court decisions discussed below.

a. Wrongful Termination from Public Employment and Administrative Mandamus Actions: How Many Primary Rights Involved?

In *Takahashi v. Board of Education*,[106] the court of appeal concluded that plaintiff's instant wrongful termination action seeking damages for employment discrimination was barred by the res judicata effect of a prior unsuccessful mandamus action, which was initiated by the plaintiff to compel her reinstatement as a teacher. The plaintiff, after a hearing before the Commission on Professional Competence, was dismissed from her employment as a public school teacher by the defendant school board on the basis of incompetency.[107] After the commission found cause for dismissal and ordered her termination, the plaintiff commenced a mandamus action in superior court to review the commission's decision. This action challenged the commission's finding of incompetency as not supported by the evidence, as well as the commission's jurisdiction to proceed, based on the state's education

640-41 (holding that plaintiff's state court action challenging defendant's mandatory maternity leave-without-pay policy under the state fair employment statute barred by prior federal class action consent decree under federal civil rights statute because both lawsuits alleged the same primary right to be free from employment discrimination); Ford Motor Co. v. Superior Court, 110 Cal. Rptr. 59, 61 (Ct. App. 1973) (holding that complaint alleging violations of federal and state anti-trust statutes rested on but a single invasion of one primary right, and therefore constituted one cause of action); *see also* City of Los Angeles v. Superior Court, 149 Cal. Rptr. 320, 326 (Ct. App. 1978) (holding that a prior federal civil rights action barred a subsequent superior court common law tort action, where both involved the wrongful seizure of personal property, on the ground that both laws were designed to vindicate the same interests in personal property); Takahashi v. Board of Educ. of Livingston Union Sch. Dist., 249 Cal. Rptr. 578, 585 (Ct. App. 1988), *cert. denied*, 490 U.S. 1011 (1989) (holding that plaintiff's wrongful termination action in superior court based on the federal civil rights act and constitution involved the same primary right as in plaintiff's prior state court mandamus action based on state statutory and common law).

105. *Mattson*, 164 Cal. Rptr. at 917.
106. *Takahashi*, 249 Cal. Rptr. at 585.
107. *See id.* at 580-82.

code. The plaintiff's mandamus petition was denied by the superior court, and this denial was affirmed on appeal.

The plaintiff then commenced subsequent wrongful discharge litigation in state court against the defendant school board, this time seeking monetary and injunctive relief on a variety of state common law and federal constitutional grounds. Her complaint alleged breach of employment contract, conspiracy to defraud, intentional infliction of emotional distress, and discrimination in employment on account of her sex, race, and ancestry. The superior court granted defendant's motion for summary judgment concluding that the prior state mandamus judgment barred the current action on the basis of res judicata, and the plaintiff appealed.[108]

The main issue for the court of appeal was whether the primary right asserted in the instant action was the same as that presented in the previous mandamus proceeding. The court determined that both actions involved the identical primary right—the plaintiff's contractual right to employment.[109] The court discussed *Agarwal* at length and concluded that separate primary rights were involved because the harms for which the plaintiff in *Agarwal* sought damages were different in the two actions. In contrast, the plaintiff in *Takahashi* suffered a single harm—alleged wrongful termination of her employment. The court reasoned that each act complained of by the plaintiff caused her dismissal or was the consequence of her dismissal, and each act was therefore part and parcel of the violation of a single primary right. Her allegations of emotional distress and other consequential injuries, according to the court, were not based upon the infringement of a separate primary right. The court found that the same primary right was involved even though the commission did not have jurisdiction to award damages and, consequently, that the mandamus proceeding was necessarily limited in available relief to compelling reinstatement. The court reasoned that because the commission had the authority to entertain any defense imposed by the plaintiff, the commission's lack of authority to award

108. In between these two state court actions, the plaintiff had also filed a federal court action for damages and injunctive relief based on various federal civil rights statutes. The federal district court held that the decision in the first state court action precluded the plaintiff's federal court case, and the U.S. court of appeals affirmed that holding. *See* Takahashi v. Board of Trustees of Livingston Union Sch. Dist., 783 F.2d 848 (9th Cir. 1986), *cert. denied*, 476 U.S. 1182 (1986). The Court of Appeal in the subsequent state court *Takahashi* litigation noted that this prior federal judgment may have provided a separate basis for claim preclusion. *Takahashi*, 249 Cal. Rptr. at 592. However, the court declined to determine the res judicata effect of the prior federal judgment because it concluded that the state court's denial of plaintiff's petition for mandamus in the first state court action barred the second state court litigation. *Id.*

109. *See Takahashi*, 249 Cal. Rptr. at 584.

damages did not excuse the plaintiff's failure to present all her defenses to the defendant's charge of incompetency at the termination hearing.[110]

The *Takahashi* court considered all the alleged "harm suffered" by the plaintiff (wrongful discharge from employment, sex and race discrimination, lost wages, and punitive damages) to constitute one primary right—the right to be free from wrongful termination from employment. As a result, the court found only one cause of action that could not be split between two lawsuits. Despite the court's attempt to distinguish *Agarwal*, the nature of the harms suffered in those two cases appears to be the same. Yet where the *Agarwal* Court found two primary rights violated, the *Takahashi* court found only one. What guidance do these precedents provide litigators and judges in such typical situations of wrongful discharge from public employment? Should the discharged employee follow the *Takahashi* court's advice and pursue all her rights to relief through the administrative hearing process, even though the administrative tribunal lacks authority to award damages or injunctive relief? Or may the dismissed employee rely on *Agarwal* by only requesting reinstatement though the administrative process and pursuing other relief through an independent court action? Unfortunately, the decisions subsequent to *Takahashi* provide inconsistent guidance as to the appropriate litigation behavior in such cases.

In a remarkably similar fact situation to that in *Takahashi*, the Court of Appeal in *Craig v. County of Los Angeles*[111] reached an opposite primary rights conclusion. The plaintiff in *Craig* had applied for a position as a harbor patrol officer with the defendant sheriff's department, but was denied employment. The plaintiff then petitioned the Civil Service Commission for a hearing, which resulted in a determination that the decision not to hire the plaintiff was improper. Subsequently, the plaintiff commenced a mandamus action in superior court, which ultimately led to a court order compelling the defendant to

110. Quite apart from any concerns about the *Takahashi* court's primary rights analysis, the court's claim preclusion ruling seems questionable in light of the well-recognized exception to the general rule against splitting causes of action. This exception is permitted where a plaintiff was unable to seek a certain remedy or form of relief in a prior proceeding because of limitations on the subject matter jurisdiction of the first tribunal to entertain certain demands for relief, and the plaintiff desires in a second action to seek that remedy or form of relief. *See* discussion and authorities cited *supra* note 28 and *infra* notes 149-50.

111. 271 Cal. Rptr. 82 (Ct. App. 1990).

comply with the Civil Service Commission order to hire the plaintiff. Finally, yielding to the court's order, the defendant hired the plaintiff.

The plaintiff then filed another lawsuit in superior court against the defendant, this time seeking money damages for fraud, intentional infliction of emotional distress, and employment discrimination. The superior court dismissed this action as barred by res judicata, and the plaintiff appealed.

The question for the *Craig* court was whether the prior state mandamus proceeding involved the same primary right as the instant case. The Court of Appeal held that the two actions involved different primary rights, although they arose out of the same subject matter. The primary right involved in the previous mandamus proceeding was the right to be employed as a harbor officer, whereas the instant action involved the right to recover damages because of the denial of that employment right. Relying on *Agarwal*, the court viewed the types of harm involved in the two proceedings as distinct. The harm suffered in the mandamus action was the denial of the harbor patrol position despite the commission's order that he be hired. In the present action, the harm suffered included the emotional distress which resulted from defendant's wrongful conduct. Since the plaintiff "is seeking to recover damages for harm distinct from his action to compel enforcement of the Commission's order, there are different primary rights involved."[112] Accordingly, the court concluded that the prior mandate action did not bar the present damage action.

The *Craig* decision is difficult to reconcile with the *Takahashi* holding. In both cases the plaintiffs failed to raise their various damages claims in their prior mandamus proceedings, but did so in subsequent lawsuits.[113] The *Takahashi* court held that the two actions involved the

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112. *Id.* at 87.

113. Another remarkable similarity to the facts in *Takahashi* is that in between the two state court actions, the plaintiff in *Craig* filed an action in federal court against the defendants for employment discrimination under federal civil rights statutes, and for intentional infliction of emotional distress and fraud. The federal court held that the federal claims were barred by res judicata based on the prior state proceedings, but exercised its discretion to not hear the pendant state claims and dismissed them. *See Craig*, 271 Cal. Rptr. at 83-84, 87.

The *Craig* court found that this prior federal judgment did not bar plaintiff's subsequent state court action, at least as to the state law claims not decided by the federal court. This determination is questionable from a primary rights standpoint and is opposite the result reached by the court in *Takahashi*, 249 Cal. Rptr. at 592, but appears consistent with prior precedent regarding the effect of a federal court's refusal to hear pendent state claims. *See, e.g.*, Koch v. Hankins, 273 Cal. Rptr. 442 (Ct. App. 1990) (holding that a prior federal judgment against plaintiff under federal securities laws did not preclude the instant action based on state claims where the federal court had declined to exercise pendent jurisdiction over the state claims); Merry v. Coast Community College Dist., 158 Cal. Rptr. 603, 609-13 (Ct. App. 1979) (noting that a federal court's

same primary right and constituted prohibited splitting of one cause of action into successive lawsuits. But the *Craig* court found the two proceedings raised different primary rights, which the plaintiff was permitted to pursue in two separate lawsuits. Both opinions profess to follow *Agarwal* and the "harm suffered" approach. Whether one court correctly applied this standard and the other did not is difficult to determine from an analytical standpoint.[114] More importantly, this conflict between primary rights precedents produces obvious uncertainty for litigants as to the appropriate litigation behavior in public employee dismissal cases. Must parties present every right to relief in the administrative proceeding and, if unsuccessful there, seek judicial review by administrative mandamus?[115] Or should they reserve certain

refusal to exercise pendent jurisdiction over state claims following pretrial dismissal of a federal claim did not bar subsequent litigation of the state claims in state court).

114. In one recent case involving dismissal from public employment for insubordination, *Swartzendruber v. City of San Diego*, 5 Cal. Rptr. 2d 64 (Ct. App. 1992), the court followed *Takahashi* and held that a prior Civil Service Commission decision upholding the dismissal barred a subsequent civil rights action because both involved the same primary right—the right to continued employment. *Id.* at 71-72. As in *Takahashi*, the plaintiff in *Swartzendruber* failed to raise her civil rights claims during the administrative proceeding, and also failed to seek judicial review of the administrative hearing decision through an administrative mandamus action. *Id.*

In another wrongful discharge case involving a public employee, *Mata v. City of Los Angeles*, 24 Cal. Rptr. 2d 314 (Ct. App. 1993), the court distinguished *Takahashi* on two grounds. First, unlike *Takahashi*, the plaintiff in *Mata* filed both a mandamus petition to review the administrative decision of dismissal and a civil rights action for damages in one lawsuit. *Id.* at 320. Second, unlike the *Takahashi* plaintiff, the plaintiff in *Mata* prevailed in his petition for administrative mandamus. *Id.* at 320.

115. A party must exhaust available administrative adjudicative remedies as a prerequisite to litigation. *See, e.g.*, Westlake Community Hosp. v. Superior Court, 551 P.2d 410 (Cal. 1976); Abelleira v. District Court of Appeal of Cal., 109 P.2d 942, 949 (Cal. 1941). If such a party obtains an adverse administrative hearing decision, she must then seek judicial review of the administrative hearing decision, through the procedural vehicle of "administrative mandamus" as a precondition to commencement of a compensation action. CAL. CIV. PROC. CODE § 1094.5 (West 1980). Failure to seek judicial review of the administrative hearing decision will preclude any subsequent tort or civil rights damage action. *See, e.g.*, *Westlake*, 551 P.2d at 420-22 (holding that a mandamus proceeding was a prerequisite to a tort action by a plaintiff whose hospital privileges were revoked); Briggs v. City of Rolling Hills Estates, 47 Cal. Rptr. 2d 29, 32-35 (Ct. App. 1995) (holding that failure to seek administrative mandamus review of zoning variance decision precluded plaintiff's independent civil rights action for damages and injunctive relief); *Swartzendruber*, 5 Cal. Rptr. 2d at 67-69 (holding that plaintiff's failure to seek mandamus review of prior administrative hearing adjudication upholding discipline precluded independent suit for damages); Patrick Media Group, Inc. v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 840 (Ct. App. 1992) (ruling that plaintiff's failure to seek timely mandamus review of an adverse Coastal Commission determination barred, based on res judicata, any subsequent action for compensation).

matters for litigation in a separate lawsuit? Because the application of the primary rights doctrine is unclear in such circumstances, parties lack guidance on how best to proceed so as not to forfeit important substantive rights without incurring unnecessary litigation expenses. The unpredictable nature of the primary rights doctrine in such public employee dismissal cases not only fosters inefficiency, it seems fundamentally unfair.

b. The "Double Injury" Problem: One or Two Primary Rights Involved?

Another difficult post-*Agarwal* question arises where a plaintiff suffers multiple personal injuries caused by a defendant's wrongful act, but the injuries are distinctly different in type and are separated in time. Does each type of injury, particularly when the later one is more serious and manifests itself long after the earlier injury, constitute a different primary right? The California appellate courts are split on this issue. Some courts have reasoned that a later-occurring, distinctly different injury constitutes an invasion of a separate primary right. Others have

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If a plaintiff seeks judicial review by administrative mandamus and prevails (for example, if the plaintiff were to obtain the reversal of an adverse administrative hearing decision regarding reinstatement in public employment), several decisions have held that the plaintiff is then permitted to commence a separate action for compensatory damages. *See, e.g.*, Westlake Community Hosp. v. Superior Court, 551 P.2d 410 (Cal. 1976); Knickerbocker v. City of Stockton, 244 Cal. Rptr. 764, 770 (Ct. App. 1988) (holding that to the extent plaintiff can prove he suffered emotional distress from an improper termination, nothing in an earlier administrative proceeding ordering his reinstatement prevents plaintiff from commencing an action); Daugherty v. Board of Trustees of South Bay Union High Sch. Dist., 244 P.2d 950, 952 (Ct. App. 1952) (holding that favorable judgment ordering reinstatement of teacher in prior mandamus action was not a bar to a second action for unpaid salary because the "causes of action in the two proceedings were thus separate and distinct, although arising out of the same subject matter"). This factual difference between *Takahashi* and *Craig* may serve to distinguish those two cases on an expedient, pragmatic basis, but it does not reconcile their divergent "primary rights" holdings from an analytical standpoint. A basic principle of res judicata is that a prior judgment precludes relitigation of the same cause of action in a subsequent proceeding, regardless of which party prevailed in the prior action. *See* RESTATEMENT, supra note 11, §§ 17, 18 [merger], 19 [bar]; Busick v. Workmen's Compensation Appeals Bd., 500 P.2d 1386, 1392-93 (Cal. 1972) (applying res judicata rule of merger and holding that a prior money judgment for plaintiff precluded plaintiff's instant action for recovery of workers' compensation benefits against the same defendant employer); Acuña v. Regents of University of California, 65 Cal. Rptr.2d 388 (Ct. App. 1997) (holding that a prior federal judgment awarding damages to plaintiff for age discrimination barred plaintiff's instant action seeking additional damages for race discrimination); Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639 (Ct. App. 1993) (holding that, under res judicata doctrine of merger, plaintiff's prior mandate action which resulted in a declaration that city's ordinance was void extinguished all plaintiff's rights to relief and therefore precluded separate inverse condemnation action for damages).

found that a plaintiff who alleges various immediate and later personal injuries as the result of a defendant's tortious act states only one cause of action. Although these cases involved the proper definition of a "cause of action" for purposes of determining whether the relevant statute of limitations had expired, their primary rights analyses seem equally applicable to res judicata determinations.[116]

One such case is *Martinez-Ferrer v. Richardson-Merrill, Inc.*,[117] which involved a plaintiff who developed cataracts sixteen years after using an anti-cholesterol drug manufactured by the defendant. A few months after he began taking the drug, the plaintiff experienced vision problems caused by the drug and a rash that lasted six weeks. The plaintiff did not commence a products liability action against the defendant, however, until after he discovered the cataracts. The trial court granted a summary judgment for the defendant manufacturer on the ground that the action was barred by the statute of limitations. On appeal, the *Martinez-Ferrer* court concluded that the plaintiff's action was not barred by the statute of limitations because his action for damages for his cataracts was a different cause of action than the one he had for his earlier injuries. The court did not articulate a clear rule in

116. The California courts appear to treat the definition of "cause of action" for the purpose of res judicata as the same as for the determination of accrual for statutes of limitations. *See, e.g.*, Holmes v. David H. Brickner, Inc., 452 P.2d 647, 649-50 (Cal. 1969); Martinez-Ferrer v. Richardson-Merrel, Inc., 164 Cal. Rptr. 591, 597 (Ct. App. 1980); *see also* Grudt v. City of Los Angeles, 468 P.2d 825, 829 (Cal. 1970) (utilizing primary rights analysis to determine whether amended complaint alleged the same cause of action as, and therefore related back to, the original pleading). The courts in other jurisdictions are less sure in their treatment. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117-21 (D.C. Cir. 1982). The policy reasons behind res judicata and the statute of limitations are quite similar. *See* Susan Demidovich, *Recent Cases*, 52 U. CIN. L. REV. 239, 251-252 (1983) (discussing the similarities in the two doctrines). The fundamental purpose of statutes of limitations is to give defendants reasonable repose, that is, to protect parties from defending stale claims and require plaintiffs to diligently pursue their claims. *See* Jolly v. Eli Lilly & Co., 751 P.2d 923, 928 (Cal. 1988); Davies v. Krasna, 535 P.2d 1161, 1168 (Cal. 1975). Likewise, the purposes of res judicata are to protect against vexatious litigation and to conserve judicial resources. *See supra* note 4 and accompanying text.

The "double injury" problem becomes a res judicata problem where the plaintiff files a timely action and recovers a modest damage award as compensation for the first significant personal injury, but later commences a second action against the same defendant to recover additional damages after manifestation of far more serious injury caused by the same tortious act. The question then is whether the second action is precluded by the prior judgment as a matter of res judicata under the rule of merger, as well as whether the second action is barred by the applicable statute of limitations.

117. 164 Cal. Rptr. 591, 597 (Ct. App. 1980).

finding two primary rights, but noted that the "wind [was] blowing: away from a blind adherence to rigid concepts of what constitutes a cause of action. . . without . . . insult to established rules of law, such as the merger aspect of the rule of res judicata."[118]

A number of decisions have directly relied on the *Martinez-Ferrer* primary rights analysis.[119] In *Zambrano v. Dorough*,[120] for example, the plaintiff suffered a variety of personal injuries caused by the defendant's medical malpractice. Her immediate injuries included emotional distress, pain, blood clots, and a ruptured fallopian tube. Three years later she developed additional injuries allegedly caused by the same malpractice, and as a result, underwent a complete hysterectomy. The plaintiff sued the defendant for damages for the loss of her reproductive capacity, based on the malpractice that occurred three years earlier. The *Zambrano* court concluded that the action was not barred by the one-year statute of limitations because the loss of reproductive capacity was a different type of injury than the one she suffered earlier, and it constituted a different primary right and therefore a separate cause of action.[121]

A view contrary to *Martinez-Ferrer* was stated in the analogous case of *DeRose v. Carswell*.[122] The plaintiff in *DeRose* sued her stepfather for assault, battery, and infliction of mental distress for alleged sexual child abuse that had occurred over 13 years earlier. The trial court dismissed her action as barred by the statute of limitations. On appeal, the plaintiff argued that even if the statute of limitations barred an action based on the harm immediately caused by the assaults, nevertheless, she stated a separate cause of action based on the subsequent emotional harm which she experienced as an adult. The court of appeal rejected this argument and found that her complaint alleged only one cause of action in tort for the invasion of one primary right. The court characterized the holdings in *Zambrano* and *Martinez-Ferrer* as violating the rule against splitting a cause of action.[123] The *DeRose*

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118. *Id.* at 597. The court did not attempt to distinguish the traditional primary rights rule that a single tort gives rise to only one claim for damages, but instead relied on various authorities, including the tentative draft of the RESTATEMENT (SECOND) OF JUDGMENTS, to support its view that the rigors of the merger aspect of res judicata were undergoing "substantial relaxation." *Id.* The court ended its primary rights analysis by confessing that it would "make no attempt to even summarize where all this may lead." *Id.*

119. *See* authorities cited *infra* notes 124 and 159.

120. 224 Cal. Rptr. 323 (Ct. App. 1986).

121. *See id.* at 326 (stating that the plaintiff's "right to be free of the transitory damages of discomfort and distress is separate from and independent of her right to have children").

122. 242 Cal. Rptr. 368 (Ct. App. 1987).

123. *See DeRose*, 242 Cal. Rptr. at 375 n.5, *quoting* Panos v. Great W. Packing Co.,

court's disapproving view of *Martinez-Ferrer* and *Zambrano* has since been adopted by at least one other court.[124]

The contradictory positions taken by the appellate courts in these double-injury cases illustrate once again the unpredictability of the primary rights approach generally, and the "harm suffered" approach specifically, when utilized to define a cause of action. The California Supreme Court could provide a resolution to this problem simply by ruling that a later injury does or does not constitute an invasion of the same primary right as an earlier injury.[125] Admittedly, such a pronouncement would make disposition of these double-injury cases far more predictable. However, as discussed below in Part III of this Article, utilization of the primary rights theory to resolve this problem masks a welter of important policy decisions, of which predictability is but one concern.[126]

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134 P.2d 242, 244 (Cal. 1943) (noting that their primary rights reasoning was contrary to "[t]he longstanding rule in California . . . that '[a] single tort can be the foundation for but one claim for damages'").

124. *See* Miller v. Lakeside Village Condominium Ass'n, Inc., 2 Cal. Rptr. 2d 796 (Ct. App. 1991). Although the majority of the court in *Miller* criticized the reasoning and holding of *Martinez-Ferrer*, a concurring opinion in *Miller* specifically endorsed the primary rights rationale enunciated in *Martinez-Ferrer* but found it inapplicable to the facts at hand. *See id.* at 805, 807-10 (Woods, J., concurring). Likewise, a majority of the court in *Marsha V. v. Gardner*, 281 Cal. Rptr. 473 (Ct. App. 1991) followed the holding in *DeRose*, but a dissenting opinion applied the *Martinez-Ferrer* primary rights analysis. *See* i*d.* at 478 (Johnson, J., dissenting).

125. Currently before the California Supreme Court is Mitchell v. Asbestos Corp., 73 Cal. Rptr. 2d 11 (Ct. App. 1998), *superceded by grant of review*, 957 P.2d 868 (Cal. 1998), a double-injury case which presents the issue of whether the extraordinarily accommodating provisions of section 340.2 can justify a departure from the rule against splitting a cause of action.

126. The double-injury problem frequently occurs in litigation seeking recovery for personal injuries caused by exposure to asbestos. *See, e.g.*, Buttram v. Owens-Corning Fiberglas Corp., 941 P.2d 71 (Cal. 1997) (collecting latent disease asbestosis cases involving accrual for purpose of statute of limitations and holding that a cause of action for damages arising from latent and progressive disease will be deemed to have accrued, for the limited purpose of determining whether the tort reform measures of Proposition 51 could be fairly applied prospectively to a lawsuit, when the disease is diagnosed or plaintiff otherwise discovers illness or injuries, whichever is earliest). The California legislature has responded to this problem by enacting a special one year statute of limitations which delays accrual of the cause of action until such time as the plaintiff first suffers a "disability" caused by asbestos exposure. *See* CAL. CIV. PROC. CODE § 340.2 (Deering 1995). The statute then defines "disability" to mean the loss of time from work as a result of such exposure "which precludes the performance of the employee's regular occupation." *Id.* § 340.2(b).

For a discussion of judicial responses to the double-injury problem in asbestos exposure litigation in jurisdictions other than California, see *infra* note160.

III. CONCLUSION

A. The California Supreme Court Should Overrule Primary Rights Precedent and Adopt the Restatement

California'a res judicata doctrine lacks predictability. The doctrine does not provide litigants with a clear warning of its consequences when invoked in many typical factual situations. The courts have not developed a consistent approach when applying the primary rights theory of claim preclusion. Res judicata principles that made sense when adopted in the nineteenth century have lost their relevance in the context of modern notions of claim joinder and judicial economy. The California Supreme Court's attempts to revise the primary rights approach to reflect these changes have only made the doctrine less certain.

The California courts acknowledge that the California primary rights doctrine is complicated by historical precedent which in several areas established primary rights "in a manner contrary to the result that might be reached by a purely logical approach."[127] This admission does little to diminish the uncertainty that confronts litigants and trial courts who must administer the doctrine. Moreover, with the change to unrestricted permissive joinder of claims in 1971, the continued vitality of these historical precedents is also in doubt.

Under the California Supreme Court's current "harm suffered" approach, there is little certainty as to which of the earlier lower court precedents are still valid today. Although the California Supreme Court endorsed the personal injury/property damage distinction for tort actions in dicta in *Holmes*, the Court has not held, since the enactment of unrestricted joinder of claims in 1971, that a single tortious act that causes injury to both persons and property violates more than one primary right. This distinction was made by Pomeroy in the nineteenth century and assumed by the lower courts more recently, but nothing in the current "harm suffered" jurisprudence informs a party that he may safely seek recovery for such injuries in two separate proceedings. Likewise, the California Supreme Court has never held that unitary tortious conduct which causes injury to personal property and to real property constitutes two different primary rights.[128] Litigants who rely

127. Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398, 403 (Ct. App. 1981).

128. This primary rights distinction is particularly precarious. It has been made in only one court of appeal decision, *McNulty v. Copp*, 271 P.2d 90 (Cal. Ct. App. 1954), and was never endorsed by Professor Pomeroy. *See supra* notes 37, 45 & 55 and accompanying text.

on this distinction, or any other primary rights distinction announced by the lower courts, do so at their own peril.

Ironically, the very unpredictability of California's primary rights doctrine may have produced, as a practical matter, some substantive judicial economy. The general uncertainty in California as to the precise limits of a "cause of action" for res judicata purposes has a sufficient *in terrorem* effect to force parties to bring all related rights to relief in one action, even if some of these rights might be considered separate causes of action under the primary rights theory.[129] This fear of the unknown, coupled with the time restrictions imposed by statutes of limitations and the financial impracticality of commencing a separate action to redress each separate primary right invaded by a defendant's wrongful act, likely means that prudent attorneys will decide to pursue all rights to relief in a single lawsuit. However, a doctrine that achieves economies through unpredictable rules is not simply an analytically dishonest one, but is also one that inevitably produces vexatious litigation and wasted judicial resources when parties fail, for whatever reason, to pursue all rights to relief in one proceeding. Clear rules with predictable applications and foreseeable consequences are a far better method of obtaining the desired economies.

The primary rights approach to res judicata is both substantively and administratively inefficient. This claim preclusion doctrine not only fails to accomplish the goals of judicial efficiency and party repose, but is actually counterproductive as to these goals. What, then, should be done about this problem? The best solution, the one that achieves both substantive and administrative efficiencies and does so in a manner that protects the parties' expectations of a fair opportunity to litigate claims on the merits, is to jettison the primary rights theory and replace it with the *Restatement*'s transactional approach.[130]

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129. *See* Friedenthal, *supra* note 39, at 12-13. Professor Friedenthal made this *in terrorem* observation about imprecise limits of a cause of action for res judicata purposes with respect to other jurisdictions, not California, that defined the scope of a cause of action in terms of "operative facts." *Id.* Because California's primary rights definition of a cause of action was narrower than the "operative facts" theory, Friedenthal argued that the California legislature should enact a mandatory joinder of claims statute to compel parties to litigate related causes of action in a single lawsuit. *Id.* at 13-14, 37. For additional discussion of such a mandatory joinder of claims statute, see *infra* notes 161-166 and accompanying text.

130. This same recommendation was made by the author Robin James, *supra* note 8, at 408, 411-413. The author's main proposal, however, was that the California legislature should replace the current permissive joinder of claims statute, § 427.10 of

The primary rights theory is the product of judge-made law. Consequently, the California Supreme Court can alter the current doctrine by the simple expedient of overruling precedent.[131] Because the court's current primary rights approach is of little predictive significance, adoption of the *Restatement* should raise few concerns about prospective reliance on an established doctrine. Moreover, although adoption of the *Restatement* would dramatically change the court's claim preclusion *analysis*, the effect on the California Supreme Court's prior *holdings* would be minimal. Of all the California Supreme Court decisions on claim preclusion during the past fifty or so years, only the *Agarwal* holding would likely have been different if the *Restatement*'s transactional standard had been applied.[132] However, as discussed below, the impact on court of appeal precedent would be far more pronounced.[133]

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the CALIFORNIA CODE OF CIVIL PROCEDURE, with a mandatory joinder of claims statute. *Id.* at 408-411. Such a statute would require a plaintiff to join in one lawsuit all causes of action arising out of the same transaction or occurrence. *Id.* The attributes of and problems with a mandatory joinder of claims statute are discussed *infra* notes 161-166 and accompanying text.

131. The highest courts in several other states have adopted the RESTATEMENT generally, and the transactional standard specifically, as their claim preclusion doctrine. *See supra* note 27. In *Reilly v. Reid*, 379 N.E.2d 172 (N.Y. 1978), for example, the Court of Appeals of New York adopted the second RESTATEMENT, then a Tentative Draft, as New York's res judicata doctrine. Like California, New York's civil practice code is based on the original Field Code and had at one time included a categorical joinder-of-claims limitation similar to that of former § 427 of the CALIFORNIA CODE OF CIVIL PROCEDURE. *See supra* notes 38-41 and accompanying text. The Court of Appeals noted that the classic definition of "same cause of action" had an unclear meaning and was inconsistent with considerations of judicial economy. *Reilly*, 379 N.E.2d at 174-175. The Court endorsed the second RESTATEMENT's transactional approach generally, and observed that the various RESTATEMENT's rules would determine subtle situations. *Id.* at 176.

In *Rush v. City of Maple Heights*, 147 N.E.2d 599 (Ohio 1958), *cert. denied*, 358 U.S. 814 (1958), the Ohio Supreme Court replaced the primary rights theory with a transactional standard as Ohio's claim preclusion doctrine. In adopting the transactional standard, the *Rush* court overruled established Ohio precedent which previously had held that a person who suffers both personal injury and property damage as a result of the same tortious act has two causes of action. 147 N.E.2d at 607.

132. If the Court had applied the RESTATEMENT's transactional standard instead of the primary rights approach, it would likely have reached the same res judicata conclusion in *Wulfjen*, *Slater*, *Holmes*, *Panos*, and most of its other decisions during the past 60 years. *See infra* Part II for discussion of these decisions. However, the Supreme Court would likely have reached a different claim preclusion result in *Agarwal* if it had applied the RESTATEMENT standard because the plaintiff's federal court action for civil rights remedies and subsequent state court action for tort damages both sought rights to relief which arose from the "same transaction or series of connected transactions," that is, the defendant's dismissal of plaintiff from employment and wrongful treatment before and after the dismissal.

133. *See infra* notes 148-160 and accompanying text. The *Sawyer* holding would most likely have been different under the RESTATEMENT's standard—the plaintiffs-

The California Supreme Court has recognized that the principles of stare decisis permit the court to reconsider, and ultimately to depart from, its own prior precedent in appropriate circumstances.[134] The Court will examine developments occurring subsequent to a decision to determine whether that decision was incorrectly decided and has generated unnecessary confusion, costly litigation, and inequitable results.[135] One important inquiry is whether the lower courts experienced considerable difficulties in applying the doctrine established by the prior decision: Has the precedent presented the appellate courts with a number of unanswered questions, and have these courts reached varying and often inconsistent conclusions in response?[136] Another relevant inquiry concerns the criticisms or rejections of the decision by the courts of other jurisdictions: Since the California Supreme Court's adoption of the doctrine, how many other states have expressly or implicitly rejected the holding?[137] A third relevant inquiry is whether scholarly commentary has been generally critical of the decision and the underlying analysis.[138] Consideration of these and other related factors may convince the Court to overrule its prior decision in favor of a different rule of law.[139] As this Article seeks to demonstrate, the developments in the area of res judicata subsequent to the California Supreme Court's adoption of the primary rights doctrine in the Nineteenth Century, and its most recent reaffirmation of that doctrine in *Agarwal* in 1979, provide convincing grounds for reexamination of the soundness of that doctrine and for its replacement with a new general rule based on the *Restatement (Second) of Judgments*. Because of the

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sellers' actions for breach of contract and for tort arose from the same real estate transaction with the defendants. *See supra* notes 75-83 and accompanying text. The conclusions in the *Craig* line of cases, the *Martinez-Ferrer* line of cases, and in *Branson* would likely have been different, unless some exception to the RESTATEMENT's general rule against claim-splitting were applicable. *See supra* notes 95-101, 111-115 & 116-126, and accompanying text.

134. *See, e.g.*, Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 673 (Cal. 1995); Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 62-63 (Cal. 1988).

135. *See, e.g.*, *Freeman & Mills*, 900 P.2d at 674-79; *Moradi-Shalal*, 758 P.2d at 63-68.

136. *See Freeman & Mills*, 900 P.2d at 674-77; *Moradi-Shalal*, 758 P.2d at 67-68.

137. *See Freeman & Mills*, 900 P.2d at 677-78; *Moradi-Shalal*, 758 P.2d at 63-64.

138. *See Freeman & Mills*, 900 P.2d at 678-79; *Moradi-Shalal*, 758 P.2d at 64-65.

139. *See, e.g.*, *Freeman & Mills*, 900 P.2d at 679-80 (overruling a 1984 decision which had established the tort of bad faith denial of a contract); *Moradi-Shalal*, 758 P.2d at 68-69 (overruling a 1979 holding which had held that a private third-party claimant may sue an insurer for engaging in unfair claims settlement practices).

reliance interest of parties and society in the primary rights doctrine, a new rule adopting the *Restatement* as California's res judicata doctrine should be prospective only.[140]

Although not a panacea for all the difficult preclusion problems discussed in this Article, formal adoption of the *Restatement* would be a marked improvement in both substantive and administrative efficiency over the primary rights doctrine. The *Restatement*'s definition of "claim" (or "cause of action") would make the claim extinguished by a prior judgment coterminous with the factual transaction which gave rise to the action, regardless of the number of primary rights that may have been invaded.[141]

As a result, a unitary transaction or occurrence would give rise to only one cause of action which must be pursued in one lawsuit. Any matter arising from that transaction which is not presented in the one lawsuit will be forever barred.[142] The substantive efficiency is obvious. By adoption of the *Restatement*, a single wrongful act by a defendant will no longer provide the plaintiff with the potential of multiple causes of action and multiple lawsuits, as is currently possible under primary rights jurisprudence.

The adoption of the *Restatement* would also result in significant improvements to the administrative efficiency of California's claim preclusion rules. As discussed above, the primary rights theory currently endorsed by the California courts is unpredictable as to its consequences and therefore causes inefficient use of judicial resources. The transactional definition of a "claim" is easier to understand than the primary rights theory and would be more predictable in application. Attorneys and courts are already familiar with the transactional standard because that standard has been employed for several years in a variety of procedural rules.[143] For example, since 1972 California's compulsory

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140. *See, e.g.*, *Moradi-Shalal*, 758 P.2d at 69; People v. Latimer, 858 P.2d 611 (Cal. 1993).

141. In explaining the rationale for the transactional view of claim, the RESTATEMENT (SECOND) OF JUDGMENTS (1982) observes:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unity or entity which may not be split.

RESTATEMENT, *supra* note 11, § 24 cmt. a.

142. *See supra* notes 19, 25-33 and accompanying text.

143. The federal courts long ago adopted the second RESTATEMENT's transactional approach to determine the claim preclusive effect of a prior federal court judgment; and a majority of states have adopted it as their res judicata doctrine. *See* authorities cited

cross-complaint statute has required a defendant to plead a cross-complaint where the cause of action asserted in the cross-complaint arises from the "same transaction, occurrence, or series of transactions or occurrences" as the cause of action which the plaintiff alleged in the complaint.[144] Other state and federal joinder rules have incorporated a "same transaction or occurrence" test for several years,[145] as has the relation-back doctrine for amended complaints in federal court.[146] Consequently, lawyers and judges frequently interpret the transactional standard in several procedural contexts; by contrast, they rarely encounter the primary rights theory.[147] The transactional standard is so

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supra notes 27 and 86.

144. CAL. CIV. PROC. CODE §§ 426.10(c), 428.10(b) (Deering 1996) (compulsory cross-complaints and new party cross-complaints). *See id.* § 426.30(d).

A party's failure to plead a compulsory cross-complaint constitutes a waiver of that cause of action. *Id.* § 426.30(a). By enacting this transactional standard for compulsory cross-complaints in 1972, the California Legislature has already imposed a transactional claim preclusion standard in many common types of cases. *See James*, *supra* note 8, at 402-403. Consider the typical car crash case. *See id.*; *see also supra* note 26. Assume that defendant's van collided with plaintiff's car on the freeway, and that assignment of fault is unclear. Both parties were seriously injured, and their respective vehicles were destroyed. Under the current res judicata approach, the defendant's act invaded two of plaintiff's primary rights: The right to be free from tortious injury (1) to person and (2) to property. Plaintiff has two causes of action which plaintiff may pursue in two lawsuits under the primary rights theory. Likewise, defendant has the same two causes of action against the plaintiff.

Regardless of which cause of action the plaintiff alleges in the first lawsuit, California's compulsory cross-complaint statute requires the defendant to assert as a cross-complaint *any* cause of action that arises out of the same transaction or occurrence. *See* CAL. CIV. PROC. CODE §§ 426.10(a), 426.30(a) (Deering 1996). Therefore the defendant must plead both his personal injury and property damage claims against the plaintiff because, pursuant to section 426.30(a), any cause of action not plead is barred from assertion in another action. If the defendant pleads either or both of his causes of action by cross-complaint against the plaintiff, the cross-complaint statute—which defines "plaintiff" to mean a person who files a complaint or cross-complaint—then requires the plaintiff to plead any cause of action which arises out of the same transaction or occurrence which defendant alleged in his cross-complaint. *Id.* §§ 426.10(a)-(c), 426.30(a). The net practical effect of the compulsory cross-complaint statute is that the transactional standard and not the primary rights theory ultimately applies to determine what rights to relief must be litigated in many typical cases, such as automobile negligence litigation.

145. The "same transaction or occurrence" test appears in California's permissive joinder of parties statutes, §§ 378(a) (1) & 379(a) (1), as well as in the FEDERAL RULES OF CIVIL PROCEDURE. *See* FED. R. CIV. P. 13(a), 14(a), 20(a) (compulsory counterclaims, impleader, and permissive joinder of parties respectively).

146. *See* FED. R. CIV. P. 15(c)(2).

147. Because courts frequently encounter the "same transaction" test in other procedural areas, and because the federal courts and a majority of state courts apply it as

ubiquitous in civil procedure, and so familiar to attorneys and judges, that its adoption as California's res judicata doctrine will seem like meeting an old friend. This familiarity alone should increase the predictability of California's claim preclusion doctrine.

There is another practical reason why adoption of the *Restatement* will increase the predictability of California's res judicata doctrine. When lawyers and judges are called upon to answer a primary rights question, their only sources of guidance are vague treatises and erratic court decisions. In contrast, if lawyers and judges encounter a question as to the proper application of res judicata under the *Restatement*, they can obtain guidance from the clear black-letter rules and exceptions which comprise the *Restatement*. In those applications where the black-letter transactional standard does not provide a clear determination, the *Restatement* provides extensive comments and numerous illustrations to further guide litigants and courts. In short, the *Restatement* approach is more predictable because it contains clearer, more precise, and better explained standards than does the primary rights approach.

B. The Effect of the Adoption of the Restatement *on* Agarwal *and Its Progeny*

Adoption of the Restatement may not automatically resolve all the difficult claim preclusion questions discussed in this Article, but it would provide parties and courts with a simpler, less elastic approach to their resolution. Because the definition of "claim" broadly encompasses all rights of the plaintiff to remedies against a defendant with respect to all or any part of the transaction or "series of connected transactions"[148] out of which the action arose, cases which now struggle with the legacy of *Agarwal* would be more easily resolved.

For example, the conflict over whether dismissal from public employment creates one or two causes of action, as exemplified by the *Craig* and the *Takahashi* lines of cases, would no longer focus on whether the harms suffered constituted one or two primary rights. Under

their claim preclusion doctrine, a large body of judicial interpretations of that test already exist to supplement the blackletter rules contained in the second RESTATEMENT. These numerous judicial interpretations, along with the RESTATEMENT's extensive comments and illustrations, provide much-needed guidance to litigants and trial courts. These considerable pre-existing sources of guidance mean that the oft-construed transactional test should be far more predictable in application than the infrequently construed primary rights theory.

148. The second RESTATEMENT also instructs that what factual grouping constitutes a "transaction," and what groupings constitute a "series of transactions," should be determined pragmatically giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. RESTATEMENT, *supra* note 11, § 24(2); *see also supra* note 19.

the *Restatement*'s transactional standard, a dismissed employee must present for adjudication all rights to remedies against the defendant with respect to the transaction (i.e., the dismissal), or series of connected transactions (i.e., improper treatment preceding or otherwise related to the dismissal) in one proceeding or those rights will be extinguished. Unlike the muddled primary rights analysis, the warning to parties and courts under the *Restatement* is clear: All rights to relief, whether based on state or federal civil rights statutes, tort or contract, statute or common law, and whether seeking reinstatement, back pay, or personal jury damages, must be pursued in the initial proceeding. In the context of dismissal from public employment, this means that all such rights to relief must be pursued through the administrative hearing process and, if unsuccessful there, through a subsequent administrative mandamus lawsuit in superior court.[149] All such rights to relief will be extinguished by the judgment in the first lawsuit unless some exception to the rules of merger and bar dictate otherwise.

The message to litigants is clear: bring all rights to relief relating to the dismissal in the first proceeding or risk losing them. If the plaintiff presents all rights to relief at the administrative hearing level and loses, and then seeks judicial review by administrative mandamus, the *Restatement* advises the plaintiff to present "all rights to relief" before the superior court. Therefore, under the *Restatement*, the appropriate course of litigation conduct is clear and predictable. If the superior court refuses to consider the tort allegations because they are premature as a matter of substantive law, the plaintiff's right to pursue them in a second lawsuit is established by an exception to the rule of bar recognized by the *Restatement*.[150] If the court also determines that it lacks jurisdiction

149. The court of appeal in one recent decision, *Mata v. City of Los Angeles*, 24 Cal. Rptr. 2d 314 (Ct. App. 1993), has indicated that such litigation behavior is currently a procedural *option*, although not a *requirement*. *Id.* at 318-320. In *Mata*, the plaintiff police officer was terminated from employment after disciplinary proceedings by the defendant city. Plaintiff then filed a court action which sought a writ of mandate directing the city to reinstate him, combined with counts for compensatory damages for violation of a federal civil rights statute. The *Mata* court ruled that plaintiff properly joined the administrative mandamus and damage counts in one lawsuit, but noted that he had another procedural option available: The plaintiff could have first sought judicial review of the city's decision pursuant to CODE OF CIVIL PROCEDURE section 1094.5 and then, after prevailing in that proceeding, filed a separate state or federal court action for compensatory damages for wrongful discharge. *Id.* at 318.

150. The RESTATEMENT provides the following blackletter exception to the general rule that a judgment for the defendant bars another action by the plaintiff on the same claim:

to entertain any requests for relief other than reversal of the administrative hearing decision, the *Restatement* again protects the plaintiff's ability to seek damages (for back pay, tort injuries, civil rights violations, etc.) or injunctive relief in a separate proceeding.[151] Because

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> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

RESTATEMENT, *supra* note 11, § 20(2).

This claim preclusion exception provides clear guidance if the superior court decides to dismiss premature tort or civil rights damage counts. A superior court need not, of course, dismiss such premature actions. One way to conserve judicial resources is not to dismiss such damage counts, which public employment cases typically present, but to stay them until after the administrative mandamus count is determined. Once the court rules on the propriety of the administrative determination, it can decide what to do with the plaintiff's requests for damages. If, for example, the superior court rules that the administrative determination was improper, the court may then proceed immediately to resolve the damage counts. This approach may be particularly appropriate in those cases where the factual record is relatively complete and a remand to the administrative agency would be futile because the agency, such as the Commission in *Takahashi v. Board of Educ. of Livingston Union Sch. Dist*., 249 Cal. Rptr. 578 (Ct. App. 1988), *cert. denied*, 490 U.S. 1011 (1989), lacks jurisdiction to award damages or equitable relief other than reinstatement.

151. The RESTATEMENT recognizes a blackletter exception to the general rule against claim-splitting by a plaintiff when the following circumstances exist:

> The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action , and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

RESTATEMENT, *supra* note 11, § 26(1) (c).

The RESTATEMENT's claim preclusion rule, which extinguishes all rights of the plaintiff to remedies against the defendant with respect to the transaction out of which the action arose, is predicated on the assumption that no formal barriers existed against full presentation of the claim in the first action. *Id.* § 26 cmt. c. Where such formal barriers in fact existed and were operative against the plaintiff in the first action, the RESTATEMENT recognizes that it would be unfair to preclude the plaintiff from a second action in which he can present those phases of the claim which he was disabled from presenting in the first action. *Id.* §§ 26 cmt. c, 24 cmt. g. The RESTATEMENT also observes that such formal limitations on a plaintiff's ability to seek all forms of relief in a single action should no longer exist in a modern system of procedure. *Id.* §§ 26 cmt. c, 25 cmt. i. Quite apart from claim preclusion concerns, judicial administration would be more efficient if the California legislature and courts followed this advice with respect to administrative mandamus actions.

The California courts already endorse this exception to the rule against splitting a cause of action in circumstances where the statutory scheme authorizes cumulative remedies and requires a plaintiff to seek certain forms of relief through an administrative process and damages through a court action, but prohibits the plaintiff from seeking both remedies in one proceeding. *See* People v. Damon, 59 Cal. Rptr. 2d 504, 514 (Ct. App. 1996) (relying on § 26(1) (c) of the second RESTATEMENT); Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 323 (Ct. App. 1994) (quoting and relying on § 26(1) (c) of the second RESTATEMENT); *see also* cases cited *supra* note 22.

the *Restatement* clearly instructs litigants as to the appropriate litigation behavior in such cases and clearly advises the courts as to the appropriate treatment of the various requests for relief, the *Restatement* approach to such cases is far more predictable than the current primary rights analysis. The savings in litigant and judicial resources are obvious.

The *Restatement* shifts focus away from the determination of whether the employer's wrongful conduct invaded one or more primary rights and, therefore, away from the unpredictable vagaries of primary rights analysis. The elastic definition of a primary right is replaced by a clear warning to litigants as to what rights to relief must be presented and by predictable consequences if such rights are not raised. The California Supreme Court may need to establish some general guidelines to instruct the lower courts in their treatment of actions which combine requests for damages with judicial review by administrative mandamus,[152] but once such procedural guidelines are established, the application of the res judicata rules and exceptions will be predictable to litigants and courts alike. When such predictability is established, administrative judicial economy will follow.

C. The Effect of the Adoption of the Restatement on the Double-Injury Problem

The proper resolution of the double injury problem exemplified by *Martinez-Ferrer* and *DeRose* may remain uncertain under the Restatement approach, but the debate will focus more properly on policy considerations as opposed to vague distinctions regarding the number of primary rights invaded by the defendant's conduct. The *Restatement*

152. In a typical case of dismissal from public employment, where the plaintiff exhausts the available administrative hearing process but is unhappy with the hearing determination, the plaintiff may wish to pursue several cumulative (i.e., not mutually exclusive) remedies when seeking judicial review in court. These remedies typically include reinstatement in the job through the procedural vehicle of administrative mandamus to reverse the administrative hearing decision, damages for lost pay and for emotional distress or perhaps for violation of civil rights, and possibly a request for injunctive relief to prevent the defendant employer from engaging in certain activity in the future. Absent some substantive or jurisdictional limitation on the plaintiff's ability to seek all such relief in one lawsuit, which limitation would trigger exceptions to claim-splitting, the RESTATEMENT's transactional definition of a cause of action would preclude the plaintiff from seeking cumulative remedies in separate actions. *See supra* notes 22 and 151; *see also* RESTATEMENT, *supra* note 11, § 25 cmt. j.

clearly and generally instructs plaintiffs to seek recovery in one lawsuit of all personal injuries, past and prospective, that may arise out of a single tortious transaction.[153] The doctrine of merger precludes a plaintiff from maintaining a subsequent action to recover increased damages even though the plaintiff lacked information about unexpected injuries and damages at the time of the first judgment.[154] The clear general rule under the *Restatement* is that an injured party, such as the products liability plaintiff in *Martinez-Ferrer*, is limited to one action to recover damages for all possible injuries caused by an actionable wrong including unanticipated serious injuries that first occur long after the date of the initial judgment.[155] But this general rule is not the endpoint of the analysis under the *Restatement*.

The *Restatement* suggests two procedures which may ameliorate the harsh effects of this general rule where a plaintiff attempts to recover increased damages. First, the *Restatement* suggests the possibility of relief from the judgment in exceptional cases by means of direct attack, such as a motion for new trial on newly discovered evidence or other similar procedures for post-judgment relief.[156] Second, Section 26(1)(f) of the *Restatement* states a black-letter exception to the general rule against claim-splitting where "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. . . ."[157] The comments to this section emphasize that this exception applies to a small category of cases involving "extraordinary circumstances" in which "the policies supporting merger or bar may be overcome by other significant policies," and acknowledge that this concept is central to the fair administration of the doctrine of res judicata.[158]

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153. *See* RESTATEMENT, *supra* note 11, §§ 24(1), 25 cmt. c.
154. *See id.* §§ 24(1), 25 cmt. c.
155. *See id.* §§ 25(1), 25 cmt. c.
156. *See id.* § 25 cmt. c.
157. *Id.* § 26(1) (f).
158. *Id.* § 26 cmt. i. In contrast to the RESTATEMENT the California courts do not appear to endorse such a public policy exception to the primary rights doctrine. *See, e.g.*, 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 be a manifest injustice); Robert J. v. Leslie M., 59 Cal. Rptr. 2d 905, 907-8 (Ct. App. 1997) (observing that public policy exceptions to claim preclusion are extremely narrow and have never enjoyed wide approval or frequent application). *But see* Citizens for Open Access to Said and Tide, Inc. v. Seadrift Ass'n, 71 Cal. Rptr. 2d 77 (Ct. App. 1998) (discerning no public policy reason for refusing to invoke res judicata where preclusion of instant suit will not result in any manifest injustice).

Comment f to section 24 of the RESTATEMENT also suggests that in certain cases a change in circumstances—material operative facts occurring after the decision of an action with respect to the same subject matter—may comprise a transaction which may be made the basis of a second action not precluded by the first. RESTATEMENT, *supra*

The adoption of the *Restatement* will not automatically resolve the double-injury problem, but will shift the focus of the courts and litigants away from vague distinctions as to separate primary rights. Instead, the focus will be on considerations of fairness and public policy.[159] These considerations may also be subjective, but they are far more meaningful and relevant to what is really at stake in these double-injury cases: the concerns of judicial economy and of securing fair compensation for the plaintiff counterbalanced by the defendant's interest in finality and repose.[160] By contrast, the current focus on whether the subsequent

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note 11, § 24 cmt. f.

159. The second RESTATEMENT recognizes two other blackletter exceptions to the general rule against claim-splitting which may be relevant in certain types of double-injury cases. Section 26(1)(a) provides for a second action in circumstances where the parties in the first action have agreed that the plaintiff may split her claim. RESTATEMENT, *supra* note 11, § 26(1)(a). Section 26(1)(b) provides for a second action where the court in the first action "expressly reserved the plaintiff's right to maintain the second action." *Id.* § 26(1)(b).

These two exceptions may be useful to the parties or the court in those instances where the parties know there is a possibility that a more serious disease may materialize later, but the probability of the individual plaintiff actually developing this disease is uncertain. In these cases, such as asbestos exposure cases where the plaintiff presently suffers asbestosis and may later develop cancer, both parties and the court may wish to invoke this exception rather than risk over-compensation (if no future disease actually occurs) or under-compensation (if the plaintiff develops a disease later which is more serious than anticipated by the jury) in an all-or-nothing award in the first lawsuit. These consensual exceptions are far less useful, however, in those double-injury cases, such as *Martinez-Ferrer v. Richardson-Merrel, Inc.*, 164 Cal. Rptr. 591 (Ct. App. 1980), and *DeRose v. Carswell*, 242 Cal Rptr. 368 (Ct. App. 1987), where the subsequent injury was not reasonably foreseeable at the time of the first judgment.

160. The double-injury problem is often encountered in asbestos exposure litigation. *See, e.g.*, Buttram v. Owens-Corning Fiberglass Corp., 941 P.2d 71 (Cal. 1997) (collecting cases). A majority of jurisdictions have held that an injured plaintiff may split his cause of action by first bringing an action for present injuries and subsequently asserting, in a another lawsuit, a second cause of action if a separate and distinct disease caused by the same exposure materializes later. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117-21 (D.C. Cir. 1982); Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020 (Md. 1983); Marinari v. Asbestos Corp., 612 A.2d 1021 (Pa. Super. Ct. 1992) (collecting cases), *cited with approval in* Simmons v. Pacor, Inc., 674 A.2d 232, 237 (Pa. 1996); Sheppard v. A.C. & S. Co., 498 A.2d 1126, 1133-34 (Del. Super. Ct. 1985), *aff'd sub nom.*, Keene Corp. v. Sheppard, 503 A.2d 192 (Del. 1986); *see also* ARVIN MASKIN ET AL, ALI-ABA, OVERVIEW AND UPDATE OF EMERGING DAMAGE THEORIES IN TOXIC TORT LITIGATION, 629, 642-49 (1993) (collecting cases). The courts in these cases concluded that the later injury constituted a separate cause of action, for statute of limitations purposes, even though both the initial injury and the later manifested disease were caused by the same wrongful act. *See, e.g.*, *Marinari*, 612 A.2d at 1027-28. These courts concluded that the defendant's interest in repose was counterbalance and outweighed by other factors, such as fairness to the plaintiff, judicial economy, and improvement in the quality of evidence. *See, e.g.*, *Wilson*, 684 F.2d at

injury constitutes a separate primary right is obscuring rather than illuminating these important policy considerations.

D. Judicial Adoption of the Restatement (Second) of Judgments *is Preferable to Legislative Enactment of a Mandatory Joinder of Claims Statute*

Some critics of California's claim preclusion doctrine, most notably Professor Jack H. Friedenthal, have advocated that the California legislature should enact a mandatory joinder of claims statute which would require a plaintiff to join in one lawsuit all claims that arise from the same transaction or occurrence.[161] Because a mandatory joinder of

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119-20; *Marinari*, 612 A.2d at 1027-28. A recent California Court of Appeal decision, Richmond v. A.P. Green Industries, Inc., 78 Cal. Rptr. 2d 356 (Ct. App. 1998), certified for publication but not yet officially published, reached the same conclusion and held that allowing separate causes of action for discrete asbestos exposure diseases does not violate the underlying rationale against splitting causes of action.

Some of these cases indicated that this division of a cause of action for purposes of statutes of limitations may not necessarily apply in the context of res judicata. *See, e.g.*, *Wilson*, 684 F.2d at 117-19. However, other courts relied on the exceptions to the rule against claim splitting recognized in the second RESTATEMENT and ruled that a plaintiff should not be barred, as a matter of res judicata or of statute of limitations, from bringing a second suit for separate and distinct injury at the time of the actual manifestation of the later disease. *See, e.g.*, *Marinari*, 612 A.2d at 1028; Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 519-23 (Fla. Dist. Ct. App. 1985), *review denied*, 492 So. 2d 1331 (Fla. 1986) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (b) & (f) and collecting cases); Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J. 1987) (noting that the single controversy rule will not preclude a second cause of action for future disease even though there has been prior litigation between the parties on different claims based on the same tortious conduct); *In re* Moorenovich, 634 F. Supp. 634, 637 (D. Me. 1986) (applying Maine law); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31 (Ariz. Ct. App. 1987) (ruling that a single cause of action rule will not preclude a later suit for injury resulting from toxic exposure even though there has been past litigation between the parties based on the same conduct).

Commentators also view the purposes of statutes of limitations and of res judicata as essentially the same, and therefore argue that a plaintiff in a toxic exposure case should be permitted to split a cause of action by bringing an action for present injuries and subsequently bringing a second action if a latent disease actually develops in the future. *See, e.g.*, David G. Poston, Note, *Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions*, 14 AM. J. TRIAL ADVOC. 159 (1990) (discussing cases that expressly rejected single cause of action rule); Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989 (1990) (construing § 26(f) of the second RESTATEMENT as authority for claim splitting and concluding that plaintiffs should be permitted to bring a second suit for distinct harms that subsequently materialize); Demidovich, *supra* note 116, at 251-252 (arguing that the statute of limitations holding in *Wilson v. Johns-Manville Sales Corp*. should also apply in the res judicata context); Kim Marie Covello, Note, Wilson v. Johns-Manville Sales, Corp. *and Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule*, 32 CATH .U. L. REV. 471, 492-493 (1981) (suggesting that the *Wilson* court's statute of limitations holding may be extended to res judicata).

161. In 1970, Professor Friedenthal suggested a number of revisions to California's

claims statute would contain the same transactional test as the *Restatement* and would deem any related cause of action waived if not asserted, enactment of such a statute would achieve many of the judicial economy benefits of the *Restatement* in a readily accessible statute.[162] Moreover, these economies would result even if the primary rights theory remained as California's res judicata doctrine.[163]

Although this proposal has merit, there are several reasons why judicial adoption of the *Restatement* is preferable to legislative enactment of a mandatory joinder of claims statute. First, the change to a transactional standard can be obtained more expeditiously by a judicial overruling of primary rights precedent in an appropriate case, without the need for legislative action.[164] Second, a mandatory joinder statute which generally adopts the transactional definition of "related causes of action" of the compulsory cross-complaints statute may encourage plaintiffs, in an abundance of statutorily-induced caution, to allege every

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then-existing joinder of claims, counterclaims, and cross-complaints statutes. One suggestion was that the California legislature enact a mandatory joinder of claims statute which would require a party to assert all causes of action against the opposing party which arise out of the same transaction or occurrence in one action; any such cause of action not plead would be deemed waived and all rights thereon extinguished. *See* Friedenthal, *supra* note 39, at 11-12, 37. Professor Friedenthal advocated that mandatory joinder of claims should be applicable to plaintiff's causes of action as well as to those of defendant. *Id.* Friedenthal argued this compulsory claim joinder statute was necessary because, unlike other jurisdictions, California's common law did not establish compulsory joinder by operation of the principles of res judicata. *Id.*

Professor Friedenthal's various joinder proposals were adopted as recommendations of the California Law Revision Commission in 1970. *See* Jack H. Friendthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 10 CAL. L. REVISION COMM'N REP. 581, 581-619 (1971). Based on these recommendations, the California Legislature amended the CODE OF CIVIL PROCEDURE in 1971 and enacted unlimited permissive joinder of claims for plaintiffs and compulsory cross-complaints for defendants. CAL. CIV. PROC. CODE §§ 426.10-426.60, 427.10 (West 1973); *see also supra* notes 49-50 and accompanying text. However, the legislature rejected the concept of mandatory joinder of claims by plaintiffs. *See* James, *supra* note 8, at 404.

162. *See* Friedenthal, *supra* note 39, at 11-14; James, *supra* note 8, at 408-411.

163. A mandatory joinder of claims statute which requires a plaintiff to assert all causes of action arising out of the same transaction or occurrence would be unconcerned with whether a cause of action was defined as an invasion of a primary right or by some other standard. *See* Friedenthal, *supra* note 39, at 12-14; James, *supra* note 8, at 410-411. Regardless of how a cause of action may be defined, the plaintiff must join them all in one lawsuit because any cause of action not pled will be deemed waived.

164. The California legislature rejected a proposed mandatory joinder of causes of action statute in 1971, despite recommendations of its adoption by the California Law Revision Commission. *See supra* note 160.

conceivable right to relief in one lawsuit. Consequently, unlike the more detailed rules and exceptions of the *Restatement*, such a statute may foster a different kind of diseconomy: vexatious litigation and judicial inefficiency caused by the unnecessary inclusion of allegations in complaints which must be responded to by defendants and weeded out by courts.[165]

The most important reason why judicial adoption of the *Restatement* as California's claim preclusion law is preferable to legislative enactment of a mandatory joinder of claims statute has to do with the comprehensive nature of the *Restatement* itself. The *Restatement*, with its black-letter rules and exceptions, its comments and illustrations, provides more guidance to courts and litigants, and advises on many more difficult problems than could practicably be addressed by a statute. The *Restatement* provides clear guidance as to when certain rights to relief need *not* be alleged because they are preserved for future proceedings by a black-letter exception to the general rule against claim-splitting. A mandatory joinder of claims statute would likely not address all the exceptions to the requirements of joinder and, if it did, it would in effect be a codification of the *Restatement*'s rules and exceptions. The coverage of such a statute would go far beyond mandatory joinder of claims and become, by necessity, a comprehensive res judicata statute. A simpler and more effective legislative solution would be for the California legislature to enact a statute which declares: "The *Restatement (Second) of Judgments* is California's res judicata law!" As noted above, the California Supreme Court can more readily and expeditiously make this declaration by judicial pronouncement. Such judicial action would also render legislative adoption of a mandatory joinder of claims statute, or of a comprehensive res judicata statute, unnecessary.[166]

For years commentators have criticized California's primary rights approach to res judicata as uncertain and unpredictable.[167] The

165. Professor Friedenthal acknowledged that mandatory joinder of claims may cause unnecessary litigation, but argued that a properly drafted statute would minimized this danger. *See* Friedenthal, *supra* note 39, at 12. However, he also acknowledged the problems of drafting comprehensive mandatory joinder provisions. *Id.* at 17.

166. Professor Friedenthal recognized that the chief argument against mandatory joinder of claims is that, in the majority of states, "the rules of res judicata make it unnecessary" because "the scope of a single cause of action is held broad enough to cover all claims arising from a single set of transactions or occurrences." *Id.* at 12.

167. 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, 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.

California Supreme Court often has been an independent leader in many areas of jurisprudence. But in the area of res judicata, the time has come for it to follow the federal courts and the vast majority of states. The Court should recognize, as have these other jurisdictions, that improvement in predictability and, therefore, judicial economy is more important than preserving tradition. The California Supreme Court should adopt the *Restatement (Second) of Judgments* as California's claim preclusion doctrine, as it already has done with respect to issue preclusion.[168]

412, 414-419 (1952); James, *supra* note 8 at 351; *see also* Friedenthal, *supra* note 39; RESTATEMENT, *supra* note 11, § 24 cmt. a. Judge Clark criticized Pomeroy's primary rights view of a cause of action as vague, as susceptible to a broad or narrow interpretation by a court, and as an imprecise measure of the limits of a single cause of action. *See* CLARK, *supra*, at 130, 135-36. The primary rights definition of a cause of action, Judge Clark observed, "gives a promise of precision and definiteness, which is not fulfilled in reality." *Id.* at 134. Judge Clark recommended replacement of the primary rights definition of a cause of action with an approach based on an "aggregate of operative facts," an approach related to but not identical with the "same transaction" test. *Id.* at 137-40.

168. *See* cases cited *supra* notes 2 and 74. Formal adoption of the second RESTATEMENT as California's *claim* preclusion doctrine may also improve the predictability of California's *issue* preclusion doctrine. As discussed in Heiser, *Collateral Estoppel*, *supra* note 2, the California courts may have applied collateral estoppel in an over-inclusive manner in order to counter the substantive inefficiencies of the primary rights doctrine. *Id.* at 527. In other words, the courts may have broadly defined the "issue" foreclosed by prior adjudication in order to achieve desired judicial economies, which could more properly have been obtained through a claim preclusion doctrine which minimized the possibility of multiple lawsuits arising from unitary wrongful conduct. *Id.* at 543-46.

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.

RESTATEMENT, *supra* note 11, § 27 intro. note.

The RESTATEMENT's observation may well have been directed at California's narrow definition of a "claim" and 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 of the California courts to rely on collateral estoppel to achieve substantive economies. *See* Heiser, *Collateral Estoppel*, *supra* note 2, at 558.