

# FINDING FAULT WITH DEFAULTS: NEW YORK COURTS' INCONSISTENT APPLICATION OF ISSUE PRECLUSION TO DEFAULT JUDGMENTS

*David Noland\**

## INTRODUCTION

Due process entitles every party to his “day in court.”<sup>1</sup> However, a “day” in court cannot be allowed to stretch into an interminable stay in court. In particular, due process does not entitle a party to litigate until he receives a favorable outcome.<sup>2</sup> Justice, efficiency, and fairness to other parties demand that there be an end to litigation at some point. The twin doctrines of claim preclusion<sup>3</sup> and issue preclusion<sup>4</sup> have developed over time to effect these goals.<sup>5</sup>

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\* Associate Editor, *Cardozo Law Review*. J.D. Candidate (June 2010), Benjamin N. Cardozo School of Law; A.B., Bowdoin College, 2005. I would like to thank Professor Maggie Lemos for her advice and comments, and Rafael Guthartz and the rest of the *Cardozo Law Review* staff for their edits. Special thanks to my parents and Sara for all of their encouragement and support.

<sup>1</sup> See *Richards v. Jefferson County*, 517 U.S. 793, 798 n.4 (1996) (“The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.”).

<sup>2</sup> 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 522 (12th ed. 1866) (“[I]t is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.”).

<sup>3</sup> The doctrine of claim preclusion states that when a final judgment has been rendered on a claim, successive litigation on that claim is barred, whether or not relitigation of the claim would involve the same issues. See, e.g., *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

<sup>4</sup> The doctrine of issue preclusion states that when an issue has been actually litigated and resolved by a valid court determination, then relitigation of that issue is barred in subsequent suits, whether on the same or different claims. *Id.* Claim preclusion and issue preclusion together are referred to as *res judicata*. *Id.* The modern trend is to use the terms claim preclusion and issue preclusion, replacing the former use of the terms of “merger” or “bar” for claim preclusion, and “collateral estoppel” or “direct estoppel” for issue preclusion. *Id.* at 2171 n.5. Further complicating matters, some courts instead use the term *res judicata* to refer to claim preclusion. See, e.g., *Sartin v. Macik*, 535 F.3d 284 (4th Cir. 2008). This Note will use the modern terminology of claim and issue preclusion, unless directly citing from a work using the older terminology.

<sup>5</sup> See *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent

However, to the extent that the contours of these doctrines are unclear, the doctrines can serve to exacerbate the very problems they exist to combat by engendering further uncertainty and unfairness to litigants who cannot know what the law requires. One example of such uncertainty is reflected by a split in authority that has developed regarding the application of issue preclusion to default judgments in New York.<sup>6</sup> Default judgments are issued because of two distinct forms of inaction by a defendant:<sup>7</sup> either a defendant never appears to contest an action or initially appears and then neglects to proceed with the normal course of litigation.<sup>8</sup> One line of New York cases<sup>9</sup> allows issue preclusion to apply to default judgments, following a well-established history.<sup>10</sup> These cases treat a default as comparable to any other judgment on the merits. Another line of cases,<sup>11</sup> on the other hand,

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decisions.”); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1403 (7th Cir. 1987) (“One of the fundamental purposes of the doctrine of *res judicata* is that of repose for litigants. *Res judicata* protects a victorious party from being dragged into court time and time again by the same opponent on the same cause of action.” (citation omitted)).

<sup>6</sup> “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” N.Y. C.P.L.R. 3215(a) (McKinney 2009).

<sup>7</sup> See BLACK’S LAW DICTIONARY 300 (8th ed. 2004) (defining “default judgment” as “1. A judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claim,” and “2. A judgment entered as a penalty against a party who does not comply with an order, esp. an order to comply with a discovery request”).

<sup>8</sup> See, e.g., N.Y. C.P.L.R. 3215(a); 50 C.J.S. *Judgments* § 253 (2009).

<sup>9</sup> See, e.g., *Gaston v. Am. Transit Ins. Co.*, 835 N.Y.S.2d 369, 370 (App. Div. 2007) (“It is fundamental that . . . a default judgment bars the litigation of issues that were, or could have been, determined in the prior action.”); *Brown v. Suggs*, 834 N.Y.S.2d 526, 527 (App. Div. 2007) (“Although two of defendant’s seven causes of action were previously dismissed in an order entered on defendant’s default, that order has preclusive effect since defendant deliberately refused to participate in the proceedings leading to the default dismissal.”); *Academic Health Prof’ls Ins. Ass’n v. Lester*, 818 N.Y.S.2d 62, 64 (App. Div. 2006) (“Defendant should not be allowed to relitigate his liability for legal malpractice where the prior legal malpractice action, involving the identical issues and parties, resulted in an award of summary judgment against himself, . . . the default on the summary judgment motion notwithstanding.”).

<sup>10</sup> See, e.g., Maurice Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN’S L. REV. 165, 174-75 (1969) (“The New York decisions in the most common cases . . . have indicated that defaults will not only preclude proof on issues that were alleged and were ‘material’ or ‘essential’ matters in the former suit, but that they will also foreclose matters that might have been raised and decided. . . . Court of Appeals decisions tracing back nearly a century have continued to echo that view . . .” (footnotes omitted)) (discussing *Gates v. Preston*, 41 N.Y. 113 (1869), *Reich v. Cochran*, 45 N.E. 367 (N.Y. 1896), and *Barber v. Kendall*, 53 N.E. 1 (N.Y. 1899)).

<sup>11</sup> See, e.g., *Aguilar v. Jacoby*, 827 N.Y.S.2d 77 (App. Div. 2006) (“[A]n order entered upon a party’s default in appearing, here, to oppose the motion to dismiss in the prior action, is not upon the merits.”); *Chambers v. City of New York*, 764 N.Y.S.2d 708, 712 (App. Div. 2003) (“[I]t is well settled that collateral estoppel applies only ‘to matters actually litigated and determined in a prior action. If the issue has not been litigated, there is no identity of issues between the present action and the prior determination. An issue is not actually litigated if there has been a default.’” (quoting *Kaufman v. Lilly Co.*, 482 N.E.2d 63, 68 (N.Y. 1985))); *Holt v. Holt*, 692 N.Y.S.2d 451, 452 (App. Div. 1999) (“The judgment obtained by the plaintiff as against the defaulting defendant is not entitled to collateral estoppel effect against the nondefaulting defendants who would otherwise be denied a full and fair opportunity to litigate.”).

follows the rule laid down in the *Restatement (Second) of Judgments*, which states that issues decided by a default judgment are not actually litigated and thus do not give rise to issue preclusion.<sup>12</sup>

These cases do not distinguish between the two different forms of default judgments. The first, most common type is known as a “simple default,” and is a default in appearance, when the defaulting party does not answer the suit or appear in the action during its pendency.<sup>13</sup> There are a variety of reasons why a party may default in appearance, including the expense of litigating the suit, a small amount in controversy, or a difficult forum for litigation.<sup>14</sup> The second type of default judgment is a judgment entered after a party appears but then fails to proceed with the course of the action or fails to comply with court orders.<sup>15</sup> The purpose of a default judgment in these circumstances is to act as a penalty for the defaulting party’s failure to act.<sup>16</sup>

Aside from failing to distinguish between the kinds of default judgments, the split in applying issue preclusion to default judgments has deleterious effects for the courts and for litigants. Issue preclusion, even when justified, deprives a party of an opportunity to be heard in court. The rationale behind the principle is that a societal desire for finality in litigation, a reduction of costs to the court system, and a sense of peace for parties at the conclusion of a suit outweigh the societal interest in allowing the precluded party an additional opportunity to be

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<sup>12</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982) (“In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.”). Section 27 addresses the general rule for issue preclusion, stating “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”

<sup>13</sup> See N.Y. C.P.L.R. 3215 practice cmt. 1 (McKinney 2004) (practice commentary by David D. Siegel) (“The most common kind of default is the defendant’s default for failure to appear in the action at all, i.e., failure to respond to the summons.”).

<sup>14</sup> See, e.g., *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1876) (“Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time.”).

<sup>15</sup> See, e.g., N.Y. C.P.L.R. 3215 practice cmt. 1 (McKinney 2004) (practice commentary by David D. Siegel) (“[T]he defendant can default by other means as well, after initially appearing, such as by not appearing on the day set for trial. These and any other situations in which the court directs a dismissal for the defendant’s omission to proceed, such as where he willfully fails to make disclosure, give rise to a full default against the defendant in the action itself.” (citations omitted)).

<sup>16</sup> See, e.g., *Angus v. Wald (In re Wald)*, 208 B.R. 516, 552 (Bankr. N.D. Ala. 1997) (“Simple default judgments are distinguishable from penalty default judgments . . . rendered for purposeful evasion of service, refusal to participate in discovery, and willful failure to appear for trial.”).

heard.<sup>17</sup> If litigants and their attorneys cannot anticipate preclusion, however, these societal interests will not be advanced.<sup>18</sup> There will not be a sense of finality in litigation if the parties, attorneys, and judges are unsure of the preclusive effect of the judgment. Any reduction of litigation costs in the court system by virtue of expanded preclusion will be offset by the need for litigants to regularly litigate the issue of preclusion—as there is no clear standard, each case will need to be determined on the individual circumstances, after extensive judicial factfinding and motion practice. On the flip side, some judges may choose not to apply preclusion in cases where it is warranted, further adding to litigation costs. In terms of repose for parties, much like the lack of finality, there will be no feeling of peace if the party is unsure about the preclusive effects of the judgment.

Part I of this Note examines the historical development of the doctrine of issue preclusion and explores the major steps in the progression of the doctrine in New York. This section also takes a closer look at two of the most important developments in issue preclusion in recent years—the decline of the requirement of mutuality of estoppel and the spread of the theory of virtual representation to bind non-parties. Part II analyzes the application of issue preclusion to default judgments, and looks at some of the arguments for and against allowing such application. This section also looks at the New York cases that have dealt with the issue, and examines the confusion in the caselaw in this state. Part III proposes a new standard for New York courts to use.

This Note argues that New York courts should adopt a new, clearer standard for the application of issue preclusion to default judgments. Specifically, this Note will argue that, consistent with the *Restatement* rule, the goals behind issue preclusion are not furthered when preclusion is applied to “simple defaults.” As such, issue preclusion should never be applied to a judgment obtained from a simple default.<sup>19</sup> However, in situations where a party appears, contests the action, then later defaults,

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<sup>17</sup> See *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”).

<sup>18</sup> See Robert Ziff, Note, *For One Litigant’s Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 906 (1992) (“[The] benefits of res judicata are based on the prospect of future preclusion affecting the behavior of both the parties and future litigants. When preclusion is unforeseeable, it cannot influence the actions of anyone and, worse, causes confusion that is counterproductive. Thus, res judicata has a particular need for clear, well-known rules.”).

<sup>19</sup> See Angus, 208 B.R. at 552 (“Because a great deal of neither the state court’s resources nor the plaintiff’s resources are expended in a simple default situation, the interest in having issues fully passed upon by a competent tribunal outweighs the interests in conserving judicial resources and avoiding undue burden on a plaintiff posed by multiple lawsuits involving the same issues.”).

issue preclusion may be appropriately applied to that judgment.<sup>20</sup> In those circumstances, the onus should be on the defaulting party to show in a later suit that issue preclusion should not apply by demonstrating a reasonable excuse for the default.<sup>21</sup> If a party defaults after appearing in an action and cannot demonstrate a reasonable excuse for such a default, then issue preclusion should be applied to that judgment in any later action.

## I. HISTORICAL BACKGROUND AND DEVELOPMENT OF ISSUE PRECLUSION

### A. *General Countours of Issue Preclusion*

Issue preclusion, like the broader theory of *res judicata*, is a judge-made common law concept, reflecting the judicial system's belief in the need for some form of finality in litigation.<sup>22</sup> *Res judicata* deals primarily with issues of fact resolved in a prior action, unlike *stare decisis*, which deals with prior rulings of law.<sup>23</sup>

The distinction between claim preclusion and issue preclusion has long been recognized,<sup>24</sup> if not always clearly delineated.<sup>25</sup> Under the doctrine of claim preclusion, once the outcome of a claim has been determined in a court of valid jurisdiction, that claim cannot be litigated

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<sup>20</sup> *Id.* (“[I]n the penalty default situation, if the interest in having the issues fully determined is actually thwarted by the defendant’s own contumacy, application of collateral estoppel to the resulting judgment when a subsequent proceeding is brought on the same issues is not unfair.”).

<sup>21</sup> New York courts already have experience in evaluating reasonable excuses for default, as proof of a reasonable excuse is part of the standard for vacating a default judgment. *See* N.Y. C.P.L.R. 5015(a)(1) (Mckinney 2009); *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 492 N.E.2d 116, 118 (N.Y. 1986) (“A defendant seeking to vacate a default under [C.P.L.R. section 5015(a)(1)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action.”). While it is true that “[w]hat constitutes a reasonable excuse for a default lies within the sound discretion of the trial court,” *Vasquez v. N.Y. City Hous. Auth.*, 859 N.Y.S.2d 195, 196 (App. Div. 2008), such a body of existing caselaw will be useful for judges to evaluate reasonableness going forward. *See infra* Part III.B.

<sup>22</sup> *See* Rosenberg, *supra* note 10, at 166 (“At the core of *res judicata* is the idea that society’s interests are better served by foreclosing repetitious litigation than by permitting litigants to show that the truth is otherwise than as found or assumed in a prior action.”).

<sup>23</sup> *Id.*

<sup>24</sup> *See, e.g.,* *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876) (“[T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.”).

<sup>25</sup> *See, e.g.,* *State v. Speidel*, 392 N.E.2d 1172, 1174 (Ind. Ct. App. 1979) (“[We] enter the miasmic land of *res judicata* where historic marsh vapors obscure concepts and semantic footing is slippery.”).

again whether or not the second claim raises the same issues as the first.<sup>26</sup> For example, consider a car accident between A and B, after which A sues B for her injuries alleging that B was negligent in causing the accident. If A recovers a small sum for minor injuries, but later realizes her injuries are more severe than previously thought, she could not bring another action against B based on the accident.<sup>27</sup>

Issue preclusion, on the other hand, is not a complete bar, but rather bars the relitigation of any issue that is actually litigated and determined, and essential to the judgment, whether on the same or a different claim.<sup>28</sup> In order to invoke issue preclusion, three general elements must be shown: the issues in the two suits are identical, the determination of the issue was necessary to the first judgment, and the issue was actually litigated.<sup>29</sup> As an example, consider again the car accident between A and B. A sues B for negligence, alleging that B was speeding and that B's speeding caused the accident. If B is victorious after trial and then files suit himself against A for negligence, A cannot invoke as a defense B's negligence. The earlier trial had determined the issue of B's negligence in B's favor, and so A cannot relitigate that issue in the second trial.<sup>30</sup>

Despite its ancient pedigree, issue preclusion has not been a static doctrine but rather has grown and developed over time. The general trend has been towards broadening the scope of preclusion. Two of the major developments—the abandonment of the requirement of mutuality of estoppel, and the growth of the “virtual representation” theory in place of traditional notions of privity—have important ramifications for evaluating the propriety of applying issue preclusion to default judgments.

### 1. The Decline of Mutuality of Estoppel

The doctrine of mutuality of estoppel stated that issue preclusion would only be permitted if the party seeking to use preclusion could also have been bound by the prior decision had it turned out the other way.<sup>31</sup> As an example, let us return to our car accident between A and

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<sup>26</sup> See generally *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001); RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

<sup>27</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. b.

<sup>28</sup> *New Hampshire*, 532 U.S. at 748-49; RESTATEMENT (SECOND) OF JUDGMENTS § 27.

<sup>29</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27.

<sup>30</sup> See *id.* cmt. c.

<sup>31</sup> See Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 REV. LITIG. 391, 403 (1993) (“Traditionally the law of collateral estoppel required mutuality: because only parties could be bound, only parties could invoke the benefits of the judgment.”).

B, this time with C as a passenger in A's car. In the first case, A sues B, alleging B's negligence in speeding caused the accident and A's subsequent injuries, and A is victorious. In the second case, C wants to sue B, also alleging that B's negligence caused the accident and C's injuries. Under the doctrine of mutuality of estoppel, C could not use the first judgment to establish B's negligence (had B been victorious in the first case, he could not have used the judgment against C because C had never had a day in court to make her case). However, if mutuality of estoppel is not required, then C could use the first adjudication—that B was negligent in causing the accident—to establish B's negligence in her suit. At that point, C would only need to show that B's negligence caused C's injuries.

The requirement of mutuality of estoppel was roundly criticized by both courts and commentators as being logically incoherent and riddled with exceptions,<sup>32</sup> and it was eventually abandoned in most jurisdictions.<sup>33</sup> If a party has had a full and fair opportunity to contest the issue of negligence, it is illogical to allow him a second chance to contest the issue solely because his new opponent would not have been bound by a prior decision going the other way.

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<sup>32</sup> See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (“In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources.”); *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942) (“No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend.”); 3 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 579 (Fred B. Rothman & Co. 1995) (1827) (describing the rule of mutuality as “a maxim which one would suppose to have found its way from the gaming-table to the bench”).

<sup>33</sup> See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (allowing nonmutual offensive preclusion in the federal courts); *Blonder-Tongue*, 402 U.S. at 313 (allowing nonmutual preclusion in the federal courts); *Ill. State Chamber of Commerce v. Pollution Control Bd.*, 398 N.E.2d 9, 11-12 (Ill. 1979) (“The recent trend in the law in this area is to discard the identical-parties mutuality rule entirely and to require that only one party or his privy, the one against whom estoppel is attempted to be used, be identical in the second action . . . .”); *Commonwealth v. Stephens*, 885 N.E.2d 785, 791 (Mass. 2008) (“Historically, mutuality of the parties was required in order for collateral estoppel to apply, a requirement now abandoned in civil cases.” (citation omitted)); *Waggoner*, *supra* note 31, at 403 (“Over the last half century the mutuality requirement has been dropped from collateral estoppel by many jurisdictions.”). *But see* *Jones v. Blanton*, 644 So. 2d 882, 886 (Ala. 1994) (“Although many courts, including the Federal courts, have dispensed with the mutuality requirement, it remains the law in Alabama.”); *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992) (“Although the principle of mutuality has been abandoned in numerous jurisdictions, this court has applied the mutuality rule as a prerequisite to the application of collateral estoppel.” (citation omitted)).

## 2. The Growth of “Virtual Representation” as a Means of Binding Non-Parties

A general rule of issue preclusion, and of American jurisprudence in general, is that a party is not bound by a judgment or precluded by a decision unless he was a party to the earlier decision.<sup>34</sup> One of the exceptions to this rule is when a litigant is considered to be in privity with a party to a former action.<sup>35</sup> In New York, privity has been described as “an amorphous concept not easy of application,” lacking a “single well-defined meaning.”<sup>36</sup> In the realm of preclusion, privity generally refers to a narrow set of close legal relationships that would justify binding a nonparty to a prior decision.<sup>37</sup> These relationships include preceding and succeeding owners of property, bailee and bailor, and assignee and assignor.<sup>38</sup> Courts should carefully scrutinize the relationship between parties to determine whether preclusion would be justified against a litigant that had not been a party to the previous action.<sup>39</sup>

Moving beyond traditional notions of privity, some jurisdictions have utilized a theory of “virtual representation” as a means of expanding nonparty preclusion.<sup>40</sup> The basis for the theory is that when one party is so aligned with the interests of later parties so as to be virtually their representative, a judgment against that party should also bind the other parties.<sup>41</sup> Returning to the example of a car accident, virtual representation might arise in a situation where A collides with B while A has multiple passengers (C, D, and E) in the car with her. C files a suit against B for personal injury and loses. B could then argue that D and E should be precluded from pursuing a suit against B, as C’s interests were so closely aligned with those of D and E that C virtually

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<sup>34</sup> *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”); *see also* *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

<sup>35</sup> As pointed out in *Taylor v. Sturgell*, the term privity has been used to describe both a set of substantive legal relationships that would justify preclusion, and any situation where non-party preclusion would be applied. 128 S. Ct. at 2172 n.8.

<sup>36</sup> *Buechel v. Bain*, 766 N.E.2d 914, 920 (N.Y. 2001) (quoting *Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997)).

<sup>37</sup> *See* R. Jason Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 SANTA CLARA L. REV. 691, 700-02 (1998).

<sup>38</sup> *Taylor*, 128 S. Ct. at 2172.

<sup>39</sup> *Buechel*, 766 N.E.2d at 920.

<sup>40</sup> *See* 18A CHARLES ALAN WRIGHT & ARHTUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4457 (3d ed. 2008); *see also* Richards, *supra* note 37, at 706.

<sup>41</sup> *See* Richards, *supra* note 37, at 706-07.

represented them in the earlier suit. This argument by B would be strengthened if there were additional factors at work aside from just adequacy of representation—for example, if it seemed that D and E had waited to file suit so as to use C’s suit as a test case, or if D and E had participated in the earlier suit in some way.<sup>42</sup> While the theory of virtual representation has been established since the eighteenth century in the probate context,<sup>43</sup> only recently has it expanded outside of that specific realm.<sup>44</sup> The expansion of virtual representation has been criticized as unnecessary and unfair to litigants.<sup>45</sup>

In 2008, in *Taylor v. Sturgell*,<sup>46</sup> the Supreme Court of the United States rejected the theory of virtual representation in the federal courts. Prior to this decision, several circuits had adopted the theory in varying forms.<sup>47</sup> In *Taylor*, Taylor had filed a Freedom of Information Act (FOIA) request with the Federal Aviation Administration seeking certain documents regarding an antique aircraft.<sup>48</sup> When his request was not granted, Taylor filed suit seeking the documents.<sup>49</sup> Less than a month before this suit, Taylor’s friend Herrick had lost an appeal to the Tenth Circuit of a denial of an identical FOIA request.<sup>50</sup> The district court, and then the D.C. Circuit, both held that Herrick was the virtual representative of Taylor, and thus Taylor’s suit was barred.<sup>51</sup> The Supreme Court reversed and disapproved the various forms of virtual representation that had been used in the federal courts, stating that the preclusive effects for a nonparty should continue to be determined by established narrow grounds for nonparty preclusion.<sup>52</sup> The *Taylor* decision, however, does not spell the end of virtual representation—as a

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<sup>42</sup> See WRIGHT & MILLER, *supra* note 40.

<sup>43</sup> “Probate” is defined as “[t]he judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.” BLACK’S LAW DICTIONARY 1239 (8th ed. 2004). The use of virtual representation in this context stems from the need “to establish a procedure that will bind persons unknown, unascertained, or not yet born.” WRIGHT & MILLER, *supra* note 40.

<sup>44</sup> See Richards, *supra* note 37, at 706-07.

<sup>45</sup> See, e.g., *id.* at 709 (“As a result of its limited approval and application, a credible argument may be made that the doctrine of virtual representation should be discarded.”); Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty’s Claim*, 68 TUL. L. REV. 1303, 1305-06 (1994) (“The doctrine of virtual representation potentially violates traditional rules of due process by denying nonparties their rightful day in court.”).

<sup>46</sup> 128 S. Ct. 2161 (2008).

<sup>47</sup> *Id.* at 2169-70, 2170 n.3 (noting that the Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits had adopted some form of a virtual representation test).

<sup>48</sup> *Id.* at 2167-69.

<sup>49</sup> *Id.* at 2168-69.

<sup>50</sup> *Id.* at 2167-68.

<sup>51</sup> *Id.* at 2169-70. The district court reached this conclusion by applying the Eighth Circuit’s seven-factor test for virtual representation. *Id.* at 2169. The D.C. Circuit affirmed, but announced its own five-factor test for determining virtual representation. *Id.* at 2169-70.

<sup>52</sup> *Id.* at 2178.

matter of federal common law, the decision only applies to federal courts.<sup>53</sup> Several states have also used virtual representation to bind nonparties to previous decisions.<sup>54</sup>

B. *Development of the Doctrine of Issue Preclusion in New York*

In New York, the basic principles of claim and issue preclusion have long been entrenched in the common law.<sup>55</sup> An oft-cited passage written by Chief Judge Cardozo in 1929 stands as an accurate statement of the doctrine in the early part of the twentieth century.<sup>56</sup> Under this earlier doctrine, issue preclusion would only be permitted if there was mutuality of estoppel;<sup>57</sup> that is, if the one claiming preclusion could also have been bound by the prior decision, had it turned out the other way.<sup>58</sup> The New York Court of Appeals gradually chipped away at the requirement,<sup>59</sup> ultimately noting in *B.R. DeWitt, Inc. v. Hall*<sup>60</sup> that “[the rule of mutuality of estoppel] has been so undermined as to be inoperative”<sup>61</sup> and proclaiming the doctrine “a dead letter.”<sup>62</sup>

This development led into the court’s grand proclamation in 1969, in *Schwartz v. Public Administrator*,<sup>63</sup> that “New York law [has] arrived

<sup>53</sup> *Id.* at 2171.

<sup>54</sup> *See, e.g., Alvarez v. May Dep’t Stores Co.*, 49 Cal. Rptr. 3d 892, 899-901 (Cal. Ct. App. 2006) (“Collateral estoppel requires that the party in the earlier case have interests sufficiently similar to the party in the later case, so that the first party may be deemed the ‘virtual representative’ of the second party. . . . The emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion.” (citation omitted)); *Beahm v. 7-Eleven, Inc.*, 672 S.E.2d 598 (W. Va. 2008); *see also* 50 C.J.S. *Judgments* § 1126 (2009) (collecting cases).

<sup>55</sup> *See, e.g., Gates v. Preston*, 41 N.Y. 113, 114 (1869) (“As a general rule, the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties upon the same question, in another court.”).

<sup>56</sup> *See Schuykill Fuel Corp. v. B&C Nieberg Realty Corp.*, 165 N.E. 456, 457 (N.Y. 1929) (“A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. It is not conclusive, however, to the same extent when the two causes of action are different, not in form only, but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined.”).

<sup>57</sup> *See Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) (“It is a principle of general elementary law that the estoppel of a judgment must be mutual.”).

<sup>58</sup> *See, e.g., Waggoner, supra* note 31, at 403; Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607 (1926).

<sup>59</sup> *See B.R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195, 197-98 (N.Y. 1967) (discussing progression of cases); *see also Good Health Dairy Prods. Corp. v. Emery*, 9 N.E.2d 758 (N.Y. 1937); *Liberty Mut. Ins. Co. v. George Colon & Co.*, 183 N.E. 506 (N.Y. 1932).

<sup>60</sup> 225 N.E.2d 195 (N.Y. 1967).

<sup>61</sup> *Id.* at 196.

<sup>62</sup> *Id.* at 198.

<sup>63</sup> 246 N.E.2d 725 (N.Y. 1969).

at a modern and stable statement of the law of Res judicata. . . . [T]he sound principle that, where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one.”<sup>64</sup> The decision in this case adopted the so-called “full and fair opportunity” test for application of issue preclusion.<sup>65</sup> Under this test, the two elements necessary to invoke issue preclusion are an identity of issues, and a full and fair opportunity to contest the controlling decision.<sup>66</sup> The burden of showing identity of issues, and that the issue in the first action was necessarily decided, rests on the party seeking preclusion.<sup>67</sup> Conversely, the burden rests on the non-moving party to show that he did not have a full and fair opportunity to contest the decision said to be controlling.<sup>68</sup> The court listed several factors to be considered in determining whether a party did indeed have a full and fair opportunity, including the size of the claim, the forum of the prior litigation, potential new evidence, and the foreseeability of future litigation,<sup>69</sup> though it did not intend those factors to be a rigid test.<sup>70</sup>

The formulation in *Schwartz* remains the controlling doctrine in New York today.<sup>71</sup> The Court of Appeals has not deviated from the two requirements of the *Schwartz* test, though there have been various decisions further developing the rule. In these decisions, among others,

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<sup>64</sup> *Id.* at 727-28.

<sup>65</sup> *Id.* at 729 (“[There are] but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.”).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 730.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 729 (“A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.”).

<sup>70</sup> *Id.* at 729-30 (“A decision whether or not the [party] had a full and fair opportunity to litigate . . . in the prior action requires an exploration of the various elements which make up the realities of litigation. . . . No one would contend that the doctrine of collateral estoppel should be applied rigidly.”); *see also* *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 527 N.E.2d 754, 756 (N.Y. 1988) (“[T]hese principles are not to be mechanically applied as a mere checklist. Collateral estoppel is an elastic doctrine and the enumeration of these elements is intended as a framework, rather than a substitute, for analysis. . . . In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings.”).

<sup>71</sup> *See, e.g.*, *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 730 (2d Cir. 2001) (applying New York law (“The New York Court of Appeals set forth what is required before invoking collateral estoppel in [*Schwartz*].”)); *Marotta v. Hoy*, 866 N.Y.S.2d 415, 417 (App. Div. 2008); *McDonald v. Rose*, 830 N.Y.S.2d 765, 767 (App. Div. 2007).

the court has reversed its previous stance and allowed a criminal conviction to have issue preclusive effect for its underlying facts in a later civil suit,<sup>72</sup> has declined to give a conviction of a petty offense issue preclusive effect in a later civil suit,<sup>73</sup> has allowed certain administrative decisions to be accorded preclusive effects in a later suit,<sup>74</sup> and has addressed the “amorphous” concept of privity in issue preclusion.<sup>75</sup> Recently, the New York Court of Appeals has twice disclaimed the use of virtual representation to bind nonparties, though in neither case did it directly rule on the doctrine.<sup>76</sup> However, the dissent in the first of those cases accused the majority of implicitly applying virtual representation in the decision.<sup>77</sup> With a large volume of litigation,<sup>78</sup> and the vague and ill-defined nature of privity,<sup>79</sup> it is certainly possible that preclusion by means of virtual representation may spread to New York courts. Nonetheless, the basic rule for application of issue preclusion has remained as stated in *Schwartz*.<sup>80</sup>

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<sup>72</sup> *S.T. Grand, Inc. v. City of New York*, 298 N.E.2d 105 (N.Y. 1973).

<sup>73</sup> *Gilberg v. Barbieri*, 423 N.E.2d 807 (N.Y. 1981).

<sup>74</sup> *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487, 489-90 (N.Y. 1984) (“[T]he doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies, when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law.” (citations omitted)).

<sup>75</sup> *Buechel v. Bain*, 766 N.E.2d 914 (N.Y. 2001).

<sup>76</sup> *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 894 N.E.2d 1, 13 n.16 (N.Y. 2008) (“Our holding is in accord with the U.S. Supreme Court’s recent rejection of ‘virtual representation’ as a basis for claim preclusion under federal common law.”); *Buechel*, 766 N.E.2d at 922 (“We do not adopt the so called ‘Virtual Representation Doctrine.’”).

<sup>77</sup> *Buechel*, 766 N.E.2d at 931 (Levine, J., dissenting) (“The majority’s rationale . . . amounts to nothing more than an application of the broad-form ‘Virtual Representation Doctrine’ . . .”).

<sup>78</sup> At the end of summer 2006, the Civil Branch of the New York County Supreme Court alone had 37,000 pending cases. See New York State Supreme Court, General Overview of the Court, [http://www.nycourts.gov/suptctmanh/General\\_Overview\\_of\\_the\\_Court.htm](http://www.nycourts.gov/suptctmanh/General_Overview_of_the_Court.htm). (last visited Nov. 20, 2009).

<sup>79</sup> *Buechel*, 766 N.E.2d at 920.

<sup>80</sup> *Schwartz v. Pub. Adm’r*, 246 N.E.2d 725, 729 (N.Y. 1969) (“[T]here are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.”).

## II. APPLICATION OF ISSUE PRECLUSION TO DEFAULT JUDGMENTS

### A. *Historical Rule—Default Judgments Are Entitled to Issue Preclusive Effects*

Default judgments were historically given preclusive effect.<sup>81</sup> The main theoretical justification for this doctrine was that by defaulting, a defendant admitted the truth of the allegations against him.<sup>82</sup> This implied admission operated the same as a judgment on the merits, and thus issue preclusion could appropriately be applied to the facts underlying the judgment.<sup>83</sup> This theory is actually a legal fiction—the reality is that a party may default for a variety of reasons, independent from admitting or denying the truth of the allegations.<sup>84</sup>

The traditional rule was heavily criticized by scholars.<sup>85</sup> The chief criticism was that it created the potential for severe consequences to the defaulting party.<sup>86</sup> If a defaulter ought to be punished, the punishment of having to satisfy the judgment rendered is punishment enough.<sup>87</sup> It is an entirely different matter to say that by virtue of a single default on an issue a party opens himself up to potentially unlimited liability on that issue.

Furthermore, though expanding preclusion generally would seem to help reduce the volume of litigation by cutting down on repetitive

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<sup>81</sup> Note, *Collateral Estoppel in Default Judgments: The Case for Abolition*, 70 COLUM. L. REV. 522, 522 (1970) (“The Supreme Court and the vast majority of the states have at one time or another given collateral estoppel effect to default judgments.”).

<sup>82</sup> *Id.* at 526.

<sup>83</sup> See, e.g., *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 (1895) (“[A] judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. . . . A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission.”).

<sup>84</sup> See *supra* note 14 and accompanying text.

<sup>85</sup> See, e.g., WRIGHT & MILLER, *supra* note 40, § 4442; Rosenberg, *supra* note 10, at 177 (“It is unfair and unwise to go as far as the New York decisions do in enforcing estoppels on the basis of earlier defaults.”); Note, *Collateral Estoppel in Default Judgments*, *supra* note 81, at 524.

<sup>86</sup> See Rosenberg, *supra* note 10, at 177 (“The consequence is to make a default so perilous that a well-advised defendant will be driven to litigate any petty claim asserted against him if there is the slightest prospect that a buried issue may be foreclosed in a subsequent suit.”); Note, *Collateral Estoppel in Default Judgments*, *supra* note 81, at 524 (“The defendant is thus required at his peril to foresee all possible litigation which might have an issue in common with the instant case. His dilemma is compounded, of course, by the fact that an issue which seems relatively insignificant at the present time might very well become the crucial issue in later litigation.”).

<sup>87</sup> Note, *Collateral Estoppel in Default Judgments*, *supra* note 81, at 527-28 (“The punishment rationale is the least justifiable reason for applying collateral estoppel to default judgments. . . . The defaulting part presumably paid his penalty by satisfying the judgment which resulted from his default.”).

suits, allowing a default judgment to have issue preclusive effect actually may have the perverse result of increasing litigation. A simple default, though it may seem undesirable for the court system, does have the benefit of sparing litigation on the issues. A rule applying issue preclusion to default judgments would likely reduce the volume of defaults, since anyone taking such a judgment would have to consider the possible preclusive effects of his decision.<sup>88</sup>

B. Restatement (Second) of Judgments—*Default Judgments Do Not Have Issue Preclusive Effects*

The influential *Restatement (Second) of Judgments*, published in 1982, rejected the traditional rule.<sup>89</sup> Under a strict application of the *Restatement*, no default judgment can have issue preclusive effect as the issues are not considered to be actually litigated when a judgment is entered by default.<sup>90</sup> This rule deals with the problems created by the traditional rule. Litigants do not have to fear the potentially severe consequence of being precluded from ever litigating an issue after defaulting once on the issue. By removing this threat, the *Restatement* rule encourages litigants not to overlitigate seemingly minor issues—if a party defaults on what appears to be a minor issue that turns out to be important in a later suit, he has the opportunity to litigate that issue in the later suit. The *Restatement* rule is the rule in many jurisdictions today.<sup>91</sup>

However, there are several jurisdictions that do not necessarily follow the *Restatement*, at least not in all circumstances.<sup>92</sup> The *Restatement* rule, while certainly having the benefit of promoting ease and stability, is not without drawbacks of its own. As with any per se rule, the exclusion of issue preclusive effect for all default judgments would result in denying preclusion in certain situations where it would be warranted. There are some provisions of the *Restatement* where it seems the authors left the language intentionally ambiguous<sup>93</sup> to leave

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<sup>88</sup> See Rosenberg, *supra* note 10, at 177 (“In the end this [rule] could frustrate the very purpose of res judicata to reduce contention and dispute. Instead of more litigation later, there will be more litigating now.”).

<sup>89</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982) (“In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.”).

<sup>90</sup> *Id.*

<sup>91</sup> See generally E.H. Schopler, Annotation, *Doctrine of Res Judicata as Applied to Default Judgments*, 77 A.L.R.2d 1410 (1961).

<sup>92</sup> *Id.*; see also *In re Catt*, 368 F.3d 789, 791 (7th Cir. 2004) (“[A] significant minority of states . . . allow findings made in default proceedings to collaterally estop, provided that the defaulted party could have appeared and defended if he had wanted to.”).

<sup>93</sup> See Ziff, *supra* note 18, at 910.

room for discretion, but the language regarding default judgments is unambiguous and direct.

The problem with this per se rule is that it gives no consideration to different kinds of defaults. As Professor David Siegel notes in his commentaries to the New York Civil Practice Law and Rules, a default judgment may arise either from a total failure to appear in an action, or alternately, from a failure to proceed after initially appearing.<sup>94</sup> The former is more common, and it is this kind of default for which the *Restatement* rule makes the most sense and the traditional rule the least.<sup>95</sup> By not appearing in an action, a party does not increase the volume of litigation at all—in fact, in most cases he actually would decrease the volume of litigation by defaulting. No additional strain is placed on the opposing party, who simply has to request the default judgment from the court, and then show damages, which he would have to show any way.<sup>96</sup> There is no danger of inconsistencies in a later judgment on the same issues as none of the issues would have been addressed or determined in the first matter. Finally, and most importantly, there are legitimate reasons for a party to default in appearance. A small amount in controversy, a difficult forum for litigation, or a host of other reasons could lead a party to choose to take an adverse default judgment rather than contest the litigation.<sup>97</sup> It would be excessively punitive to hold a party responsible in subsequent actions for any issues raised in the first action if the party defaulted in appearance.<sup>98</sup>

Applying issue preclusion in this context is especially problematic given the decline of mutuality and the rise of virtual representation. As noted above, most jurisdictions are moving away from requiring mutuality of estoppel. While this move is logical, it raises an important issue regarding issue preclusion and default judgments. As a general matter, not requiring mutuality of estoppel greatly expands the scope of preclusion. Though only parties and those in privity with parties can be precluded, anyone seeking to invoke issue preclusion against a party may now do so provided the party has had at least one full and fair opportunity to contest the decision.<sup>99</sup> Allowing defaults to have a preclusive effect would have raised far fewer concerns while mutuality

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<sup>94</sup> N.Y. C.P.L.R. 3215 practice cmt. 1 (McKinney 2004).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* practice cmt. 6 (“If the claim is not for a sum certain and is not ascertainable by mere arithmetical computation, the default must be applied for to the court. The court is empowered to assess the damages itself or order the assessment to be tried to a jury or to a referee. . . . An important point here is that the defendant, by defaulting, does not admit damages. It is only liability that a default is deemed to admit.”).

<sup>97</sup> See *supra* notes 14 and 84 and accompanying text.

<sup>98</sup> See *supra* note 87 and accompanying text.

<sup>99</sup> *Schwartz v. Pub. Adm’r*, 246 N.E. 2d 725, 729 (N.Y. 1969).

was still a requirement, as a defaulting party would only have to concern himself with the potential for preclusion in any subsequent suits by the same plaintiff.

Without the requirement of mutuality, however, a party that defaults opens himself up to potential future liability not just to the opposing party from the first suit, but to any other party that may have an identical issue as the basis for its claim.<sup>100</sup> This concern is present in any situation where nonmutual preclusion is allowed; however, the concern is particularly great when considering default judgments because of the possibility that a party could be held liable to multiple parties without ever having actually contested the issues. For this reason, any doctrine that would allow issue preclusion to attach to default judgments must be particularly mindful of the concerns created by use of nonmutual estoppel.

Likewise, courts must be wary of the dangers of applying issue preclusion at the intersection of default judgments and virtual representation. Applying issue preclusion through the doctrine of virtual representation means that certain parties will be shut out of their day in court if their interests have been sufficiently represented by a party to a previous suit. These interests will never have been sufficiently represented if the first party defaulted in appearance. Thus, any system of applying issue preclusion to default judgments should ensure that such preclusion would not apply to any litigant that was not a party to the previous action or in privity (in a very narrow sense) with a party to the previous action.

However, these same concerns are not present when dealing with a default after the party has initially appeared. The purpose of entering a default in those circumstances is punitive—to punish the party for not complying with the orderly administration of justice.<sup>101</sup> In this circumstance, there is a definite strain on the litigation system if issue preclusion is not allowed to attach to a default—a party could willingly answer and begin to litigate an action, then default. While a judgment on that action would be entered against the party, if no issue preclusive effect is given to the judgment, any future litigation of the same issue would have to duplicate what had already taken place in the first

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<sup>100</sup> As an example, consider the car accident between A and B. If A's claim is minor, B may not find it worthwhile to contest the suit and may choose to default. With mutuality of estoppel in place, B would only have to be concerned then with the collateral estoppel effects of the default as applied to any future suits by A (for example, if the initial suit was for personal injury, and A later sued for damage to her car). However, if mutuality of estoppel is not required, then B's default in A's suit may open B up to (potentially unforeseen) liability to A's passengers, with B never having an opportunity to appear in court and contest his negligence in the accident.

<sup>101</sup> See N.Y. C.P.L.R. 3215 (McKinney 2009); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.27 (2009).

action.<sup>102</sup> Such an outcome is unduly burdensome for both the court system and opposing litigants.

This concern is particularly salient in a jurisdiction where there is no rule of mandatory counterclaims.<sup>103</sup> Under a permissive counterclaim system, a defendant could respond to a complaint and then proceed to waste the time of the court and other litigants through delays, failure to respond to discovery requests, failure to respond to motions, etc., to the point where the judge enters a default judgment against the defendant. If issue preclusion is not applied to that default judgment, the defendant could then turn around and file a claim against the plaintiff on the exact same issue, forcing the plaintiff to relitigate the same issue on which he just received a default judgment. This is both a waste of judicial resources and an unfair burden on an innocent party who has proceeded in good faith and in accordance with court rules.

C. *Exception to the Restatement Rule in Federal Courts When the Default Is Found To Be Willful*

It is this concern over defaults after appearance that has led several circuits in the federal courts, where issue preclusion does not normally apply to default judgments,<sup>104</sup> to carve out an exception to the general rule. In two 1995 decisions, handed down six months apart, the Ninth and Eleventh Circuits ruled that default judgments entered as sanctions against a party would be entitled to issue preclusive effect.<sup>105</sup> In *Federal Deposit Insurance Corp. v. Daily* (*In re Daily*), the Ninth Circuit ruled that a party who had willingly avoided complying with discovery for over two years could be bound in a subsequent suit by a

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<sup>102</sup> For example, in a suit by A against B arising out of a car accident, B could answer the complaint, and begin the process of discovery and motion practice. If B continually ignores discovery deadlines and impedes the progress of the litigation, the judge may choose to enter a default judgment against B under N.Y. C.P.L.R. section 3216. If under a system where no issue preclusion attaches to that judgment, and if C (a passenger in A's car) wanted to then file suit against B, C would have to go through the whole litigation process again, instead of using the judgment entered against B.

<sup>103</sup> See N.Y. C.P.L.R. 3019 practice cmt. 2 (McKinney 1991) (practice commentary by David D. Siegel) ("In New York practice, all counterclaims are 'permissive.' When defendant D has a claim against the plaintiff P, D can assert it as a counterclaim or bring a separate action on it. D does not, merely by withholding it as a counterclaim, forfeit it, as would occur if a 'compulsory' counterclaim rule applied."); cf. FED. R. CIV. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.").

<sup>104</sup> See, e.g., *In re Catt*, 368 F.3d 789, 792 (7th Cir. 2004) ("It is generally believed . . . that the federal rule is that default judgments are not entitled to collateral estoppel effect.").

<sup>105</sup> *Fed. Deposit Ins. Corp. v. Daily* (*In re Daily*), 47 F.3d 365 (9th Cir. 1995); *Bush v. Balfour Beatty Bah., Ltd.* (*In re Bush*), 62 F.3d 1319 (11th Cir. 1995).

default judgment entered against him in the first action.<sup>106</sup> The court relied on an earlier Ninth Circuit decision<sup>107</sup> that allowed preclusive effect for a judgment entered after an uncontested summary judgment motion. In that case, the court held that, under the circumstances, the precluded party had enough of an opportunity to participate in the litigation so as to make preclusion appropriate.<sup>108</sup>

The Eleventh Circuit, in *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*,<sup>109</sup> followed the lead of the Ninth Circuit in a case factually similar to *Daily*. The court found that issue preclusion could be applied against a party who had a full opportunity to defend on the merits but chose not to do so and instead willingly interfered with the administration of justice in the earlier proceedings.<sup>110</sup> The decisions in *Daily* and *Bush* have since been followed by several other Circuits.<sup>111</sup>

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<sup>106</sup> 47 F.3d at 368 (“The judgment entered in [the first action] was not an ordinary default judgment. *Daily* did not simply decide the burden of litigation outweighed the advantages of opposing the FDIC’s claim and fail to appear. He actively participated in the litigation, albeit obstructively, for two years before judgment was entered against him. A party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication. In such a case the ‘actual litigation’ requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.”).

<sup>107</sup> *In re Gottheiner*, 703 F.2d 1136 (9th Cir. 1983).

<sup>108</sup> *Id.* at 1140 (“[The defaulting party] did not simply give up from the outset. For sixteen months he actively participated in litigation . . . . That after many months of discovery Gottheiner decided his case was no longer worth the effort does not alter the fact that he had his day in court.”).

<sup>109</sup> 62 F.3d 1319.

<sup>110</sup> *Id.* at 1324-25 (“[We] are reluctant to allow this debtor a second bite at the apple. *Bush* actively participated in the prior action over an extended period of time. Subsequently, he engaged in dilatory and deliberately obstructive conduct, and a default judgment, based upon fraud, was entered as a sanction against him. . . . Such abuse of the judicial process must not be rewarded by a blind application of the general rule denying collateral estoppel effect to a default judgment. . . . Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment, it is not an abuse of discretion for a district court to apply the doctrine of collateral estoppel to prevent further litigation of the issues resolved by the default judgment in the prior action.” (footnote omitted)).

<sup>111</sup> See *In re Docteroff*, 133 F.3d 210, 215 (3d Cir. 1997) (“We do not hesitate in holding that a party . . . who deliberately prevents resolution of a lawsuit, should be deemed to have actually litigated an issue for purposes of collateral estoppel application. . . . To hold otherwise would encourage behavior similar to *Docteroff*’s and give litigants who abuse the processes and dignity of the court an undeserved second bite at the apple. We reject such a result.”); *McCart v. Jordana (In re Jordana)*, 232 B.R. 469, 476 (B.A.P. 10th Cir. 1999) (“[I]t is apparent that the Debtor is twisting the term ‘default judgment’. In this case, the entry of a ‘default judgment’ against the debtor was not the traditional ‘default’ situation where a judgment is entered against a defendant who has been served but has failed to appear or plead. . . . Here the default was entered as a sanction where the debtor was properly served, filed an initial answer and given every opportunity to defend himself. He chose, however, to ‘assiduously pursue a policy of obfuscation’ to frustrate the judicial process. . . . Allowing him to relitigate the District Court judgment would reward his misbehavior.” (citation omitted)), *aff’d*, 216 F.3d 1087 (10th Cir.

The courts in these particular cases reach the right result—it would be difficult to argue under the facts provided that the precluded parties deserved another chance to utilize the justice system after they intentionally retarded its administration in the first actions. However, the problem with relying on ad hoc determinations of when an exception to the general rule should apply is that such determinations necessarily require a case-by-case analysis and give little guidance to courts in subsequent cases. How much participation in a case is enough participation to open the party up to issue preclusion? How intentional does the conduct have to be by the party to be precluded? Does the determination depend on the length of time the first action was litigated, or is it dependent on the actual conduct in the first action?

These difficult line-drawing questions are reflected in later cases. *Federal Insurance Co. v. Gilson (In re Gilson)*,<sup>112</sup> decided by the Bankruptcy Court of the Eastern District of Virginia several years after *Daily and Bush*, is a prime example. The court in *Gilson* declined to follow the lead of *Daily and Bush*<sup>113</sup> in a situation where the previous default came after the defendant filed an answer but had not willingly hindered or delayed the action and proffered a legitimate reason for defaulting.<sup>114</sup> In its opinion, the court discussed some of the questions left unanswered in the decisions of the Courts of Appeals.<sup>115</sup> Likewise, *In re Wald*<sup>116</sup> is another case where a lower federal court wrestled with the amount of participation necessary to afford issue preclusive affect to a default. In that case, the debtor answered the complaint in the prior action, appeared at a hearing in the prior action, requested and was

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2000); see also Pahlavi v. Ansari (*In re Ansari*), 113 F.3d 17, 21-22 (4th Cir. 1997) (applying Virginia law); *In re Gober*, 100 F.3d 1195, 1205-06 (5th Cir. 1996) (applying Texas law). But see *Mishkin v. Gurian (In re Adler, Coleman Clearing Corp.)*, 205 F. App'x 857 n.2 (2d Cir. 2006) (declining to address whether to adopt the *Daily and Bush* exception).

<sup>112</sup> 250 B.R. 226 (Bankr. E.D. Va. 2000).

<sup>113</sup> *Id.* at 235 (“While it is true that Ms. Gilson was properly before the district court, had retained counsel and filed an answer, she did not engage in any other significant activity. . . . [S]he did not otherwise hinder or delay the judicial process. She did not create unnecessary hurdles or create needless expenses. . . . Ms. Gilson’s conduct in this case does not rise to the level of either Bush’s or Daily’s conduct.”).

<sup>114</sup> *Id.* The defendant asserted her Fifth Amendment right against self-incrimination (in an ongoing criminal investigation), which effectively barred her from participating in discovery in the first action. *Id.*

<sup>115</sup> See *id.* at 234-35 (“The present case points to some of the difficulties of *Daily, Bush* and their progeny. How much obstreperous or bad faith conduct precludes subsequent dischargeability litigation? Is the standard objective misconduct or subjective intent? . . . Must a defendant, at the time of a default hearing, prove that his prior conduct was not in bad faith so that he will not be precluded from contesting the dischargeability of the default judgment in a subsequent hypothetical bankruptcy? Must a plaintiff seek to prove such bad faith at a default hearing to protect the default judgment in a subsequent hypothetical bankruptcy? . . . Applying collateral estoppel based on subjective intent does not necessarily permit the discovery of the truth of the underlying matter . . .”).

<sup>116</sup> 208 B.R. 516 (Bankr. N.D. Ala. 1997).

granted a continuance, and then chose to default.<sup>117</sup> Despite this level of participation, the court held that it did not rise to a level of activity high enough to warrant applying issue preclusion.<sup>118</sup> The questions left open by *Bush* and *Daily* will remain unanswered as courts continue to rely on individualized determinations of when to allow an exception to the general rule.

D. *Recent New York Decisions Have Been Inconsistent in Their Treatment of Issue Preclusion for Default Judgments*

With all of these doctrines having both legitimate support and legitimate criticism, it is not surprising that decisions in New York have been inconsistent.<sup>119</sup> Though much has changed in the realms of claim and issue preclusion since 1969, Professor Rosenberg's statement that "New York decisions have not been notably lucid"<sup>120</sup> in responding to questions about applying collateral estoppel to default and consent judgments is still quite apt today.

1. Cases Following the *Restatement* Rule

One line of cases has followed the *Restatement* in not giving issue preclusive effect to default judgments.<sup>121</sup> Many of these cases rely on language from the Court of Appeals in *Kaufman v. Eli Lilly & Co.*<sup>122</sup> While *Kaufman* was not a case involving default judgments, it was one of the earliest Court of Appeals decisions applying section 27 of the *Restatement (Second) of Judgments*. In that case, a products liability action against a pharmaceutical company that manufactured the drug DES, the Court of Appeals dealt with a plaintiff seeking to use issue preclusion against Eli Lilly based on the determination of liability in a prior action, *Bichler v. Eli Lilly & Co.*<sup>123</sup> In *Bichler*, the Court of Appeals upheld a jury verdict against Eli Lilly.<sup>124</sup> However, the court expressly noted that it was not ruling on the merits of a concerted action

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<sup>117</sup> *Id.* at 552-53.

<sup>118</sup> *Id.*

<sup>119</sup> See *supra* notes 9-11 and accompanying text.

<sup>120</sup> Rosenberg, *supra* note 10, at 173.

<sup>121</sup> See, e.g., *Chambers v. City of New York*, 764 N.Y.S.2d 708, 712 (App. Div. 2003) ("[T]he issue of [the individual defendant's] negligence was never actually litigated. Thus, the default judgment against [the individual defendant] does not collaterally estop the City from litigating the issue of negligence in the instant case.").

<sup>122</sup> 482 N.E.2d 63 (N.Y. 1985).

<sup>123</sup> 436 N.E.2d 182 (N.Y. 1982).

<sup>124</sup> *Id.*

theory of recovery<sup>125</sup> because Eli Lilly had not challenged that theory in the trial court.<sup>126</sup> In *Kaufman*, the plaintiff sought to use issue preclusion to prevent Eli Lilly from relitigating several issues decided in the previous action, including the appropriateness of concerted liability.<sup>127</sup> The Court of Appeals held that Eli Lilly was precluded from relitigating several factual issues<sup>128</sup> but that the findings of the *Bichler* jury on the theory of concerted action should not be given preclusive effect.<sup>129</sup> The court stated that, since the appropriateness of concerted action had not been challenged in the earlier action and thus was not actually litigated, the required identity of issue between *Bichler* and *Kaufman* was lacking.<sup>130</sup>

In reaching this conclusion, the court referenced section 27 of the *Restatement (Second) of Judgments* to illustrate situations where an issue is not actually litigated, such as a default judgment.<sup>131</sup> Thus, although *Kaufman* did not itself deal with default judgments, the Court of Appeals appeared to implicitly endorse the *Restatement* view that default judgments do not have preclusive effects.

Later cases have relied on the language following the *Restatement* in *Kaufman* to deny preclusive effect to default judgments.<sup>132</sup> While the *Restatement* approach certainly has its benefits,<sup>133</sup> some of these cases are problematic because they rely on the language of *Kaufman* regarding default judgments without evaluating whether the individual circumstances of the case justify denying the use of issue preclusion.<sup>134</sup> Even putting aside the fact that the decision in *Kaufman* did not deal with default judgments itself, the court in *Kaufman* specifically emphasized particular policy reasons for not allowing issue preclusion on the theory of concerted action liability in that case.<sup>135</sup> Rather than

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<sup>125</sup> *Id.* at 186 (“Concerted action liability rests upon the principle that ‘[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.’” (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 292 (4th ed. 1971))).

<sup>126</sup> *Bichler*, 436 N.E.2d at 186.

<sup>127</sup> *Kaufman*, 482 N.E.2d at 65-68.

<sup>128</sup> *Id.* at 67.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 68.

<sup>131</sup> *Id.* (“An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation.” (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmts. d, e (1982))).

<sup>132</sup> See, e.g., *Aguilar v. Jacoby*, 827 N.Y.S.2d 77 (App. Div. 2006); *Chambers v. City of New York*, 764 N.Y.S.2d 708 (App. Div. 2003); *Holt v. Holt*, 692 N.Y.S.2d 451, 452 (App. Div. 1999); *Rourke v. Travelers Ins. Co.*, 678 N.Y.S.2d 195 (App. Div. 1999); *Pigliavento v. Tyler Equip. Corp.*, 650 N.Y.S.2d 414, 415 (App. Div. 1996).

<sup>133</sup> See *supra* Part II.B.

<sup>134</sup> See, e.g., *Rourke*, 678 N.Y.S.2d 195.

<sup>135</sup> See *Kaufman*, 482 N.E.2d at 68 (“Although it may seem a paradox that we should permit defendant to benefit in this litigation because of its failure to challenge concerted action in the

relying on the language of the opinion as broadly laying down a bright-line rule following the *Restatement*, it seems the better reading of *Kaufman* is that the court reached its decision in that particular case based on the unique nature of the claims and the broad policy implications that would have resulted had preclusion been applied.<sup>136</sup> Nonetheless, some courts in New York have followed *Kaufman* for the proposition that default judgments as a general rule do not have issue preclusive effect.<sup>137</sup>

It is noteworthy that in many of these cases, even if the courts had not followed *Kaufman*, the party to be precluded likely would not have had a full and fair opportunity to contest the first decision anyway as required by *Schwartz v. Public Administrator*.<sup>138</sup> For example, in *Chambers v. City of New York*, the plaintiff sought to preclude the City of New York from litigating the negligence of one of its employees, who had defaulted in the first suit.<sup>139</sup> As the city had not been involved in the first suit, and indeed had expressly chosen not to provide the employee with representation in the first suit, it could hardly be said that the city had a full and fair opportunity to contest the issue of negligence.<sup>140</sup> Likewise, in *Rourke v. Travelers Insurance Co.*, the plaintiff sought to preclude an insurance company on the issue of whether an act of its insured, who had defaulted in the first suit, was intentional.<sup>141</sup> Again, the insurance company did not have a full and fair opportunity to contest the issue in the first suit and so even without following *Kaufman* preclusion would not have been appropriate. Perhaps it is the case that the courts, while using the strict language of *Kaufman*,<sup>142</sup> were in actuality applying the more flexible doctrine of *Schwartz*<sup>143</sup> to reach the correct result.

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prior litigation, the policy reasons for refusing to do so outweigh the reasons for limiting litigation on the issue. It is of paramount importance that the courts establish and develop the law in this emerging area of mass tort liability, rather than permit it to be fixed, even in this limited number of DES actions, on the basis of the law of the case. The need for uniformity and certainty mandates that in such cases collateral estoppel should be rejected. This is particularly so when the other defendants will be free to claim, against this same plaintiff, that concerted action is not an appropriate theory of liability and thereby cause inconsistent results." (citations omitted)).

<sup>136</sup> Indeed, when it finally had the chance to confront the issue directly, the Court of Appeals did not adopt the concerted action theory of liability with regard to DES, and instead adopted a market share theory using a national market. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1071-72, 1076 (N.Y. 1989) ("Now given the opportunity to assess the merits of this [theory of concerted action liability for DES], we decline to adopt it as the law of this State."). Had the court in *Kaufman* given preclusive effect to the jury findings in *Bichler*, it would not have had the option of adopting a different theory later, since Eli Lilly would have been precluded from later litigating the appropriateness of concerted action as a theory for imposing liability.

<sup>137</sup> See *supra* note 132 and accompanying text.

<sup>138</sup> 246 N.E.2d 725, 729 (N.Y. 1969).

<sup>139</sup> 764 N.Y.S.2d 708, 709-10 (App. Div. 2003).

<sup>140</sup> *Id.* at 713.

<sup>141</sup> 678 N.Y.S.2d 195, 196 (App. Div. 1998).

<sup>142</sup> *Kaufman v. Eli Lilly & Co.*, 482 N.E.2d 63, 68 (N.Y. 1985) ("An issue is not actually

## 2. Cases Allowing Issue Preclusion for Default Judgments

Another group of cases has taken the seemingly opposite approach—following the historical approach of Court of Appeals cases such as *Gates v. Preston*<sup>144</sup> and *Reich v. Cochran*,<sup>145</sup> default judgments are given issue preclusive effect.<sup>146</sup> With nary a mention of *Kaufman* or the *Restatement*, these cases appear to continue unchanged the historical common law approach. For example, in 2007, in *Gaston v. American Transit Insurance Co.*, the defendant insurance company was precluded from litigating the issue of its coverage for a vehicle involved in an accident when two prior proceedings, in which the defendant had been a named party, had determined that the defendant afforded insurance coverage for the vehicle.<sup>147</sup> The Appellate Division noted that there was no evidence the defendant lacked notice of the prior proceedings, or had shown any interest in vacating the prior default judgments, and thus should be bound by the prior determinations.<sup>148</sup> In *Rock v. Capitol Air*, decided just two years after *Kaufman*, plaintiffs filed suit for breach of contract, false imprisonment, and slander after having been removed from an airplane operated by defendant air carrier.<sup>149</sup> The Appellate Division held that plaintiffs were precluded from challenging the defendant's decision to remove them from the plane for safety reasons by virtue of their prior default in an action against them to recover civil penalties for violations of Federal Aviation Administration regulations.<sup>150</sup> These cases show a willingness on the part of some courts to apply issue preclusion to default judgments when it appears the defaulting party had a full and fair opportunity to contest the first judgment, but chose not to do so.

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litigated if, for example, there has been a default . . .”).

<sup>143</sup> *Schwartz v. Pub. Adm'r*, 246 N.E.2d 725, 729 (N.Y. 1969).

<sup>144</sup> 41 N.Y. 113 (1869).

<sup>145</sup> 45 N.E. 367 (N.Y. 1896).

<sup>146</sup> *See, e.g.*, *Gaston v. Am. Transit Ins. Co.*, 835 N.Y.S.2d 369 (App. Div. 2007); *Chai Props. Corp. v. Carb, Luria, Glassner, Cook & Kufeld*, 733 N.Y.S.2d 336 (App. Div. 2001); *Rock v. Capitol Air, Inc.*, 513 N.Y.S.2d 191 (App. Div. 1987); *Pace v. Perk*, 440 N.Y.S.2d 710 (App. Div. 1981).

<sup>147</sup> *Gaston*, 835 N.Y.S.2d 369.

<sup>148</sup> *Id.* at 370.

<sup>149</sup> *Rock*, 513 N.Y.S.2d at 192.

<sup>150</sup> *Id.*

### 3. Cases Allowing an Exception to the *Restatement* Rule

A third group of recent cases attempts to strike a balance between these competing views. As seen in 2003, in the case of *Kanat v. Ochsner*, these cases acknowledge the general rule that default judgments do not give rise to issue preclusion.<sup>151</sup> However, when a defendant appears in an action, but intentionally and willfully delays the progress of litigation, issue preclusion may be applied to a default judgment entered as a sanction.<sup>152</sup> These cases mirror federal cases such as *Daily*<sup>153</sup> and *Bush*,<sup>154</sup> both in the creation of an exception to the general rule for willful conduct leading to a default and in the lack of clear standards to determine when conduct should be considered willful or disruptive enough to merit the application of issue preclusion to a default. While these cases appear to reach a good result, they leave little guidance for future courts looking to follow their lead. None of the courts rendering these decisions attempted to outline standards or factors for subsequent courts to use when deciding whether issue preclusion is appropriate for default judgments. For example, the Appellate Division in *In re Abady* stated that preclusion may be applied to default judgments when a party appeared in the prior action and “willfully and deliberately refuse[d] to participate in those litigation proceedings,” yet did not go further in defining what “willfully and deliberately” should mean in this context.<sup>155</sup>

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<sup>151</sup> 755 N.Y.S.2d 371, 374 (App. Div. 2003) (“[C]ollateral estoppel is generally not available where the judgment in the prior action was obtained on default . . .”).

<sup>152</sup> *Id.* (“Defendants . . . charted the course of their own litigation, engaging in conduct intentionally calculated to frustrate and impede the court to whose jurisdiction they submitted by their general appearance and by interposing an answer. The merits of the action were, therefore, determined in accordance with the position they adopted.”); see also *In re Abady*, 800 N.Y.S.2d 651, 661 (App. Div. 2005) (“[W]e hold that collateral estoppel may be properly applied to default judgments where the party against whom preclusion is sought appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so.”); *Lutine Realty Corp. v. Perry Films, Inc.*, 2004 WL 1514331 (N.Y. Sup. Ct. Mar. 23, 2004).

<sup>153</sup> 47 F.3d 365 (9th Cir. 1995).

<sup>154</sup> 62 F.3d 1319 (11th Cir. 1995).

<sup>155</sup> 800 N.Y.S.2d at 661.

### III. NEW YORK COURTS SHOULD ADOPT A NEW SYSTEM FOR APPLYING ISSUE PRECLUSION TO DEFAULT JUDGMENTS

#### A. *The Current Situation in New York Is Unworkable and Does Not Further the Goals of Issue Preclusion*

The current inconsistent system of applying issue preclusion to default judgments in New York does not advance the goals of issue preclusion. Inherent in any system of preclusion is the balancing of competing interests: fairness to litigants and judicial economy.<sup>156</sup> Fairness to litigants and the preservation of due process are the benchmark goals for all systems of preclusion to meet. A preclusive system that would deny an opportunity for some parties to litigate an issue at all would be untenable. Balanced against this desire for fairness is the need for judicial economy. Neither courts, nor litigants, nor society at large would be well served by a system that allowed excessive relitigation of issues or multiple bites at the apple for undeserving litigants.<sup>157</sup> An inconsistent system of applying issue preclusion will hinder both of these goals.

An unclear system of preclusion inherently involves a substantial risk of unfair outcomes. Fairness in this sense refers to the reasonable expectations of the parties to a suit.<sup>158</sup> In order for litigants to rely on the judicial system, they must be able to have some indication of how their behavior will be treated by the courts. Under the current system, neither party can have this knowledge with any certainty, as they will not be able to predict which line of cases the court will follow in applying issue preclusion to a default judgment.

In addition, an inconsistent system of issue preclusion harms judicial economy. To the extent litigants are unsure about the potential preclusive effect of taking a default judgment, inconsistency in preclusion can increase the volume of cases that will be fully contested.<sup>159</sup> A consistent standard would both give guidance to litigants, who would understand the effect of a default judgment and either proceed with suits or not accordingly, as well as give guidance to trial courts, which would be able to consistently use the same standard to deal with such situations. Likewise, a stable, consistent system of issue preclusion reduces litigation costs, both for parties and the court, and disposes of cases that have already been adjudicated

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<sup>156</sup> See Ziff, *supra* note 18, at 910-18.

<sup>157</sup> See *Bush*, 62 F.3d at 1324.

<sup>158</sup> See Ziff, *supra* note 18, at 911.

<sup>159</sup> *Id.*

competently.<sup>160</sup> Parties will have a strong incentive to litigate vigorously as they will know when they will be bound by the outcome of a suit.

### B. *A New Standard*

Professor Vestal, a frequent writer on preclusion issues, proposed a new standard for dealing with default judgments and issue preclusion shortly after the adoption of the *Second Restatement*.<sup>161</sup> His proposal was that courts should recognize a presumption in favor of preclusion if a default judgment had been entered in the first suit, but allow the defendant a chance to show why preclusion should not be applied.<sup>162</sup> The court should then determine if, by defaulting, the defendant implicitly admits the allegations against him.<sup>163</sup> If so, then preclusion should properly be applied to that default judgment.<sup>164</sup>

Professor Vestal was on the right track in proposing that there should be a presumption in favor of preclusion when a party has a full incentive and opportunity to litigate but chooses not to.<sup>165</sup> However, this presumption should only be applicable in situations where a default is taken after a party has appeared and contested the action. It is in these situations that the benefits of invoking issue preclusion sufficiently outweigh the negative ramifications so as to warrant such a presumption. Placing this burden on a party who has defaulted after appearing will adequately balance the desire to punish those who abuse the judicial system, while ensuring that those who did not have a full and fair opportunity to contest an issue will be entitled to show that they did not have such an opportunity.

A new standard for applying issue preclusion to default judgments should begin by distinguishing between a party that defaults in appearance and a party that appears, contests the action, and then defaults. When a party simply defaults in appearance, issue preclusion

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<sup>160</sup> See *id.* at 914 (“The true efficiency benefit of res judicata is the reallocation of legal resources away from cases that can be resolved through preclusion. Preclusion lowers the direct litigation costs both for the parties in those precluded cases and for parties to other suits which advance on the docket as a result of the prior preclusion.”).

<sup>161</sup> Allan D. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464 (1981).

<sup>162</sup> *Id.* at 488.

<sup>163</sup> *Id.* (“[I]ssue preclusion should arise from a default judgment that reflects an admission on the part of the losing party that the facts asserted are true. If the default implies that the defendant acknowledges the correctness of the allegations against him, then a court should bar relitigation of the issue.”).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

should never be applied to that judgment.<sup>166</sup> In this situation, the burden placed on other litigants and the court system by the default is minimal. A default in appearance means that the opposing party will simply have to move for entrance of a default judgment and then proceed with a determination of damages.<sup>167</sup> The courts and the opposing party will not be subjected to the burden of litigating the same issues multiple times since the issues were not actually litigated in the first judgment. Further, allowing issue preclusion in this circumstance could mean that a party, who may have defaulted for understandable reasons, would be bound by virtue of that default in future cases that he would otherwise have litigated vigorously. This undermines the goal of accuracy in judicial decision-making, as it is preferable for the most part that actions are disposed of on the merits.<sup>168</sup>

However, when a party defaults after appearing and contesting the suit, the interest in promoting both efficiency and fairness to non-defaulting parties is much stronger. Shutting off issue preclusion for defaults under these circumstances means that a party may appear, occupy the time and energy of the court and opposing parties in litigating an issue, then force further time and energy to be expended in relitigating those exact same issues in future suits. If a party does indeed have a full and fair opportunity to litigate an issue, and chooses to abandon the action before he completes that litigation, he should not be allowed to come back for a second chance at the issue.<sup>169</sup> In addition, allowing relitigation in such cases undermines the purpose of entering a default judgment as a sanction. Courts do not take such a step lightly—if a default judgment is entered as a sanction, it reflects the court's decision that a party has behaved so egregiously as to forfeit its right to contest the action.<sup>170</sup> Allowing that same party to turn around and sue its opponent on the basis of identical issues, or defend against subsequent claims based on those same issues, softens the punitive impact of the court's decision.

The remaining question is how the party who has defaulted can demonstrate that preclusion is inappropriate in a future case. Without clear standards to evaluate attempts to rebut the presumption, courts will

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<sup>166</sup> See *supra* Part II.B.

<sup>167</sup> See N.Y. C.P.L.R. 3215 (McKinney 2009).

<sup>168</sup> See, e.g., *Sanford v. 27-29 W. 181st St. Ass'n*, 753 N.Y.S.2d 49, 51 (App. Div. 2002) (“[T]here is a preference that disputes be resolved on their merits . . .”).

<sup>169</sup> See, e.g., *Jones v. Wilson (In re Wilson)*, 72 B.R. 956, 959 (Bankr. M.D. Fla. 1987) (“Debtor/defendant was given the full opportunity to defend himself in the [prior] action and he chose not to do so. . . . It would be undeserved to give debtor/defendant a second bite at the apple when he knowingly chose not to defend himself in the first instance.”).

<sup>170</sup> See, e.g., *Ryan v. Ryan*, 307 N.Y.S.2d 2, 3 (App. Div. 1970) (“Courts are reluctant to declare a party in default. With the obligation to keep the calendar moving and do justice to all parties, there may come a time, however, when they have no alternative.”).

find themselves confronting the same line-drawing problems as those<sup>171</sup> that have attempted to follow *Bush*<sup>172</sup> and *Daily*.<sup>173</sup> Professor Vestal suggested that the determination should depend on an evaluation of the party's intention in defaulting.<sup>174</sup> However, this standard is no clearer to later courts and litigants than the ad hoc determinations of "willfulness" that have caused such trouble in cases such as *Gilson*.<sup>175</sup> Any standard for rebutting the presumption that issue preclusion should be applied needs clear, workable factors that can be evaluated in advance by courts and litigants.

Fortunately, in New York there is already a body of caselaw that provides such a clear, workable standard. If a party wishes to vacate a default judgment, he must demonstrate both a reasonable excuse for his default and a meritorious cause of action.<sup>176</sup> What constitutes both a reasonable excuse, and a meritorious cause of action, has been developed and refined through numerous cases, both on the trial and appellate levels. For example, cases such as *Moore v. Day*,<sup>177</sup> decided by the Appellate Division, outline factors for trial courts to weigh when determining if an excuse for a default should be considered reasonable, such as the length of the delay, prejudice to the opposing party, whether there was willfulness, and the preference for resolving cases on their merits.<sup>178</sup> In addition, as the decision whether or not to grant vacatur of a default judgment is solidly within the discretion of the trial court,<sup>179</sup> factual distinctions between different situations are of paramount importance. The appellate courts have provided guidance on making such distinctions through their decisions. For example, in the 2003 case of *Consortium Consulting Group v. Tsai*, the Appellate Division allowed vacatur of the default of a defendant whose failure to attend court proceedings and oppose a summary judgment motion was due to his lack of English proficiency and a corresponding inability to retain counsel.<sup>180</sup> On the other hand, in the 2007 case of *Dorrer v. Berry*, the

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<sup>171</sup> See, e.g., *Fed. Ins. Co. v. Gilson (In re Gilson)*, 250 B.R. 226 (Bankr. E.D. Va. 2000); *Angus v. Wald (In re Wald)*, 208 B.R. 516 (Bankr. N.D. Ala. 1997).

<sup>172</sup> 62 F.3d 1319 (11th Cir. 1995).

<sup>173</sup> 47 F.3d 365 (9th Cir. 1995).

<sup>174</sup> Vestal, *supra* note 161, at 488 ("[I]ssue preclusion should arise from a default judgment that reflects an admission on the part of the losing party that the facts asserted are true. If the default implies that the defendant acknowledges the correctness of the allegations against him, then a court should bar relitigation of the issue.")

<sup>175</sup> 250 B.R. 226 (Bankr. E.D. Va. 2000).

<sup>176</sup> See, e.g., N.Y. C.P.L.R. 5015(a)(1) (McKinney 2009); *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 492 N.E.2d 116 (N.Y. 1986); *Gray v. B.R. Trucking Co.*, 449 N.E.2d 1270 (N.Y. 1983); *Murray v. N.Y. City Health & Hosps. Corp.*, 861 N.Y.S.2d 373 (App. Div. 2008).

<sup>177</sup> 866 N.Y.S.2d 303 (App. Div. 2008).

<sup>178</sup> *Id.*; see also *Orwell Bldg. Corp. v. Bessaha*, 773 N.Y.S.2d 126, 127 (App. Div. 2004); *Workman v. Amato*, 647 N.Y.S.2d 793, 794 (App. Div. 1996).

<sup>179</sup> See, e.g., *Vasquez v. N.Y. City Hous. Auth.*, 859 N.Y.S.2d 195, 196 (App. Div. 2008).

<sup>180</sup> 768 N.Y.S.2d 213, 213 (App. Div. 2003).

Appellate Division did not accept as a reasonable excuse the claim that the individual defendant did not know how to answer the complaint and could not retain an attorney, when the individual defendant was the CEO of a corporation also named as a defendant and when the individual defendant had previously been represented by counsel in her dealings with the plaintiff.<sup>181</sup>

The excuse of law office failure (misplaced document, incorrect calendar entry, etc.) has had a long and rich path in the courts and legislature, and illustrates the development of standards in the realm of determining what constitutes a reasonable excuse. In the 1980 case of *Barasch v. Micucci*, the Court of Appeals held that law office failure could not serve as a reasonable excuse as a matter of law.<sup>182</sup> In response, the Legislature enacted N.Y. C.P.L.R. section 2005, which overturned the *Barasch* decision and permitted law office failure as a reasonable excuse.<sup>183</sup> Instead of routinely accepting such excuses, however, courts began to develop criteria for parties to show before accepting as sufficient a claim of law office failure. Today, in order to succeed by claiming law office failure, a party must provide particularized details as to the claimed error along with supporting evidence.<sup>184</sup>

These examples show how courts have, over the years, developed standards and criteria to be used when evaluating a reasonable excuse for a default. Adopting such a standard for determining the application of issue preclusion to a default judgment would mean that courts and litigants have a ready source of guidance for their own behavior and decisions. A system of evaluating whether to apply issue preclusion to defaults that mirrors the evaluation for vacatur of default judgments

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<sup>181</sup> 830 N.Y.S.2d 277 (App. Div. 2007).

<sup>182</sup> 404 N.E.2d 1275, 1277 (N.Y. 1980) (“While the decision as to what constitutes a reasonable excuse ordinarily lies within the sound discretion of the trial court, we would stress that those excuses which may be roughly categorized under the heading of ‘law office failures’ cannot properly serve as a basis for defeating a motion to dismiss under [N.Y. C.P.L.R. section 3012(b)].” (citations omitted)). While the holding specifically referred to defeating a motion to dismiss under N.Y. C.P.L.R. section 3012(b) (which deals with failure to timely serve a complaint), the standard for that action is the same as the standard for vacating a default judgment—a reasonable excuse for the delay and a meritorious cause of action. *Id.*

<sup>183</sup> N.Y. C.P.L.R. 2005 (McKinney 2009) (“Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.”).

<sup>184</sup> *See, e.g., White v. Daimler Chrysler Corp.*, 843 N.Y.S.2d 168, 168 (App. Div. 2007) (“Although a court has the discretion to accept law office failure as a reasonable excuse, a conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse.” (citations omitted)); *Morris v. Metro. Transp. Auth.*, 595 N.Y.S.2d 539, 540 (App. Div. 1993) (“[T]here must be detailed allegations of fact which explain the reason for such a [law office] failure.”).

would minimize the difficulty of line-drawing we have seen in cases such as *Gilson* or *Abady*.<sup>185</sup>

#### CONCLUSION

Since the publication of the *Restatement (Second) of Judgments*, New York courts have been inconsistent in the application of issue preclusion to default judgments. Some courts have followed the *Restatement* in finding that an issue is not actually litigated if it is determined by a default judgment, while others have followed earlier cases in allowing issue preclusive effect to some default judgments. A third line of cases has attempted to strike a balance between the two by following the *Restatement* but carving out an exception for willful defaults. This inconsistency has increased judicial inefficiency, provided unclear guidance for future courts and parties, and raised the potential for unfair treatment of different litigants. Instead of maintaining this confused state of the law, New York courts should adopt a new standard, grounded in existing law that will promote fairness, judicial economy, and accuracy. This standard should distinguish between defaults in appearance, where preclusion would not be appropriate, and defaults by a party after appearance, where preclusion may be appropriate. In the latter situation, the burden should be on the party who defaulted in the first action to demonstrate a reasonable excuse for his default and a meritorious cause of action. This apportions the burden of avoiding preclusion to the person who is at fault for the default, while offering those who should genuinely not be precluded an opportunity to avoid its harsh effects and providing courts with a pre-existing standard by which to evaluate such claims.

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<sup>185</sup> 800 N.Y.S.2d 651 (App. Div. 2005).