Restatement (Second) of Judgments § 42 (1982)

Restatement of the Law - Judgments | October 2019 Update

§ 42 Exceptions to the General Rule of Representation

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(a) Notice concerning the representation was required to be given to the represented person, or others who might act to protect his interest, and there was no substantial compliance with the requirement; or

(b) The subject matter of the action was not within the interests of the represented person that the party is responsible for protecting; or

(c) Before rendition of the judgment the party was divested of representative authority with respect to the matters as to which the judgment is subsequently invoked; or

(d) With respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked; or

(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

(2) A person who has litigated on his own behalf in a previous action is not bound by or entitled to the benefits of a judgment in a subsequent action concerning the same claim that is brought or defended by a party representing him.

Comment:

a. Rationale of exceptions. A representative participating in an action on behalf of another is authorized to do so if he is properly constituted as such, limits his participation to the matters within his representative responsibility, and faithfully discharges that responsibility. On the other hand, the party opposing the representative is entitled to assume that the representative participates in a way that will bind those whom he represents unless the circumstances warn the opposing party that there is doubt about the matter. It must be recognized, however, that the adequacy of the representation can be established in the action itself only with

respect to such of the represented persons who have had opportunity to be heard on the representation question. As to others, the question can be concluded only if and when a person allegedly represented challenges the judgment's effect on him. When such a challenge is made, the adequacy of the representation is a matter of proof as to the position and conduct of the representative.

b. Failure to comply with notice requirements. In the designation of representatives constituted by sanction of court, procedural statutes and rules generally require preliminary notice to persons on whose behalf the representative undertakes to act. Such notice provisions are required in the appointment of executors, administrators, guardians, receivers, and conservators. Essentially similar notice is required in appraising the appropriateness of allowing a member of a class to proceed with an action on behalf of its membership, at least with respect to certain types of class actions. Where it is impracticable to give notice to the represented person, notice may be given to someone who is in a likely position to be concerned for his interests. Thus, the natural guardian of a minor, the relatives of an incompetent, or some members of a very large class may be notified in lieu of notifying those persons themselves.

The function of such notice, though akin to service or publication of process, is distinct from it. Personal or substituted service of process aims at making the notified person a party to the action, and if effective has that result even if he defaults. On the other hand, notice concerning designation of a representative is an invitation to dispute the propriety of the designation and does not foreclose the notified party from later contesting the adequacy of the representation and on that basis avoiding the conclusive effect of a judgment involving the representative. The purpose of offering opportunity to dispute the fitness of the representative is to permit anticipation of the possibility of subsequent attack on his authority and thus to assure as far as possible that the judgment in the action will have conclusive effects. Where such notice requirements, whether imposed by statute or order of court, have not been substantially complied with, the investiture of the representative is defective and the judgment for that reason is not binding on the persons putatively represented.

Illustrations:

1. As a preliminary to determining whether a class suit brought by A may be maintained as such, the court requires that notice be given by mail to designated groups of individuals within the class, advising them of the suit and inviting them to be heard on the question of representation. A fails to comply. A subsequent judgment in the action is not binding on members of the class.

2. The statutory procedure for appointment of an administrator for a decedent requires that notice of the proposed appointment be given to all known persons having a specified kinship to the decedent. If there is a failure to comply with the requirement, persons whose interests are represented by the administrator are not bound by his representation in actions to which he is a party.

c. Subject matter not within represented interests. A representative's authority is defined in terms of the interest that he is empowered to protect. His participation in an action concerning other interests is therefore not binding for or against those whom he purports to represent. Whether the subject matter of an action is within the scope of his representational authority is determined by reference to his situation anterior to the litigation itself, the definition of the interests he is designated to protect in the litigation, and the pertinence of the matters litigated to those interests. An executor, administrator, or trustee has general managerial responsibilities apart from bringing or defending litigation, and correspondingly has authority to represent the estate

on any matter touching it. On the other hand, a guardian ad litem or the representative of a class is constituted with reference to specific litigation and has authority only as to matters pertinent to it.

Illustrations:

3. F and S, father and son, deposit a sum of money in B, a bank. Following F's death, A as his administrator sues B to recover the sum. B defends by asserting a set-off of an equal sum lent by B to F; judgment is for B. The judgment concludes S insofar as he claims the money as a beneficiary of H's estate but neither bars his claims against B as a co-depositor of the money nor precludes him as such to issues determined in the first action.

4. A, on behalf of himself and all other persons similarly situated, brings an action to enjoin C, an employer, from discriminating in hiring and promotion against persons who are black. A judgment in the action, whether for or against A, does not preclude B, a woman, from bringing an action against C to enjoin employment discrimination on the basis of sex.

d. Divestiture of authority. A representative's authority may be divested or limited in the course of the proceedings in which he has appeared as representative. The divestiture or limitation may occur at the initiative of the represented person, as where a trust beneficiary successfully intervenes in an action by or against the trustee, or where some members of a class effectively opt out of the class or have the class redefined to exclude themselves. It may also occur at the initiative of the court, as in the appointment of a guardian ad litem for persons previously otherwise represented or in the refusal to permit an action to proceed as a class suit as to any or some issues. The effect of the divestiture or limitation is to restrict correspondingly the binding effects of a judgment in the action.

Illustrations:

5. A brings a class action on behalf of himself and other owners of boats in a certain harbor, alleging that the boats owned by him and others are suffering damage from polluted discharges from defendant C's factory. In pre-trial proceedings, the representational allegations are struck out and A proceeds individually to judgment. B, another boat owner, is not precluded by a judgment in favor of C, nor is he precluded as to issues determined in the action.

6. In the same facts as Illustration 5, in the pre-trial proceedings notice is directed to all members of the class, giving them opportunity to opt out of the action; B, another boat owner, does so. B is not precluded by a judgment in favor of C, nor, if the judgment is against C, may he invoke the benefit of preclusion as to issues determined in the action.

7. In a class action on the part of bondholders, the court permits the proceeding to go forward on the condition that the representatives undertake to represent only the class A bondholders, on the ground that there is a potential conflict of interest with class B. The class B holders are not bound by the judgment even if no such conflict of interest materialized.

e. *Divergence of interest within a class*. The representative authority of a party appearing on behalf of a class derives principally from the identity between his interests and those of the rest of the members of the described class. Where it appears that there is in fact a substantial divergence of interest between them, assurance is lacking that the representative will effectively protect the interest of the class. That divergence may exist with respect to some members of the class although it does not with respect to others. In such circumstances the judgment is not binding on those whose interests are divergent. Where there is identity of interests as to some of the issues adjudicated, but divergence as to others, the judgment is preclusive as to the former but not the latter.

Illustrations:

8. A, a member of an association, brings an action, purportedly on behalf of himself and all other members of the association, against C, an officer of the association, to rescind certain of the association's by-laws on the ground that they violate the antitrust laws. A recovers judgment. B, also a member of the association, then sues C for C's failure to enforce the by-laws. If it appears that at the time of the first action the members of the association had divergent interests in affirming or disputing the validity of the by-laws, the judgment is not preclusive as to B.

9. A is receiver for D mutual insurance company. A sues C, as an individual policyholder in D and as representative of all other such policyholders, to collect premiums due D, asserting D's insolvency and the policyholders' consequent immediate liability for premiums contracted. A recovers judgment. In an action against B, a policyholder governed by a law limiting the liability of mutual insurance policyholders to earned premiums, the judgment is conclusive on the issue of D's insolvency but not on the extent of B's liability based thereon.

f. *Representative's inadequate conduct of litigation.* The failure of a representative to invoke all possible legal theories or to develop all possible resources of proof does not make his representation legally ineffective, any more than such circumstances overcome the binding effect of a judgment on a party himself. On the other hand, a fiduciary does not bind those for whom he acts as against third parties who are aware of the fiduciary's failure to fulfill his responsibility. As applied to litigation, this principle implies that a judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party, or where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person. Where the representative's management of the litigation is so grossly

deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party. Tactical mistakes or negligence on the part of the representative are not as such sufficient to render the judgment vulnerable. In actions by or against the representative of a class, the thoroughness and vigor of the representation is properly subject to particular scrutiny because the bonds of responsibility between the representative and those for whom he acts are transitory and ordinarily not otherwise readily enforcible. Similar scrutiny is appropriate concerning the adequacy of representation in actions by or against a public agency or official where the judgment would have preclusive effects in an action by citizens or taxpayers concerning the same subject matter. See § 41, Comment *d*. In any event, whether the representation has been inadequate is a question of fact to be decided in light of the issues presented in the case and the factual and legal contentions that might reasonably have been expected to be presented.

Illustrations:

10. A as trustee is duly served in an action by B contesting title to the trust property. A answers and appears at trial but fails to cross-examine any of B's witnesses or to offer any of his own although, to B's knowledge, there are several available. The resulting judgment for B does not bind the beneficiary unless there are other facts indicating that A's conduct of the litigation was duly diligent in the circumstances.

11. A, a city taxpayer proceeding on behalf of himself and all others similarly situated, sues to restrain the city's issuance of bonds. The sole ground of A's action is that applicable procedures for issuance of the bonds have not been complied with. A dismissal of the action does not preclude a subsequent taxpayer's action by B contending that the purpose for which the bonds are issued is unlawful, if that contention has such substantial merit that competent counsel would reasonably have asserted it in the first action.

g. *Represented party previously bound.* (Subsection 2.) A person who appears in his own behalf in litigation has had his day in court and is bound by the judgment. Just as he may not himself relitigate the claims thus decided, neither may he do so in a subsequent action prosecuted or defended through a representative.

Illustrations:

12. A brings an action against B for damages arising from A's purchase of the stock of a corporation; judgment is for B. C then brings a class action against B on behalf of all purchasers of the stock, and obtains judgment. A may not be awarded recovery as a member of the class.

13. A, the beneficiary of an estate, brings an action against B, the executor of an estate, contending that B wrongfully appropriated estate property to his own use. Judgment is for B. B is thereafter succeeded as executor by C, who sues B seeking to recover the same property for the estate. A may not be awarded a share of that property.

Reporter's Note

(§ 86, Tent. Draft No. 2.) This Section, which should be read in connection with the preceding one, delineates the situations in which a prior adjudication involving a representative does not bind a supposedly represented person. In one sense this Section is a list of exceptions to the general rule that a representative proceedings is binding on the person represented. It may also be considered as describing the situations in which the proceedings fail to conform to the necessary conditions for representation and application of the general principle that one is not bound by an adjudication to which he was neither a party nor represented by one. The provisions of this section are thus closely related to, if indeed they are not particularized expressions of, the requirements of due process, a fact which historically was obscured by the tendency of courts to see some of these questions in the context of necessary parties issues. Compare, e.g., Baylor's Lessee v. Dejarnette, 54 Va. (13 Gratt.) 152 (1856); Miller v. Foster, 76 Tex. 479, 13 S.W. 529 (1889), Chapin v. Collard, 29 Wash.2d 788, 189 P.2d 642 (1948), with Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Hansberry v. Lee, supra, stands in any event as a reminder that there are constitutional limits on giving binding effect to litigation conducted through representatives. See Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv.L.Rev. 589 (1974).

The present Section includes components of several sections of the first Restatement dealing with equitable relief from judgments (§§ 112- 124, 127- 130); it borders on several substantive areas of law, particularly those having to do with the power of various representatives, e.g., Restatement, Second, Trusts §§ 117, 178; Restatement of Property §§ 180-185. Its aim is to draw together the various circumstances that result in a suit by a representative being non-binding on those whom he undertakes to represent.

Comment b. Perhaps the plainest of these circumstances is the failure to give judicially or statutorily mandated notice to the represented absentees. Many statutes or rules of court make such notice either mandatory or discretionary, e.g., Uniform Probate Code §§ 1-403, 3-106; Note, 53 Ia.L.Rev. 508 (1967) (collecting state statutes requiring notice in probate); Uniform Veterans' Guardianship Act, § 8; Federal Rules of Civil Procedure, Rule 23(c), (d). With respect to Federal Rule 23 and similar rules governing class suits, the question of what, under the circumstances of the case, constitutes adequate notice to the represented class is itself a matter of some uncertainty. Compare Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), with United States ex rel. Walker v. Mancusi, 338 F.Supp. 311 (W.D.N.Y.1971), aff'd, 467 F.2d 51 (2d Cir.1972); Lopez v. Wyman, 329 F.Supp. 483 (W.D.N.Y.1971), aff'd without opinion, 404 U.S. 1055, 92 S.Ct. 736, 30 L.Ed.2d 743 (1972). That question is beyond the scope of this Restatement. The rule of paragraph (1)(a) deals with the situation that arises when the required notice, whatever it might be, was not given. In such a case the judgment does not bind the unnotified absentees. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Battles v. Braniff Airways, Inc., 146 F.2d 336 (5th Cir.1944), cert. denied, 325 U.S. 871, 65 S.Ct. 1411, 89 L.Ed. 1990 (1945); Wright and Miller, Federal Practice and Procedure: Civil §§ 1786, 1793; Homburger, State Class Actions and the Federal Rule, 71 Colum.L.Rev. 609, 637-647 (1971); cf. Papilsky v. Berndt, 466 F.2d 251 (2d Cir.1972), cert. denied, 409 U.S. 1077, 93 S.Ct. 689, 34 L.Ed.2d 665 (1972) (dismissal of class suit); Note, 5 Conn.L.Rev. 294 (1972); In re Buchman's Estate, 123 Cal.App.2d 546, 267 P.2d 73 (1954); Annot. 47 A.L.R.2d 307 (1956) (notice of proceeding to remove executor). See also New Mexico Veterans' Service Comm'n v. United Van Lines, Inc., 325 F.2d 548 (10th Cir.1963) (minor defect held immaterial).

Comment c. The limitation on the scope of representation is implicit in the concept of representation itself. The chief problem encountered in the cases is whether the interest asserted in the second action is sufficiently distinct from that asserted in the first. Although the distinctions are drawn as ones of a kind, they often appear to be ones of degree. See McFadden v. McFadden,

239 Or. 76, 396 P.2d 202 (1964) (on which Illustration 3 is based); Collie v. Tucker, 229 Ark. 606, 317 S.W.2d 137 (1958); Wesley v. Mississippi Power & Light Co., 273 So.2d 174 (Miss.1973); Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962). The question may be whether the purported representative is authorized to represent any interests at all other than his own, Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) (state as parens patriae); Dudley v. Meyers, 422 F.2d 1389 (3d Cir.1970); Chapin v. Collard, 29 Wash.2d 788, 189 P.2d 642 (1948) (trustee does not represent beneficiaries on questions concerning trustee's fees).

Comment d. Where the court determines that a representative is not properly constituted as such with respect to all or part of the issues involved, that determination prevents any binding effect as to those issues. Clark v. Chase Nat'l Bank, 45 F.Supp. 820 (S.D.N.Y.1942); City of San Jose v. Superior Court, 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701 (1974); cf. Lonsford v. Burton, 200 Or. 497, 267 P.2d 208 (1954) (class members intervene to seek dismissal).

Divestiture of the representative's authority may be the result of a successful assertion of lack of a necessary party wherein the scope of the action is limited to the interests of those who are parties. Compare, In re Hensel's Estate, 144 Cal.App.2d 429, 301 P.2d 105 (1956), with Beatty v. Cake, 242 Or. 128, 407 P.2d 619 (1965). See also, 3 Scott on Trusts § 280.7 (2d ed.1956). Divestiture as to part of a class is frequently the result of a judicial finding of divergence of interest but may rest on other grounds. Compare Southern California Edison Co. v. Superior Court, 7 Cal.3d 832, 103 Cal.Rptr. 709, 500 P.2d 621 (1972) (on which Illustration 5 is based), with Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir.1970), on remand, 371 F.Supp. 754 (C.D.Cal.1973), rev'd, 533 F.2d 1126 (1976); Battles v. Braniff Airways Inc., 146 F.2d 336 (5th Cir.1944), cert. denied, 325 U.S. 871, 65 S.Ct. 1411, 89 L.Ed. 1990 (1945). A finding of conflicting interest or other circumstances leading to divestiture of authority as to some issues may not destroy the binding effect as to other issues. See In re Estate of Wiswall, 11 Ariz.App. 314, 464 P.2d 634 (1970); Aronoff v. Carraher, 146 Colo. 223, 361 P.2d 354 (1961); State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (1943).

Whether a member of a class has effectively opted out depends on the rules governing the opting out procedure and the terms of the option given pursuant thereto. See, e.g., Federal Rules of Civil Procedure, Rule 23(c). On the effect of a class member's opting out, see Sarasota Oil Co. v. Greyhound Leasing & Financial Corp., 483 F.2d 450 (10th Cir.1973), and authorities cited therein. But see In re Transocean Tender Offer Securities Litigation, 427 F.Supp. 1211 (N.D.Ill.1977).

Comment e. The effect of divergence of interest between the putative representative of a class and all or some other members of the class is established by Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Some cases, referring to Hansberry, suggest that if there is any divergence as to any issues, the action should not properly proceed as a class action at all, see Kimes v. City of Gary, 224 Ind. 294, 66 N.E.2d 888 (1946), and consequently should be accorded no binding effect. The more carefully reasoned cases, however, indicate that the divergence must be real rather than conjectural and that its significance is determined with reference to the specific matters—claims or issues as the case may be—as to which judgment is asserted to be preclusive. See, e.g., Gart v. Cole, 263 F.2d 244 (2d Cir.1959), cert. denied, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959); Giordano v. Radio Corp. of America, 183 F.2d 558 (3d Cir.1950); Brotherhood of Locomotive Firemen & Enginemen v. Graham, 175 F.2d 802 (D.C.Cir.1948), rev'd on other grounds, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949); Carroll v. American Fed. of Musicians, 372 F.2d 155 (2d Cir.1967), vac., 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968), reh. denied, 393 U.S. 902, 89 S.Ct. 64, 21 L.Ed.2d 189 (1968) (on which Illustration 8 is based); State Life Ins. Co. v. Bd. of Ed. of Chicago, 394 Ill. 301, 68 N.E.2d 525 (1946); Keehn v. Stapleton, 161 Kan. 476, 169 P.2d 811 (1946) (on which Illustration 9 is based); cf. Sosna v. Iowa, 419 U.S. 393, 399, 95 S.Ct. 553, 557, 42 L.Ed.2d 532 (1975); Badgley v. City of New York, 606 F.2d 358 (2d Cir.1979); Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir.1974), reh. denied, 518 F.2d 1407 (1975), vac., 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), on remand, 560 F.2d 1286 (1977); In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir.1974), cert. denied, 419 U.S. 1034, 95 S.Ct. 516, 42 L.Ed.2d 309 (1974); Lonsford v. Burton, 200 Or.497, 267 P.2d 208 (1954). The finding of divergence of interest may, of course, be made on collateral challenge. Hansberry v. Lee, supra; Mixon v. Barton Lumber & Brick Co., 226 Ark. 809, 295 S.W.2d 325 (1956). But compare the very questionable decision in Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945), cert. denied, 329 U.S. 798, 67 S.Ct. 487, 91 L.Ed. 683 (1947), reh. denied, 329 U.S. 834, 67 S.Ct. 629, 91 L.Ed. 706 (1947), motion denied, 330 U.S. 809, 67 S.Ct. 1079, 91 L.Ed. 683 (1947).

While the principle concerning divergence of interest is perhaps most frequently applied in the context of class actions, it underlies analysis of virtual representation in future interest cases as well. Miller v. Foster, 76 Tex. 479, 13 S.W. 529 (1889); Faber v. Faber, 76 S.C. 156, 56 S.E. 677 (1907); Longworth v. Duff, 297 Ill. 479, 130 N.E. 690 (1921); Newkirk v. Ingels, 197 Ky. 473, 248 S.W. 488 (1923); People's Bank & Trust Co. v. Gregory, 347 Ill. 397, 179 N.E. 856 (1932); Langstaff v. Meyer, 305 Ky. 116, 203 S.W.2d 49 (1947); cf. Wilkins v. Mulkey, 252 S.C. 615, 167 S.E.2d 619 (1969).

Comment f. While collusion and inadequate diligence or vigor by a representative are logically distinct from conflict of interest on his part, as a practical matter the two will often coalesce. As to collusion see Hansberry v. Lee, supra; see Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir.1968), on remand, 50 F.R.D. 471 (S.D.N.Y.1970). See also the first Restatement of Judgments, §§ 86, 116. But see Richardson v. Kelly, supra; In re Hanson's Estate, 126 Cal.App.2d 71, 271 P.2d 563 (1954). Short of fraud, a showing of conflict of interest may be sufficient to impugn the adequacy of the presentation made by the representative. See Estate of Wiswall, supra; Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15 (1946) (conflict between life beneficiary and remainderman); Bonds v. Joplin's Heirs, 64 N.M. 342, 328 P.2d 597 (1958) (failure of guardian ad litem to represent minors with due diligence); In re Eitingon's Estate, 70 N.Y.S.2d 883 (Surr.Ct.1941) (special guardian); cf. Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed 1387 (1956) (partial subrogee's conflict of interest permits direct action by subrogor). In class actions at least, the failure to advance a claim that has strong legal cogency may itself be regarded as a sufficient basis for refusing preclusion as to that issue. See Murphy v. Erie County, 28 N.Y.2d 80, 320 N.Y.S.2d 29, 268 N.E.2d 771 (1971) (on which Illustration 11 is based). Compare Saylor v. Lindsley, 456 F.2d 896 (2d Cir.1972), and Gonzales v. Cassidy, 474 F.2d 67 (5th Cir.1973), with Newman v. Stein, 464 F.2d 689 (2d Cir.1972), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972), for analysis of the required standards of litigating conduct, indicating that a mechanical test of whether the case was pressed to trial or appeal is not appropriate. See also Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457 (5th Cir.1978); City of Philadelphia v. Chas. Pfizer & Co., Inc., 345 F.Supp. 454 (S.D.N.Y.1972); Weiss v. Chalker, 55 F.R.D. 168 (S.D.N.Y.1972); Note, 87 Harv.L.Rev. 589 (1974); Comments 68 N.W.L.Rev. 1133, 1156 (1974).

Comment g. For application of the rule stated in Subsection (2), see St. Louis Typographical Union No. 8 v. Herald Co., 402 F.2d 553 (8th Cir.1968). Illustration 13 is based on Bernhard v. Bank of America, Nat. Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942).

Case Citations - by Jurisdiction

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A.B.A.Section on Litigation

U.S.

U.S.1996. Subsec. (1)(d), coms. (e) and (f) cit. in conc. and diss. op. Shareholders of acquired corporation filed class action against corporate directors in Delaware Court of Chancery, alleging purely state law claims, then sued acquiring corporation in California district court for violations of Securities Exchange Commission (SEC) Rules. The district court granted acquiring corporation's motion for summary judgment and dismissed the case. While shareholders' federal appeal was pending, the Chancery Court approved a settlement that incorporated shareholders' agreement to waive their SEC claims. The Ninth Circuit refused to accord the settlement judgment full faith and credit on the ground that it released claims over which the Chancery Court had no subject-matter jurisdiction. Reversing and remanding, this court held that the Chancery Court's judgment was entitled to preclusive effect, since state courts had jurisdiction to release, though not adjudicate, exclusively federal claims. Concurring and dissenting opinion would have remanded for the constitutionally required determination of the adequacy of class representation, as insufficiently represented class members would not be bound by the settlement judgment. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 395, 116 S.Ct. 873, 888, 134 L.Ed.2d 6.

U.S.1983. Subsec. (1)(d) cit. in ftn. in sup. (Erron. cit. as § 42(d)). The United States brought this action against an irrigation district and others to acquire additional water rights on behalf of an Indian reservation. The Indian reservation later intervened. Previous litigation, brought by the United States to adjudicate water rights along the course of a river, resulted in guaranteed water rights for both the reservation and the irrigation district. The trial court dismissed the complaint based on the res judicata effect of the prior litigation. The intermediate court affirmed in part and reversed in part. On further appeal, this court reversed a portion of the appellate court's decision, ruling that under the res judicata doctrine neither the United States nor the reservation could prosecute the claim for additional water rights. This court determined that all parties to the present litigation were bound by the judgment in the prior litigation. Citing the Restatement, this court reasoned that because the United States had represented both the reservation and the irrigation district, both of those present litigants were bound by the prior litigation. Any new landowners were also bound because they were successors to the water rights awarded the irrigation district. Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906, 2921, 77 L.Ed.2d 509, rehearing denied 464 U.S. 875, 104 S.Ct. 210, 78 L.Ed.2d 186 (1983).

C.A.1

C.A.1, 2007. Subsec. (1)(d) cit. in sup., subsec. (1)(e) cit. in sup. and quot. in disc., com. (f) quot. in disc. Shareholders brought a derivative suit on behalf of corporation against corporation's officers and directors, alleging breach of fiduciary duties. The district court dismissed their suit. Affirming, this court held that the dismissal of an earlier derivative suit in Massachusetts state court for failure to plead either demand on corporation's board of directors or the futility of such a demand barred this action under the doctrine of issue preclusion. The court concluded that privity existed between the state-court plaintiffs and the plaintiffs in the instant action; the state-court plaintiffs were not grossly deficient in failing to assert all of the facts alleged by plaintiffs here, and thus the state plaintiffs' representation of the interests of the corporation in the state action was not inadequate. In re Sonus Networks, Inc., 499 F.3d 47, 64-66.

C.A.1, 1990. Subsec. (1)(d) cit. in disc. As provided in a settlement reached between a Chapter 7 trustee and secured creditors, the trustee brought this proceeding, seeking a determination of the various creditors' claims. The secured creditors moved to dismiss claims of two unsecured creditors for equitable subordination, asserting that the bankruptcy courts's order approving the settlement between the trustee and the secured creditors was res judicata on such claims. The bankruptcy court granted the motion to dismiss, and the district court affirmed. This court also affirmed, noting that the two unsecured creditors had received a full and fair opportunity to argue their special equities to the bankruptcy court in opposition to its approval of the settlement; therefore, the district court did not err in concluding that, in a system where notice and hearing safeguards were provided that would have allowed the unsecured creditors to raise and seek to preserve their own special equitable claims, the unsecured creditors were represented by the trustee, with whom they were in privity, and were therefore bound by the bankruptcy court's approval of the settlement. In re Medomak Canning, 922 F.2d 895, 900.

C.A.1, 1981. Cit. in disc. and com. (f) quot. in disc. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) Food companies brought an action for a declaratory judgment and injunctive relief against the Massachusetts Department of Health and the Commissioner thereof, alleging that the Massachusetts open date food labeling regulation was unconstitutional. The lower court entered a judgment in favor of the defendants and the food companies appealed. On appeal this court stated that the Massachusetts court, the federal courts, and the Restatement (Second) of Judgments, T.D. No. 2, recognize that a person who is not a party to an action, but who expressly, or impliedly, gives a party authority to represent him may be bound by the rule of res judicata as though he were a party. The court stated that such a rule was not repugnant to the due process clause of the Fifth and Fourteenth Amendments because the person so represented has had a vicarious opportunity to be heard in the underlying litigation. The court held that the food company, which was a member of a trade association which had previously brought a challenge to the regulation, was barred by res judicata from bringing its own challenge, where it had been invited to participate in the prior litigation and, although declining, had contributed toward the expenses of the litigation. However, the court also held that the other food company, which was not a member of the trade association which had previously brought a challenge to the regulation and which had not contributed to the expenses of such litigation, was not barred by res judicata from bringing its own challenge, even though it was related to a company which had participated in the previous litigation, because there was no showing that it controlled the related company or that it had expressly or impliedly authorized the related company to represent it in the previous litigation. Accordingly, the judgment of the lower court was affirmed in part and reversed in part. General Foods v. Mass. Dept. of Public Health, 648 F.2d 784, 788.

C.A.3

C.A.3, 1990. Subsec. (2) cit. in sup., subsec. (2), com. (g) quot. in sup., com. (d) cit. in disc. The EEOC filed a complaint that a steel corporation was violating the Age Discrimination in Employment Act (ADEA) by requiring execution of a release waiving employees' rights under the ADEA and other antidiscrimination statutes as a condition for obtaining a more favorable retirement pension. The district court ruled in favor of the EEOC, granting injunctive relief. Pursuant to the injunction, the corporation submitted a list of employees who had been denied or had lost their pension benefits due to the release, but contended that certain former employees were barred from receiving retroactive reinstatement in the pension plan by the doctrine of res judicata. The district court ruled that the individuals who had unsuccessfully litigated their ADEA claims in separate actions were not

precluded from retroactive relief. Reversing, this court explained that, having had their day in court, those individuals could not relitigate the same claim through the EEOC any more than they could relitigate the same claim on their own behalf. E.E.O.C. v. U.S. Steel Corp., 921 F.2d 489, 493, 495.

C.A.3, 1985. Subsec. (1)(a) cit. in disc. Prison inmates filed a federal class action suit seeking injunctive relief and money damages because of the conditions in which they were confined. The trial court granted the defendants' motion to dismiss, citing an earlier state court case that found that the prison operated in violation of the Eighth Amendment. The state courts had since issued a series of decrees intended to improve prison conditions. The trial judge in the instant case ruled that the plaintiffs' claim was barred by res judicata. This court reversed and remanded. The court noted that the state action had been concluded more than 10 years before, that there was no identity of persons or parties between the present class members and the named plaintiffs in the state action, and that there was no identity of causes of action between the plaintiffs in the state suit and those in the instant action. Harris v. Pernsley, 755 F.2d 338, 343, rehearing denied 758 F.2d 83 (3d Cir.1985).

C.A.4

C.A.4, 1986. Com. (d), illus. 6 cit. in sup. A prison detainee who was subjected to a strip search sued the county and several of its officers for violation of her constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. The district court entered summary judgment for the plaintiff, applying offensive collateral estoppel from a prior class action case that held that such searches were unconstitutional when unreasonable and not supported by probable cause. The court of appeals reversed and remanded, holding that the prior case was not sufficiently final to be used for issue preclusion because it was still pending in the court regarding the definition of the class, and that there wasn't a sufficient determination of the facts in the present case to decide if the search was unreasonable. The court noted that the plaintiff had an opportunity to join the prior class action and declined to do so, and that allowing her to apply offensive collateral estoppel could burden the defendants with multiple suits. Polk v. Montgomery County, Md., 782 F.2d 1196, 1202.

C.A.5

C.A.5, 2005. Quot. in ftn. Retired professors sued state-university system for age discrimination in violation of state and federal laws, and the EEOC brought a separate action, naming plaintiffs as the aggrieved parties. The district court remanded the state-law claims to state court, and granted summary judgment against the EEOC, which voluntarily dismissed its appeal. After the state trial court's dismissal of the remanded claims on res judicata grounds was reversed on appeal, defendant filed motion in federal district court under the relitigation exception of the Anti-Injunction Act to enjoin plaintiffs' state-court suit based on federal court's judgment against EEOC. The district court denied the injunction. Reversing and remanding, this court held that the EEOC did not inadequately represent plaintiffs by voluntarily dismissing its appeal, and thus plaintiffs were precluded from pursuing their state-law claims. Vines v. University of Louisiana at Monroe, 398 F.3d 700, 712, certiorari denied 546 U.S. 1089, 126 S.Ct. 1019, 163 L.Ed.2d 852 (2006).

C.A.7

C.A.7, 2009. Com. (f) quot. in sup. Environmental group sued metropolitan sewerage district under the Federal Water Pollution Control Act, alleging that certain sanitary sewer overflows violated the Act. On remand, the district court found that a 2002 stipulation settling an enforcement action brought against defendant by the state of Wisconsin was a diligent prosecution for privity purposes, and therefore dismissed plaintiff's suit on res judicata grounds. Affirming, this court held that the trial court did not err in declining to give decisive weight to plaintiff's post-stipulation evidence, with respect to the issues of privity and diligent prosecution; when the evidence in a case like this one demonstrated that a citizens' representative had acted in good faith and obtained relief adequate to address all known problems in the system and to prevent all foreseeable violations, that constituted diligent prosecution, no matter what happened later. Friends of Milwaukee's Rivers and Alliance for Great Lakes v. Milwaukee Metropolitan Sewerage Dist., 556 F.3d 603, 610.

C.A.7, 2003. Subsec. (1) cit. in sup., subsec. (1)(e) quot. in sup. Owner of building on which large commercial sign had been painted sued city under 42 U.S.C. § 1983, arguing that city's sign ordinance and zoning board's refusal to grant nonconforming-use status for sign violated due-process clause and First Amendment. The district court abstained. Reversing and remanding, this court held, inter alia, that plaintiff's claims were not precluded on the basis of res judicata by wall lessee's state-court action challenging the zoning board's decision, since lessee failed to prosecute its case with reasonable prudence to protect plaintiff's interests. General Auto Service Station LLC v. City of Chicago, Illinois, 319 F.3d 902, 906

C.A.7, 1978. Cit. in ftn. in sup. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) Meat association brought action on behalf of its members against municipalities challenging the validity of enacted ordinances authorizing inspection of meat delivery vehicles. The district court dismissed the complaint. The court of appeals affirmed the dismissal, holding that municipal ordinances were not invalid under the Wholesome Meat Act of 1967, and that the ordinances did not contravene the commerce clause of the United States Constitution. In addition, the court disagreed with the defendant municipalities' argument that the district court erred when it assumed that the association had standing to bring the action because a judgment against it might not be binding upon its members. The court saw little likelihood that the defendants would suffer the burden of relitigating the claims raised in the case noting, inter alia, that the defendant municipalities would have the opportunity in any case brought by members of the association to argue that the members were bound by the res judicata effect of the Court's decision in this case. Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278, 281, certiorari denied 442 U.S. 946, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1978).

C.A.9,

C.A.9, 2014. Cit. in ftn., subsec. (1) quot. in sup. and cit. in case quot. in sup., com. (f) quot. in sup. and quot. in case quot. in sup. Shareholder brought a derivative action against corporation that made and serviced electronic gaming systems and against corporation's board of directors, alleging that certain officers of corporation made intentionally misleading statements about corporation's financial prospects. The district court granted defendant's motion to dismiss based on the doctrine of issue preclusion, finding that shareholder was not excused from making a pre-suit demand on the board in this action on the basis that demand would be futile, because the issue of demand futility was previously litigated in corporation's favor in a prior action brought by other shareholders. Affirming, this court held that the matter in dispute in both actions was whether shareholder sufficiently alleged demand futility. The court rejected plaintiff's argument that the shareholders who filed the prior action did not adequately represent corporation's interests as required for him to be bound under Restatement Second of Judgments § 42, reasoning that the shareholders in the prior action adequately litigated their case through its dismissal and on appeal, and there was no indication that there was any collusion between those shareholders and corporation. Arduini v. Hart, 774 F.3d 622, 635.

C.A.9

C.A.9, 2005. Cit. in diss. op. §§ 39-42. Indian tribe moved to reopen judgment that had denied its members treaty fishing rights on the ground that tribe had not maintained an organized tribal structure. The district court denied relief. Reversing, this court held, inter alia, that federal recognition of the tribe was an extraordinary circumstance that justified reopening the prior judgment. The dissent argued that recognition by the Bureau of Indian Affairs (BIA) did not necessarily entail treaty status, and noted that other tribes that were not parties to the BIA proceedings, were not represented in the proceedings, and did not control the parties to the proceedings or agree to be bound by the proceedings could not be collaterally estopped from relitigating the BIA's underlying factual findings. U.S. v. Washington, 394 F.3d 1152, 1169, cert. denied 546 U.S. 1090, 126 S.Ct. 1025, 163 L.Ed.2d 854 (2006).

C.A.9, 2003. Subsecs. (1) and (2) quot. in case quot. in sup. Disabled person brought suit on behalf of class of similar people against company that operated gas stations, alleging denial of access to public accommodations and discrimination under Americans with Disabilities Act and California disability laws. District court certified mandatory class, and approved proposed consent decree. This court reversed and remanded, holding that consent decree's terms were unfair, inadequate, and unreasonable

for absent class members, and thus demonstrated that named plaintiff and class counsel failed to prosecute suit with due diligence and reasonable prudence. The court expressed concern about possible collusiveness between named plaintiff, class counsel, and defendants, as plaintiff and defendants reached agreement on decree's primary components in four months. Molski v. Gleich, 318 F.3d 937, 956.

C.A.9, 1992. Subsec. (1)(e) quot. in case quot. but dist. (Erron. cit. as § 42(1)(2).) Representative of Arizona and Wisconsin classes of title insurance consumers sued title company, alleging conspiracy to fix prices for title searches. Title company moved for summary judgment, asserting that representative was bound by judgment in prior class action suit to which both title company and representative were parties. The district court granted the motion. Affirming, this court rejected plaintiff's argument that plaintiff was not adequately represented by class counsel in prior class action so that that judgment was without preclusive effect. The court concluded that class counsel was not derelict in its duties owed to class and that any errors committed by class counsel were harmless. Brown v. Ticor Title Ins. Co., 982 F.2d 386, 391, cert. granted in part _ U.S. _, 114 S.Ct. 56, 126 L.Ed.2d 26 (1993).

C.A.9, 1992. Quot. in disc., subsec. (1)(d) cit. in disc. The Washington Public Power Supply System (WPPSS) defaulted on $2.25 billion in revenue bonds. The bond trustee, on behalf of all bondholders, sued the WPPSS on various theories involving allegations of material misrepresentations or omissions in the prospectuses issued with the offer and sale of the bonds. The district court approved a settlement of more than $580 million before interest, finding it fair, reasonable, and adequate. One group of bondholders who were nonparties to the suit appealed the order approving the settlement, arguing, inter alia, that the bond fund trustee did not have authority to agree to anti-suit injunction provisions included in the settlement and that the trustee did not adequately represent their interests. This court affirmed, holding that, as representative of the class, the bond fund trustee was authorized to settle or compromise claims on behalf of all bondholders, including the appellants, and that the appellants were bound by the settlement because the trustee adequately represented their interests. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1278, 1283, certiorari denied 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333.

C.A.9, 1982. Subsec. (e) cit. in ftn. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) The plaintiffs, the United States and an Indian tribe, sought to quiet title to a water right to sustain a lake fishery. The lower court dismissed the plaintiffs' claims because they were part of the same cause of action settled in a previous suit. In an opinion published at 649 F.2d 1286, the court affirmed except with regard to the named defendant, because it had been represented by the United States in the prior action and never had an opportunity to litigate its interest as against the Indian tribe. The case was remanded for the lower court to determine whether the plaintiff tribe was entitled to a water right for its fishery. In this order amending its first opinion, the court noted that Federal-Indian relations were long established and involved a fiduciary duty which required the court to give a broader preclusive effect to the previous decision than it would if it had been only a class action. The court also noted that antagonistic parties were not necessarily adverse parties, because adversity was only a legal concept. United States v. Truckee-Carson Irr. Dist., Etc., 666 F.2d 351, 352, affirmed in part, reversed in part 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), rehearing denied 464 U.S. 875, 104 S.Ct. 210, 78 L.Ed.2d 186 (1983), rehearing denied 464 U.S. 875, 104 S.Ct. 210, 78 L.Ed.2d 185 (1983), on remand 720 F.2d 622 (9th Cir.1983).

C.A.9, 1981. Cit. and quot. in disc. and cit. in conc. and diss. op. and Rptr's Note cit. and quot. in part in ftn. and com. (f) cit. and quot. in disc. and cit. in ftn. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) Action was brought by the United States and an Indian tribe to quiet title to a water right to sustain a lake fishery. The court below found that the final decree in a prior action brought by the government to adjudicate water rights to the lake precluded the instant cause of action, although the government in the prior action had not asserted a claim to sustain the lake fishery. Accordingly, the lower court dismissed the complaint. On appeal, the tribe contended, inter alia, that the cause of action asserted in the prior case was not the same cause of action asserted in the instant case. The court first addressed the issue of whether the Secretary of the Interior was authorized to obtain a judicial decree quantifying the reserved water rights. The court held that the Secretary's authority to make decisions regarding the conduct of the prior litigation did not extinguish the tribe's property interest and, to the extent extinguishment occurs, it is as a result of giving the prior decree preclusive effect. The court noted that authority to represent Indian reservations in litigation does not give the government unrestricted control over the litigation,

and the government acts as trustee, which implies obligations which may supplement the obligations of advocate. The court held, however, that once litigation is concluded, the court must focus on the principles of res judicata. As to the res judicata effect of the prior litigation, the tribe asserted, inter alia, that different evidence would be required to establish a fishery water right than to establish the water rights prior litigated. The court noted that the "same evidence test" is but one of many tests used to distinguish one cause of action from another, and, accordingly, held it to be undeterminative in this case. The tribe next contended that it was inadequately and improperly represented in the prior case and thus could not be bound by the judgment. The court noted that a person who is not a party to an action but who is represented by a party is bound by the rules of res judicata as though he were a party, even though he was not personally served, unless the party who purports to represent him failed to do so with due diligence or prudence, or unless there was a substantial divergence of interest between the representative and the party whom he represents. The court found that, assuming that the government's representation of the tribe in the prior action was inadequate, the tribe would not now be bound if the defendants in the prior action had knowledge of the government's impropriety, and, thus, had no justifiable reliance on the prior adjudication. The appellate court found that the lower court's finding that any impropriety in the government's representation was unknown to the defendants in the prior action was not clearly erroneous. Thus, the defendants in the prior action were entitled to rely on the final decree. The court, however, reserved the judgment as to the defendant irrigation district, which was not a defendant in the prior litigation. The court held that by representing the tribe and the irrigation district in the prior action, the government compromised its duty of undivided loyalty to the tribe. Accordingly, the court held that since there was no diversity between the tribe and the district, and since there was no evidence that the fishery water right was actually ever litigated in the prior proceedings, the plaintiff's action should not have been dismissed against the irrigation district. The concurring and dissenting justice agreed with the majority that there could have been no public perception of any impropriety in the government's conduct in the prior litigation which would preclude reliance upon the decree. United States v. Truckee-Carson, Etc., 649 F.2d 1286, 1303, 1304, 1307, 1313, opinion amended 666 F.2d 351. See case below. Affirmed in part, reversed in part 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), rehearing denied 464 U.S. 875, 104 S.Ct. 210, 78 L.Ed.2d 186 (1983), on remand 720 F.2d 622 (9th Cir.1983).

C.A.10

C.A.10, 2011. Subsec. (1)(e) quot. in sup., cit. in case cit. in disc., and quot. in case quot. in diss. op. Environmental group sued electric-power-plant operator under the citizen-suit provision of the Clean Air Act (CAA), alleging that defendant was attempting to build a coal-fired power plant with an invalid permit in violation of the CAA. The district court granted defendant's motion to dismiss. Affirming, this court held that plaintiff's suit was barred under the doctrine of issue preclusion by the Wyoming Environmental Quality Council's orders settling permitting disputes between defendant and the Wyoming Department of Environmental Quality (DEQ). The court concluded that DEQ was diligent in requiring compliance with the CAA before the Council, and thus was in privity with the citizens of Wyoming in the Council proceedings under the doctrine of parens patriae; therefore, DEQ was in privity with plaintiff, which represented the interests of citizens of Wyoming. The dissent argued that there was no privity, because DEQ failed to prosecute the action with due diligence. Sierra Club v. Two Elk Generation Partners, Ltd. Partnership, 646 F.3d 1258, 1269, 1271, 1277.

C.A.10, 1996. Subsec. (1)(d) quot. in sup. Judgment creditor sued judgment debtor, among others, for an equitable lien against assets excluded from the bankruptcy estate of judgment debtor's corporation pursuant to a settlement agreement between judgment debtor and the bankruptcy trustee. Affirming the district court's grant of the equitable lien, this court held, inter alia, that the bankruptcy court-approved settlement was not res judicata as to any claim that judgment creditor might have against the excluded assets, since judgment creditor was not in privity of interest with the trustee; thus, judgment creditor was not barred from asserting its equitable lien. The court said that, even though judgment creditor was also an unsecured creditor of the bankruptcy estate and in privity with trustee by virtue of the unsecured claim, its asserted interest in the excluded assets was based on its status as a judgment creditor of judgment debtor, and in this respect it was in direct opposition to the trustee. Hoxworth v. Blinder, 74 F.3d 205, 208.

C.A.D.C.

C.A.D.C.1985. Subsec. (1)(e) cit. in ftn. An organization and its members appealed from the trial court's summary judgment dismissing their claims against their employer. This court affirmed and reversed in part, holding that the trial court erred in determining that claim preclusion barred other members and the organization itself from litigating in this case the constitutional aims that two of the organization's officers unsuccessfully asserted in a previous lawsuit. Noting that persons who are not parties to an action are not bound by that action's judgment, the court held that the officers who had previously sued had not done so as representatives for the organization's members, since the complaint had not disclosed that they were doing so. To hold otherwise, said the court, would raise questions about the adequacy of the representation and whether the members were bound by inadequate representation. The court noted that the rules governing virtual representation and the preclusive consequences of suits brought by an unincorporated association were complex and uncertain. Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1411.

C.A.Fed.

C.A.Fed.2011. Subsec. (1)(e) cit. and quot. in diss. op. Native American tribe filed a claim for monetary damages against the United States, alleging that defendant's inadequate representation and failure to secure and protect its water rights in a particular river constituted a breach of fiduciary duty that defendant owed to it. The Court of Federal Claims granted defendant's motion to dismiss plaintiff's claim. Affirming, this court held that plaintiff's claim was barred by the six-year statute of limitations on actions against the United States, because plaintiff's claim accrued in 1935 upon entry of a consent decree settling plaintiff's water-rights claims. The dissent argued that plaintiff was not adequately represented in connection with the 1935 decree, and thus plaintiff's claim for damages did not ripen until 2006, when the water rights were finally adjudicated by the Arizona Supreme Court. San Carlos Apache Tribe v. U.S., 639 F.3d 1346, 1360.

D.Ariz.

D.Ariz.1989. Subsec. (1) quot. in disc. Several parties including bondholders who filed a class action, a bank as trustee and attorney-in-fact for the bondholders, and all the defendants, sought this court's approval of a settlement agreement for securities litigation stemming from a power supply system's two nuclear power projects. This court approved the settlement agreement, holding, inter alia, that, while some of the bondholders were not members of the plaintiff class, they would still be bound by the class action settlement agreement because their legal identity and interests had been represented by the bond fund trustee. In re Wash. Public Power Supply Sys. Sec. Lit., 720 F.Supp. 1379, 1422.

C.D.Cal.Bkrtcy.Ct.

C.D.Cal.Bkrtcy.Ct.2016. Cit. in sup. and cit. in case cit. and quot. in sup.; subsec. (1)(e) cit. and quot. in sup. Creditor of non-debtor entity filed an administrative claim against estate of Chapter 11 debtor, alleging that debtor received a fraudulent transfer from non-debtor while claimant was a creditor of non-debtor. This court held that creditor failed to establish a prima facie administrative claim. In so holding, the court determined that, even though claimant obtained a default judgment against non-debtor, claimant failed to show the necessary privity, under Restatement Second of Judgments § 41, between non-debtor and debtor's estate. Moreover, even if privity existed under § 41, the privity exception set forth in § 42(1)(e) would apply because non-debtor, having no assets, had no incentive to defend the prior default judgment action. The court noted that, because Nevada had already adopted the privity analysis set forth in § 41, it would likely follow § 42 as well. In re Blanchard, 547 B.R. 347, 355, 356.

N.D.Cal.

N.D.Cal.1984. Com. (c) quot. in disc. (citing § 86, T.D. No. 2, 1975, which is now § 42 of the Official Draft). Under the Anti-Injunction Act, an oil company sued to enjoin approximately 1,000 former employees from pursuing a claim filed in an Alaska state court under the Alaska Wage and Hour Act. The plaintiff argued that the state court claim was reduced to judgment by a

consent decree entered by this court in a federal enforcement action initiated by the Secretary of Labor under the Fair Labor Standards Act (FLSA) and that the principle of res judicata required preclusion of the state court claim. This court denied the plaintiff's motion for summary judgment, holding that the employees' state court claim was not precluded by the doctrine of res judicata because the employees had been neither parties to the federal action nor in privity with the Secretary of Labor in that action. The court reasoned that the Secretary had sued in the general public interest in the FLSA enforcement action and not on behalf of the employees. The court further reasoned that the FLSA enforcement action had not been intended to settle any of the employees' claims under the Alaska wage and hours regulations. Bechtel Petroleum, Inc. v. Webster, 636 F.Supp. 486, 498, decision affirmed 796 F.2d 252 (9th Cir.1986), cert. dismissed 481 U.S. 1065, 107 S.Ct. 2455, 95 L.Ed.2d 864 (1987).

D.Del.

D.Del.2008. Quot. in disc. Wife and daughter of a passenger who was killed in an automobile accident brought suit for negligence against driver of the other vehicle involved in the collision, seeking to recover for their own injuries in the accident and for the wrongful death of passenger. This court granted summary judgment for defendant, holding that daughter, as a beneficiary under passenger's will, was in privity with passenger's estate such that collateral estoppel applied to preclude the instant action against defendant by virtue of the estate's prior survival action litigated against defendant in Delaware state court, in which the issue of defendant's negligence was decided. Young v. Shore, 588 F.Supp.2d 544, 547.

D.Del.2003. Cit. and quot. in sup. Job applicant who wore scarf for religious reasons was not hired by store because store believed that scarf violated store's dress code and was a safety hazard. After applicant filed charge with EEOC alleging religious discrimination by store, EEOC filed complaint against store to enjoin discriminatory practices and to obtain damages for applicant. When EEOC complaint was dismissed due to applicant's absence at depositions, applicant sued store for damages for religious discrimination. This court granted store summary judgment, holding that since EEOC prosecuted applicant's claim with due diligence and reasonable prudence, EEOC and employee were in privity and store established claim preclusion. Store expended resources defending EEOC suit, and fairness dictated that it should not have to defend itself twice against same allegations and same party. Mohammed v. May Dept. Stores, Co., 273 F.Supp.2d 531, 535, 537.

D.D.C.

D.D.C.2012. Sec. and subsecs. (1)(a)-(1)(e) cit. in sup. Timber association sued U.S. Department of Agriculture and U.S. Forest Service, seeking injunctive relief from defendants' adoption of a forest-plan amendment that reduced the amount of land available for commercial timber harvesting in a national forest in Alaska. Granting defendants' motion to dismiss, this court held that plaintiff's claim was barred, under the doctrine of res judicata, by the court's judgment in a prior case in which a conference of Alaskan cities and regional organizations had unsuccessfully challenged the forest-plan amendment, finding that the prior case involved the same parties or their privies as the present case for purposes of res judicata. The court concluded that, even if the conference did not understand itself to be acting as plaintiff's representative in the earlier litigation, its lack of subjective understanding about the representation was not a recognized exception to the rule that one who was represented by another party was bound by a judgment that also bound that party. Alaska Forest Ass'n v. Vilsack, 883 F.Supp.2d 136, 142.

N.D.Ill.

N.D.Ill.1989. Cit. in disc., subsec. (1)(e) quot. in disc., com. (f) quot. in disc. The sellers of a waste treatment facility sued the purchasing partnership and an individual partner for breach of contract, failure to pay promissory notes, misappropriation and improper transfer of funds, and damage to personal property. The partner counterclaimed, alleging misrepresentation regarding the purchase contract and breach of a contractual indemnification provision. This court denied the defendant partner's motion for summary judgment and granted the plaintiff's motion, holding that res judicata precluded the partner's counterclaims because a federal district court in Indiana had dismissed with prejudice two counterclaims of the partnership virtually identical to the counterclaims in the present action. Moreover, the partner could point to no facts indicating that the partner who represented

the partnership in the earlier action had failed to adequately prosecute or defend the partnership's claims. Continental Waste System, Inc. v. Zoso Partners, 727 F.Supp. 1143, 1152.

N.D.Ill.1978. Subsec. (1)(c) cit. in ftn. in disc. and com. (d) cit. in ftn. in disc. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) Action was brought alleging violation of various federal securities laws as well as breach of common-law fiduciary duties in connection with a tender offer made by majority shareholders for minority shares. Plaintiffs motioned for summary judgment on liability based on principles of res judicata and collateral estoppel. The overriding considerations in the decision to enforce the offensive use of collateral estoppel were whether the defendants had a full and fair opportunity to litigate in the Delaware court proceedings and whether judicial economy would be served by an application of collateral estoppel. The court held, inter alia, that under principles of collateral estoppel plaintiffs who excluded themselves from a class claim in a suit in Delaware state courts were not prohibited by the rule of mutuality from claiming the benefit of a judgment won by that class with respect to both their state and federal claims. In re Transocean Tender Offer Securities Litigation, 455 F.Supp. 999.

D.Me.

D.Me.1990. Subsec. (1)(d) quot. in disc. Creditors appealed an order of the bankruptcy court dismissing their cross-claims to subordinate appellee creditors' liens against a Chapter 7 debtor. A consent agreement that the bankruptcy trustee had entered, releasing any and all claims against appellees, provided that the extent, priority, allowability, and amount of the claims of various creditors could be subsequently determined in an action brought by the trustee. Appellants maintained that the consent agreement's contemplation of a later suit by the trustee to determine the priority of all claims included their right to assert a claim of equitable subordination. This court affirmed the dismissal, holding the claim was barred by res judicata. The court noted the appellants were represented by the trustee, who had acted on behalf of all the creditors of the estate and who was the proper party to seek equitable subordination, yet the trustee had explicitly asserted and relinquished the claim of equitable subordination in the consent agreement approved by the bankruptcy court after notice and a hearing where appellants had been given an opportunity to object. In re Medomak Canning, 111 B.R. 371, 376, decision affirmed 922 F.2d 895 (1st Cir.1990).

D.Mass.

D.Mass.2006. Cit. in disc., subsec. (e) quot. in disc. Shareholders brought a federal derivative suit on behalf of corporation against several officers and directors, alleging negligence and misconduct. Granting defendants' motion to dismiss on the basis of issue preclusion, this court held that a determination in a state-court shareholder derivative suit that the failure to make a demand on directors could not be excused precluded different shareholder plaintiffs in this parallel federal derivative suit from relitigating the question of demand futility. The court concluded that a privy of the plaintiffs had a full and fair opportunity to litigate the identical demand-futility issue in state court, which reached a final judgment on that issue. In re Sonus Networks, Inc. Shareholder Derivative Litigation, 422 F.Supp.2d 281, 291.

S.D.N.Y.

S.D.N.Y.2006. Subsec. (e) quot. in disc. Shareholders brought derivative action against officers and directors of company for their alleged breach of fiduciary duties. Noting that a similar shareholder derivative action filed in state court had been dismissed for failure to adequately allege, pursuant to Delaware law, that a pre-suit demand on company would have been futile, this court granted defendants' motion to dismiss, holding that plaintiffs in this action were precluded, on both res judicata and collateral estoppel grounds, from relitigating the issue of demand futility. The court pointed out that plaintiffs failed to show or contend that the plaintiffs in the state-court action did not adequately represent their interests or the interests of company's shareholders generally. Henik ex rel. LaBranche & Co., Inc. v. LaBranche, 433 F.Supp.2d 372, 381.

S.D.N.Y.1994. Cit. in disc. Employees of communications company who were discharged soon after second communications company bought their employer brought ERISA action against both organizations alleging, inter alia, that they were entitled to the severance package offered by their former employer rather than the less favorable package they received from the buying company. Referring to the judgment rendered in a virtually identical California case decided in their favor, defendants argued that plaintiffs' action was barred because their interests were fully represented by the California plaintiffs. The court denied preclusion, holding that plaintiffs did not participate in the California action as parties, did not agree to or authorize their representation by the California plaintiffs, were not in privity with them, exercised no control over the earlier case, and never indicated to defendants an intent to be bound by that judgment. The court also rejected defendants' request to apply the doctrine of offensive issue preclusion before granting in part and denying in part the parties' motions for summary judgment on the substantive ERISA question. Algie v. RCA Global Communications, Inc., 891 F.Supp. 839, 852.

E.D.Va.

E.D.Va.1991. Subsec. (2) cit. in ftn. A bankruptcy trustee filed a complaint to revoke discharge based on fraud. Previously, a creditor had unsuccessfully filed an adversary complaint for denial of discharge based on fraud. The bankruptcy court granted the debtor summary judgment, dismissing the trustee's complaint. This court reversed and remanded, holding that the trustee was not in privity with the creditor and the trustee's claim was not precluded by res judicata. Noting that a trustee acts on behalf of all creditors equally, the court explained that, in his suit for denial of discharge, the creditor was acting mainly if not completely in his individual capacity as evidenced by his request for a judgment for the amounts owed him. It therefore did not appear that the interests of the same parties were being represented in the creditor's suit and the trustee's suit. The court reserved ruling on how res judicata would affect whether the creditor was bound by or entitled to any benefits of a judgment by the bankruptcy court on the merits of the trustee's claim for revocation of discharge since that issue had not been raised. Hudgins v. Davidson, 127 B.R. 6, 9.

D.V.I.

D.V.I.2001. Subsec. (1)(e) and com. (a) quot. in sup. Virgin Islands Bureau of Internal Revenue attempted to collect unpaid income taxes from corporations, sought to reduce unpaid tax assessments to judgment, and attempted to collect any unsatisfied portion of judgment from corporations' owners. This court denied owners' motion for summary judgment, holding, inter alia, that the bureau's claims against owners personally were not precluded by prior tax receiver litigation that resulted in a stipulated settlement. The receiver did not represent the bureau, the parties did not intend that the stipulation for dismissal would preclude bureau from bringing its own suit against owners, and the receiver was not authorized to bring the claims now asserted by bureau. Government of Virgin Islands, Bureau of Internal Revenue v. Lansdale, 172 F.Supp.2d 636, 654.

Alaska

Alaska, 2010. Cit. in case quot. in sup. and cit. in ftn. §§ 39-42. Client brought an action for professional malpractice against attorney who had negotiated his DUI plea bargain, after his conviction was vacated based on attorney's ineffectiveness in failing to recognize that, because Daylight Savings Time was still in effect, the law under which client was arrested had not yet become effective. Following a bench trial, the trial court found in favor of attorney. Affirming, this court held that issue preclusion did not bind attorney to the post-conviction relief decision. While attorney had submitted an affidavit in those proceedings, he was neither a party to nor in privity with a party to the proceedings, which were between client and state; in addition, there was no privity between attorney and the state, because his limited participation did not allow him sufficient control or discretion to establish privity, he did not agree to be bound, and he was not represented by the state in a capacity such as trustee, agent, or executor. Stewart v. Elliott, 239 P.3d 1236, 1241.

Ariz.

Ariz.2006. Subsec. (1)(e) cit. in ftn. and cit. and quot. in disc. In general stream adjudication proceeding, Indian tribe asserted claims to additional water from river and its tributaries. The trial court held that a 1935 federal court consent decree precluded tribe's claims to additional water from river mainstem but not from its tributaries. Affirming and remanding, this court held, inter alia, that the decree adjudicated only claims to the river and had no preclusive effect as to the tributaries. The court declined, on the ground of comity, to address the tribe's argument that the decree was not entitled to preclusive effect based on an absence of privity between tribe and the government owing to the government's inadequate representation of the tribe in the prior litigation. In re General Adjudication of All Rights to Use Water in Gila River System and Source, 212 Ariz. 64, 127 P.3d 882, 887, 897, 898, reconsideration denied 212 Ariz. 470, 134 P.3d 375 (2006), certiorari denied 549 U.S. 1156, 127 S.Ct. 931, 166 L.Ed.2d 781 (2007).

Ariz.1991. Com. (f) cit. in sup. Individual investors who won a fraud and breach of trust judgment against a mortgage banking operation brought a garnishment action against the bank's insurers. The trial court quashed the writs of garnishment, holding that the plaintiffs had not properly vouched in the insurers in their action against the bank and that the bank had not defended the action with due diligence. The intermediate appellate court reversed and remanded. This court vacated the intermediate appellate court's decision and affirmed the trial court's judgment, finding that the bank had not defended with due diligence and reasonable prudence. The court stated that whether due diligence had been exercised was a question of fact and that fraud or collusion was not a necessary predicate to a finding of lack of due diligence. Falcon v. Beverly Hills Mortg. Corp., 168 Ariz. 527, 815 P.2d 896, 900.

Ariz.App.

Ariz.App.1993. Subsec. (1)(e) quot. in ftn. A doctor sued another doctor in California for defamation. After plaintiff doctor obtained judgment against defendant doctor, defendant doctor and his wife moved from California to Arizona. Plaintiff subsequently obtained an amended judgment valid against marital community of defendant doctor and wife and then domesticated that California judgment in Arizona. Arizona trial court granted defendants' motion to stay enforcement of the new Arizona judgment and to vacate the judgment as to wife. This court reversed, holding that California judgment was entitled to full faith and credit and was therefore valid and enforceable against defendants' marital community. The court cited authority illustrating principle that a judgment against one spouse may be enforced against marital community without necessarily violating due process. California's statute gave sufficient notice to all married persons that a judgment binding both spouses could be obtained by suing only one spouse. Oyakawa v. Gillett, 175 Ariz. 226, 854 P.2d 1212, 1216.

Ariz.App.1978. Com. (f) cit. in part in disc. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) A distributor sought indemnification from a manufacturer after an adverse judgment based on strict liability in tort. Both parties sought summary judgment. The trial court held for defendant, and this court reversed with instructions to enter a verdict for plaintiff. The court noted that one reason why the indemnitee did not file a complaint against the indemnitor was their agreement to allow the statute of limitations to run so plaintiff in the tort action brought against indemnitee would not also sue the indemnitor. The court ruled, inter alia, that under the theory of vouching in, as expressed in the Restatement of Judgments, the indemnitor/defendant was bound, due to the notice and opportunity given it by indemnitee/plaintiff to defend in the tort action. Indemnitee's possible failure to invoke all possible legal theories in the tort action would not make its representation legally ineffective or constitute a failure to defend with due diligence where there was no collusion with the opposing party or an attempt to further its interests at the indemnitor's expense. The court rejected defendant's arguments that the doctrine of vouching in is inapplicable to seller's strict liability cases, that the tender of defense to the indemnitor was insufficient, and that the vouching in process violated due process. The court ruled that the indemnitee's liability could not be relitigated. Litton Systems, Inc. v. Shaw's Sales & Service, Ltd., 119 Ariz. 10, 579 P.2d 48, 50-51.

Cal.App.

Cal.App.1990. Cit. in disc. As a result of a schism within a church, Illinois courts and the United States Supreme Court were forced to settle a dispute concerning the ownership of property of the church in Illinois. A company that held legal title to

property in California brought an action in California to quiet title to the real property, after the church claimed that it was the beneficial owner of the property. The trial court granted the church's motion for summary judgment holding in part that pursuant to the principles of res judicata and collateral estoppel, the Illinois final judgment conclusively established that the company was a secular arm of the church diocese holding title in trust for the benefit of the diocese. Reversing, this court held, inter alia, that a factual issue existed as to whether the Illinois judgment was void as to the company, because the company may not have been actually and efficiently represented in the proceedings in Illinois as an indispensable party to the litigation, and that privity did not exist between the company and the administrative head of the diocese who was a party in the Illinois litigation. St. Sava Mission v. Serbian Eastern, 223 Cal.App.3d 1354, 273 Cal.Rptr. 340, 350, 355, cert. denied 499 U.S. 977, 111 S.Ct. 1624, 113 L.Ed.2d 721 (1991).

Del.

Del.2018. Subsec. (1) cit. in sup., cit. and quot. in ftns.; com. (b) cit. in ftn.; com. (e) cit. in sup.; com. (f) cit. and quot. in sup. and in ftns.; Rptr's Note quot. in ftn. Following reports of bribery and related cover-ups, shareholders brought a derivative action against directors and executives of corporation. The trial court granted defendants' motion to dismiss based on the preclusive effect of a prior federal-court order dismissing a derivative action against corporation for failure to plead demand futility. This court affirmed, holding, inter alia, that giving preclusive effect to the prior judgment did not violate due-process rights, because the interests of plaintiffs in this action were aligned with and adequately represented by the plaintiffs of the prior action. The court cited Restatement Second of Judgments § 42(1) to define inadequate representation of a prior plaintiff and for criteria used in determining the adequacy of representation. California State Teachers' Retirement System v. Alvarez, 179 A.3d 824, 839, 844, 851-853, 855.

Del.2013. Subsec. (1) quot. in ftn. Stockholder of a Delaware pharmaceutical corporation brought a derivative suit against corporation's directors, after corporation pled guilty to the criminal misdemeanor of misbranding and agreed to pay substantial civil and criminal fines. The chancery court denied defendants' motion to dismiss. Reversing, this court held that the chancery court was required to give full faith and credit to a prior federal California court judgment dismissing essentially the same complaint brought by different stockholders, and that the California judgment thus collaterally estopped plaintiff from pursuing the present action. The court declined to apply the irrebuttable presumption that derivative plaintiffs who filed their complaints without seeking books and records, very shortly after the announcement of a "corporate trauma," were inadequate representatives, and, absent this presumption, concluded that there was no basis on which to decide that the California plaintiffs were inadequate representatives for purposes of collateral estoppel. Pyott v. Louisiana Mun. Police Employees' Retirement System, 74 A.3d 612, 618.

Del.Ch.

Del.Ch.2017. Cit. in disc.; com. (f) quot. in disc. and cit. in ftn. Shareholders filed a derivative action against current and former officers and directors of corporation, alleging breach of fiduciary duty. This court initially granted defendants' motion to dismiss, finding that plaintiffs were precluded from relitigating the issue of demand futility based on the decision in a similar action filed by other shareholders against defendants in Arkansas; however, on remand, the court recommended the adoption of a rule in which a judgment in a derivative action did not bind the corporation or other shareholders until it had survived a motion to dismiss for demand futility or the board of directors had given the plaintiff authority to proceed by declining to oppose the suit. The court noted that, under Restatement Second of Judgments § 42, a court generally accorded preclusive effect to the dismissal of a derivative action for failure to plead demand futility unless the shareholder did not adequately represent other shareholders or the shareholder's representation was grossly deficient. In re Wal-Mart Stores, Inc. Delaware Derivative Litigation, 167 A.3d 513, 515, 516, 518-520, 522, 523.

Del.Ch.2012. Quot. in ftn. Stockholder of a specialty pharmaceutical corporation incorporated in Delaware brought a derivative action against corporation's individual directors, after corporation pled guilty to criminal misdemeanor misbranding of its muscle-relaxing drug and paid civil and criminal penalties. Denying defendants' motion to dismiss, this court held that plaintiff

was not collaterally estopped from bringing the instant case by a California federal court's prior dismissal with prejudice, for failure to plead demand futility, of a derivative action brought by California stockholders against defendants. The court concluded that, by filing hastily and failing to conduct a meaningful investigation, the California plaintiffs acted self-interestedly and contrary to corporation's best interests, and thus did not adequately represent corporation. Louisiana Municipal Police Employees' Retirement System v. Pyott, 46 A.3d 313, 335.

Del.Ch.2012. Subsec. (1)(e) quot. in ftn. Holders of shares in a mining corporation brought a derivative action against corporation's directors, seeking to recover, on behalf of corporation, damages that corporation had suffered and would continue to suffer as a result of various safety violations. While granting defendants' motion to dismiss for failure to make demand or adequately plead demand futility, this court held that the dismissal was with prejudice only as to the named plaintiffs, because plaintiffs and their counsel had failed to provide adequate representation for corporation. The court reasoned that the dismissal of plaintiffs' claims should not have preclusive effect on the litigation efforts of more diligent stockholders, noting that, rather than acting in the best interests of corporation, plaintiffs had filed hastily, without first conducting a meaningful investigation, and had made allegations that appeared to have been drawn entirely from public filings and press releases, because doing so served the interests of their attorneys. South v. Baker, 62 A.3d 1, 13.

Del.Ch.2000. Cit. in ftn. §§ 41-42, com. (b) and illus. 5 quot. in ftn. Preferred stockholders brought class action against corporation and its directors for payment of a special distribution and for breach of fiduciary duty. Granting defendants' motion to dismiss, the court held that plaintiffs failed to state a claim upon which relief could be granted. The court noted, however, that res judicata and collateral estoppel did not apply to bar plaintiffs' claims, because plaintiffs' interests were not adequately represented by the plaintiffs in a previous action against the same defendants. Kohls v. Kenetech Corp., 791 A.2d 763, 769.

Idaho

Idaho, 2009. Subsec. (1)(e) quot. in sup. Minor child was struck from behind by a vehicle and seriously injured. After father's action against driver of the vehicle was dismissed with prejudice for failure to timely make a written appearance, the trial court denied mother's motion to modify the dismissal to one without prejudice, and dismissed her subsequent action against driver on the basis of claim preclusion. Reversing the denial of mother's motion for relief in father's action, and reinstating her action, this court held, inter alia, that a judgment could be modified in cases such as this, where a person lacking the capacity to sue or be sued was represented in an action, and the representative completely failed to prosecute a meritorious claim that resulted in that claim being dismissed with prejudice. Berg v. Kendall, 147 Idaho 571, 212 P.3d 1001, 1006.

Ill.App.

Ill.App.2013. Cit. in disc. §§ 41-42. Ironworker who was injured at a construction site sued general contractor for the site and subcontractor that hired the sub-subcontractor that employed him, alleging breach of various duties of care regarding jobsite safety; general contractor filed a claim against subcontractor for contribution, alleging that subcontractor breached its contract with general contractor by failing to require sub-subcontractor to maintain insurance covering general contractor. The trial court granted subcontractor's motion to dismiss general contractor's breach-of-contract claim. Reversing, this court held that general contractor's claim for breach of contract was not barred by res judicata based on sub-subcontractor's insurer's prior declaratory-judgment action against general contractor, in which it was determined that general contractor was not an additional insured or an intended third-party beneficiary under sub-subcontractor's policy with insurer. The court reasoned, in part, that, while subcontractor arguably benefited from sub-subcontractor's insurer's success in the declaratory-judgment action, subcontractor was not in privity with insurer in that action for purposes of res judicata, which required an identity of interests. Oshana v. FCL Builders, Inc., 2013 IL App (1st) 120851, 994 N.E.2d 77, 85.

Ill.App.2007. Com. (a) cit. in case cit. in disc. During liquidation proceedings of Illinois insurer, reinsurer sought a declaration of its rights with respect to the calculation and reporting of balances it was owed. The trial court granted reinsurer's motion for summary judgment. Affirming, this court held that the trial court did not err in finding that the judgment in a prior Pennsylvania

state-court case between reinsurer and a Pennsylvania insurer precluded, under the doctrine of res judicata, relitigation of the issue of the parties' obligations with respect to two accounting statements. The court concluded that privity existed between Illinois insurer's liquidator and the Pennsylvania insurer, since the interests of the two insurers were closely aligned based on a written contract outlining the respective responsibilities of both insurers and reinsurer under an international property insurance program in which they had been involved. In re Liquidation of Legion Indem. Corp., 373 Ill.App.3d 969, 312 Ill.Dec. 385, 870 N.E.2d 829, 834.

Ill.App.2005. Com. (a) quot. in case quot. in disc. Physician who, along with two colleagues, brought arbitration action for breach of contract against hospital, but was not a named party in a separate trial-court action by colleagues, alone filed a petition to vacate attorney's fee awards granted by the arbitrator to defendant, after defendant prevailed on most of the arbitration action's claims. The trial court dismissed. This court affirmed, but held, inter alia, that the final judgment in the trial-court action did not collaterally estop physician's petition to vacate, since, at the time the trial court entered its order confirming the final arbitration award, physician was no longer in privity with colleagues, and defendant, who knew of physician's petition to vacate, did not justifiably rely on the award in regard to physician. Yorulmazoglu v. Lake Forest Hospital, 359 Ill.App.3d 554, 561, 295 Ill.Dec. 887, 892, 834 N.E.2d 468, 473.

Ill.App.1997. Cit. in headnotes, coms. (a) and (f) quot. in disc. Assignee of mortgage notes from FDIC brought foreclosure action against various banking institutions. Banks moved to dismiss on the ground that assignee was a party or privy to an earlier federal case between banks and FDIC that was dismissed with prejudice. The trial court granted the motion. Reversing and remanding, this court held that res judicata did not apply because, under the circumstances, FDIC could not be said to have been assignee's representative in the federal action, and, even if it was, it was clear that FDIC did not adequately represent assignee's interests. Diversified Financial Systems v. Boyd, 286 Ill.App.3d 911, 222 Ill.Dec. 696, 699, 700, 678 N.E.2d 308, 309, 311, 312.

Mass.

Mass.1976. Subsec. (1)(a) of Section 86, Tentative Draft 2, which is now Section 42 of the Official Draft, cit. in sup. This was a suit brought by the heirs of a life beneficiary of a testamentary trust against the beneficiary's half brother and others seeking rescission or damages on the ground that the half brother, through false and fraudulent representations, induced the sale of stock held in trust for the plaintiffs. In earlier litigation, involving the same trust, which was brought by the guardian ad litem for other beneficiaries of the trust, the court had ordered the defendant and others to restore to the trust property belonging to the trust. In the instant case, plaintiffs appealed from the lower court's dismissal of the action. The Supreme Court, on its own initiative ordered direct appellate review. In affirming the court held: (1) that the present plaintiffs, although not parties to the prior litigation, were, since their interests were identical with the interests of other beneficiaries of the trust, in effect represented by the guardian ad litem in the prior case and were bound, under the principle of res judicata, by the final decree; that the transaction under attack in the instant case was part of a series of transactions out of which the prior case arose, and that the rights of the plaintiffs were included in the claim extinguished by the final decree; and that a trust beneficiary, having been represented by a guardian ad litem in prior litigation could not “now prosecute a second action on the same claim, even though he is prepared to ‘present evidence or grounds or theories of the case not presented in the first action’ or to ‘seek remedies or forms of relief not demanded in the first action.’ ” Dwight v. Dwight, 371 Mass. 424, 357 N.E.2d 772, 775.

Mass.App.

Mass.App.1979. Subsec. (1b) quot. in part in sup. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) Mortgagors brought an action challenging advance real estate payments which were required by the bank under a mortgage and on which the bank did not pay interest. The trial court allowed the bank's motion to dismiss the new action on the basis of res judicata and collateral estoppel. On appeal, the court held that the claims raised in the present action were sufficiently similar with the issues raised in earlier cases so as to preclude the plaintiffs from relitigating the claims under a different theory. Boyd v. Jamaica Plain Co-op. Bank, 7 Mass.App. 153, 386 N.E.2d 775, 779.

Mass.App.1979. Com. (f) cit. in sup. (Cit. section 86 of the Tentative Drafts, which is now section 42 of the Official Draft.) The current owners of some real property sued the owner of the property adjacent to them and the building inspector of the town seeking an order revoking the building permit issued by the defendant inspector because the defendant property owner had failed to comply with zoning law requirements; an injunction to prohibit any building on the defendant's property and an order requiring the defendant property owner to remove all structures on the property and return it to the condition it was in prior to any construction activities. The defendants essentially claimed that a prior action brought by the plaintiff's predecessor in title had already determined all issues presented herein. The appellate court found that the issues presented herein had in fact been litigated in the previous action and that the plaintiffs' interests herein were fully litigated by a governmental agency even though they themselves were not a party in the prior action. The court noted that the earlier judgment was erroneous but there was no showing of collusion or incompetence, either of which was required to attack the prior judgment. Therefore the decision of the trial court dismissing the plaintiff's complaint was affirmed. Morganelli v. Bldg. Inspector of Canton, 7 Mass.App. 475, 388 N.E.2d 708, 715.

N.H.

N.H.2011. Com. (f) cit. in disc. College alumni and members of alumni association sued college trustees for, inter alia, breach of contract arising from trustees' alleged failure to maintain parity between the number of alumni-nominated trustees and board-nominated trustees, as dictated by an unwritten, century-old agreement. The trial court granted summary judgment for defendants, holding that plaintiffs were barred by res judicata arising from a previous lawsuit by alumni association that was dismissed with prejudice by a court-approved stipulation entered into by members of a previous alumni association committee and defendants. Affirming, this court rejected plaintiffs' argument that this was not a final judgment because it was the product of collusion between the committee and defendants, explaining that, while a party would be able to set aside a judgment that was procured by collusion between the party representing him and the opposing party, facts supporting this type of collusive conduct were not demonstrated here. Brooks v. Trustees of Dartmouth College, 161 N.H. 685, 20 A.3d 890, 895, 899.

N.H.1999. Com. (c) quot. in sup. Children sued stepmother to set aside transfer to her of motel as fraudulent. Affirming the trial court's grant of plaintiffs' petition to set aside the transfer, this court held, inter alia, that stepmother was collaterally estopped from relitigating the finding in children's prior contract action against her as executrix of father's estate that father had made an enforceable promise to bequeath the motel to his children in return for their uncompensated work. The court stated that stepmother was in privity with herself as executrix of father's estate. Tsiatsios v. Tsiatsios, 144 N.H. 438, 744 A.2d 75, 79.

N.Y.

N.Y.2008. Subsecs. (1)(d)-(1)(e) cit. in disc. After the appellate division affirmed the trial court's grant of summary judgment for state's attorney general and issuance of a permanent injunction prohibiting subprime lender and debt collector from engaging in certain fraudulent and deceptive credit practices, the trial court awarded restitution, penalties, and costs to attorney general. The appellate division affirmed, as modified. Affirming, this court held, inter alia, that res judicata barred restitution for pre-January 1, 2002 claims by New York consumers who were bound by a nationwide class-action settlement with lender approved by a California court. The court noted that a class-action judgment was binding upon class members who were adequately represented in the action, and that the adequacy of representation in the class action was not at issue here. People ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105, 124, 863 N.Y.S.2d 615, 894 N.E.2d 1, 13.

N.Y.1987. Cit. in sup. Minority shareholders of a corporation sued the majority shareholder, alleging fraud, violations of the state's general business law, and breach of fiduciary duty after defendant effected a short-form merger and became the sole owner of the corporation. The trial court granted summary judgment to the defendant on the ground that the action was barred by res judicata because of a successful suit by some of the plaintiffs in federal court. Affirming on other grounds, this court held, inter alia, that res judicata did not apply because the other plaintiffs were not really represented in the federal court action. The court reasoned that because each of the plaintiffs owned separate blocks of stock, their relationship was not close enough to be in privity. Green v. Santa Fe Industries, Inc., 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 796, 514 N.E.2d 105, 108.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.1992. Cit. in case quot. in disc. Child's court-appointed guardian brought filiation proceeding to establish that respondent was child's biological father. The family court denied respondent's motion to dismiss. Reversing the family court's order and dismissing the guardian's petition, this court held that the petition was barred under res judicata by the prior dismissal on the merits of the child's mother's earlier paternity petition against respondent. The court held that the child was in privity with his mother so as to be bound by the adverse determination in the prior proceeding, since there was no showing that the child's interests were not fully represented in the earlier proceeding. Slocum on Behalf of Nathan A. v. Joseph B., 183 A.D.2d 102, 588 N.Y.S.2d 930, 931.

Pa.Cmwlth.

Pa.Cmwlth.1983. Subsec. (1)(a) quot. but dist. The plaintiff taxpayer brought a taxpayers' representative suit against the city to challenge a public contract. The trial court dismissed the suit on res judicata grounds since there was a final judgment on an earlier taxpayers' suit on the same public contract. This court affirmed, holding that because a representative derived authority from his position as a member of the affected class, the plaintiff taxpayer was represented by the party to the first action, the therefore was bound by that judgment. The court acknowledged that a prior judgment was not binding against a represented party if notice was required to be given to the represented party and was not given. The court stated, however, that a taxpayers' suit was not a technical class action and no notice was required to be given. Sica v. City of Philadelphia, 77 Pa.Cmwlth. 97, 465 A.2d 91, 92, 93.

Vt.

Vt.2003. Subsec. (1)(d) quot. in sup. Following settlement in Alabama of national class action by over 300,000 mortgagors against certain banks for requiring mortgagors to maintain excessive escrow amounts, state of Vermont brought collateral action seeking injunction against banks' illegal acts, refund of money deducted from Vermont mortgagors' accounts, civil penalties, sanctions and costs. Trial court granted banks summary judgment, holding that Alabama judgment precluded this case. Reversing and remanding, this court held, inter alia, that class representatives and attorneys did not adequately represent Vermont class members in Alabama litigation; therefore Vermont class members could collaterally attack Alabama judgment. State v. Homeside Lending, Inc., 175 Vt. 239, 826 A.2d 997, 1017.

A.B.A.Section on Litigation

A.B.A.Section on Litigation, 1986. Com. (b) cit. in disc. (citing § 86, T.D. No. 2, 1975, which is now § 42 of the Official Draft). In recognition of the need for reform of the procedural aspects of class action suits, the American Bar Association recommended the deletion of the Special notice provisions of Federal Rule of Civil Procedure 23(c)(2). Report and Recommendations of the Spec. Com. on Class Action Improvements, 110 F.R.D. 195, 209.

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