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COMMON-LAW COMPULSORY COUNTERCLAIM RULE: CREATING EFFECTIVE AND ELEGANT RES JUDICATA DOCTRINE

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INTRODUCTION

A simple but elusive insight is that res judicata is nothing more or less than the body of law that defines "judgment."[1] A judgment is more than a concrete embodiment of what a court has decided. Res judicata performs the job of delineating the real content of a judgment, doing so by specifying the effects of the decision. Res judicata dictates whether decided matters are subject to reopening, as well as which actually undecided matters nevertheless fall within the bounds of a judgment and so receive treatment as if decided. It thus defines by means of fixing the boundaries of the judgment. Although res judicata law may appear to be a jumble of rules, it essentially has this straightforward but profound mission of defining the scope of a prior adjudication. A version of it must apply to every judgment ever rendered.

This one insight informs all sorts of comparative and historical inquiries. Each legal system, from its beginnings, generates a common core of res judicata law. "The doctrine of res judicata is a principle of universal jurisprudence forming part of the legal systems of all civilized nations."[2] The essence of res judicata—its mission of defining judgment—is nonoptional.

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* Flanagan Professor of Law, Cornell University. I would like to thank Kathleen Tighe Sullivan, class of 2005, for her wonderful research assistance, and Robert Casad and Benjamin Kaplan for their insightful comments. Incidentally, I was Ben Kaplan's research assistant when he and David Shapiro were working as the original reporters on the Restatement (Second) of Judgments. Even then, this common-law compulsory counterclaim rule struck me as something special, but I must confess unhappily that I had nothing whatsoever to do with its creation.

1 *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 3–7 (2001).

2 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 627, at 1321 (5th ed. 1925).

The prime example of that common core of res judicata is that, in order for any nascent judicial system to operate, a judgment must have at least some minimal meaning (whether the judgment is litigated or defaulted). If disputants could just reopen their adjudicated disputes, there would be neither an end to litigation, nor any beginning of judicial authority. Finality is not just an efficient policy, it is a necessary condition for the existence of a judiciary.

Thus emerges the intuitive principle of claim preclusion that a valid and final judgment generally precludes the defendant from later asserting mere defenses to the claim.[3] An implicit extension of this idea is that once a plaintiff obtains a judgment, the defendant generally cannot bring a new action to undo the judgment by reopening the plaintiff's claim and pushing those defenses (whether or not a written compulsory counterclaim provision appears on the books or applies in the circumstances). This implicit barrier to collateral attack, which some of us now call the common-law compulsory counterclaim rule and which is the subject of this Article, may seem to occupy some arcane corner of the specialty of res judicata. But it in fact is critical to any judicial system. That is, although it is intuitive, it is also important.

Legal systems must take such an intuition, discern its rationale, and then formulate law. Here res judicata law gets uglier, but in different ways in different systems. Systems may differ (1) in how far res judicata law reaches,[4] or merely (2) in how the lawmakers have shaped the doctrine as a matter of form.[5] In the realm of defendant preclusion, because it is undeniable that a judgment must somehow cut off defenses asserted collaterally, it is only the risk of overbreadth and the form of the doctrine that are of concern.

Before Professor Shapiro came along, legal systems imprecisely understood the rationale of the intuitive barrier to asserting defenses collaterally, and so often produced an overly broad and very sloppy law. David Shapiro saw the problem with unprecedented clarity and so, as a reporter, was able to recast the doctrine in the Restatement

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3 *See generally* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4414, at 344–48 (2d ed. 2002) (discussing the rules of "defendant preclusion").

4 *See generally* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 61–70 (1984) (providing a survey of the law of issue preclusion "in several countries whose judgments are likely to be presented for recognition in American courts").

5 *See generally* CASAD & CLERMONT, *supra* note 1, at 39–45 (noting that res judicata rules and exceptions reflect the struggle between the need for clear law and the desire for its sensitive application).

(Second) of Judgments.[6] In his common-law compulsory counterclaim rule, he gave judgments precisely the right effect—not too much or too little—and did so in a formulation that was simple and clear. Springing original and full-blown from his brow sometime around 1972,[7] the common-law compulsory counterclaim rule constitutes a curious instance that proves the power of theorizing in law restatement and reform.

I. PRE-RESTATEMENT APPROACH

The reason that the law could wait so long for Shapiro's common-law compulsory counterclaim rule to arrive was that some other doctrine would usually provide the right result. Most commonly in U.S. law, collateral estoppel would step in to prevent a losing defendant from relitigating the plaintiff's successful judgment. Difficulty especially arose, however, when the plaintiff won judgment by default. U.S. law still obeyed the intuition to preclude in that situation, with most courts sticking with an explanation of the preclusion as collateral estoppel of the defendant on some key issue supposedly decided by

6 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) (1982). The Second Restatement is a highly significant work. It sets out the modern approach to res judicata in the United States. Of course, the American Law Institute's Restatements and the country's courts interact. The Second Restatement of Judgments tried to express and refine the recent efforts of the federal courts and the progressive state courts. Today those courts tend to follow the Second Restatement in further developing the doctrine of res judicata. As a consequence, a coherent modern law of res judicata has become perceptible and accepted, so that the United States today enjoys a semi-codification of most of res judicata law, fairly uniform albeit unofficial. In fact, at one point then Justice Rehnquist felt obliged to remind the other Justices that this Restatement was not binding on the Supreme Court. *See* Montana v. United States, 440 U.S. 147, 164 (1979) (Rehnquist, J., concurring) (concurring in "the Court's opinion on the customary understanding that its references to . . . drafts or finally adopted versions of the Restatement of Judgments are not intended to bind the Court to the views expressed therein on issues not presented by the facts of this case"). Even if not binding, the Second Restatement merits careful study because it manages to bring much order to the field and because it has so influenced the courts. It is not perfect, but it is unarguably a work of the highest quality.

7 The idea of the common-law compulsory counterclaim rule did not appear in the reporters' initial submission to the ALI, Benjamin Kaplan & David L. Shapiro, A Preliminary Survey of Judgments (Nov. 26, 1969), and they only hinted at it in RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 cmt. i(4) (Preliminary Draft No. 1, 1972). Yet it did appear in virtually final form in Shapiro's portion of the next draft. RESTATEMENT (SECOND) OF JUDGMENTS § 56.1 cmt. f (Preliminary Draft No. 2, 1972). Later, Geoff Hazard took over as reporter.

the prior court in accepting the plaintiff's claim over any possible denial.[8]

The law thus yielded the right results in such easy cases as those (1) precluding a defendant seeking to impair the plaintiff's property interest declared by the initial judgment,[9] (2) precluding a defendant seeking restitution for money paid pursuant to the initial judgment,[10] or a fortiori (3) refusing injunctive[11] or declaratory[12] relief against enforcement of the initial judgment. Yet any approach applying collateral estoppel to a default judgment will inevitably prove far too broad, precluding lots of issues not actually litigated and determined that should not receive preclusive effect.[13]

For example, in *Gates v. Preston*,[14] a surgeon's default judgment before a justice of the peace for $6.58 in medical services precluded the patient's pending $5000 malpractice action. The New York high court relied on collateral estoppel, explaining that

> the rule also applies to a judgment by default. In such a case the right of action (there being no denial thereof) is by implication admitted, and when there is in the answer of the defendant an express and direct admission by him of the plaintiff's right to recover, and a

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8 *See* 2 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 622, at 949, §§ 697–698, at 1048–51, §§ 754–768, at 1142–62 (2d ed. 1902); 2 FREEMAN, *supra* note 2, §§ 660–664, at 1390–401, §§ 774–787, at 1646–72. New York is the jurisdiction that provides the best illustrations. So, on the one hand, *Reich v. Cochran*, 45 N.E. 367 (N.Y. 1896), held that a default judgment dispossessing a lessee for nonpayment precluded a subsequent action by that defendant to cancel the lease for actually being a usurious mortgage. But, on the other hand, *Meyerhoffer v. Baker*, 106 N.Y.S. 718 (N.Y. App. Div. 1907), was a very similar case that distinguished *Reich* to allow the defendant to sue for damages from fraudulent inducement to enter the valid lease. *See generally* 10 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE: CPLR ¶¶ 5011.20–.21, .30–.31 (2003) ("Even if the defense was not raised at all, a finding adverse to the defendant may preclude a subsequent suit if the original judgment inferentially contains, as an essential element, a finding adverse to the original defendant.").

9 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f, illus. 10, rptr. note (1982) (relying on Moore v. Harjo, 144 F.2d 318 (10th Cir. 1944); Lynch v. Lynch, 94 N.W.2d 105 (Iowa 1959); Paulson v. Oregon Sur. & Cas. Co., 138 P. 838 (Or. 1914); Weiser v. Kling, 57 N.Y.S. 48 (N.Y. App. Div. 1899) (alternative holding)).

10 *See id.* § 22 cmt. f, illus. 9, rptr. note (1982) (relying on Bank of Montreal v. Kough, 612 F.2d 467 (9th Cir. 1980); Martino v. McDonald's Sys., Inc., 598 F.2d 1079 (7th Cir. 1979); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610 (S.D.N.Y. 1979); Massari v. Einsiedler, 78 A.2d 572 (N.J. 1951); Middlesex Concrete Prods. & Excavating Corp. v. Borough of Carteret, 113 A.2d 821 (N.J. Super. Ct. App. Div. 1955)).

11 *See, e.g.*, Aerojet-General Corp. v. Askew, 511 F.2d 710, 718–20 (5th Cir. 1975).

12 *See, e.g.*, ACLU Found. v. Barr, 952 F.2d 457, 465 (D.C. Cir. 1991).

13 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982).

14 41 N.Y. 113 (1869).

> consent to the entry of a judgment for a certain amount, it is an admission on the record of all the facts which the plaintiff would have been bound to prove on a denial of the cause of action alleged by him in his complaint.[15]

The court observed that to recover the price of medical services a doctor must establish the adequate performance of the legal duty of care, and so the malpractice action had to fail.[16]

Similarly, the same court in *Dunham v. Bower*[17] held that a canal-carrier's judgment for freight charges against an apple-vendor precluded the defendant's later contract action for damages from a delay in the shipment that caused freezing and destruction of the apples. The court seemed to grasp the delicacy of the problem, but nevertheless followed New York's overbroad and clumsy solution:

> It is sometimes difficult to draw the line between a judgment which will operate as a bar to an action for a specified claim, and one which leaves the claim outstanding to be enforced by a cross-action. It depends in a great measure upon the nature of the demand litigated, the relation which the claim sought to be enforced bears to it, and the circumstances attending it. Any fact or allegation which is expressly or impliedly involved in a judgment, is merged in it, and cannot again be litigated.[18]

Here, the court observed that the earlier judgment had established performance except as excused, and so the damages action had to fail.[19]

However, this extreme New York result, as in the malpractice case, ran contrary to the widely accepted, and desirable, results elsewhere.[20] Even in New York, there was expression of some disquiet. Chief Judge Cardozo, in *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*,[21] seemed to make a major advance toward recasting the problem:

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15 *Id.* at 115; *see also* Blair v. Bartlett, 75 N.Y. 150, 155–56 (N.Y. 1878) (coming to the same result on very similar facts, reasoning that to obtain such a judgment, despite default, the doctor had to offer proof to the justice of the peace that the services were of value and hence that the judgment established the absence of malpractice).

16 *Gates*, 41 N.Y. at 115–16.

17 77 N.Y. 76 (N.Y. 1879).

18 *Id.* at 79–80.

19 *Id.* at 82.

20 *See, e.g.*, Gwynn v. Wilhelm, 360 P.2d 312 (Or. 1961); RESTATEMENT OF JUDGMENTS § 58 cmt. b, illus. 3 (1942); 2 BLACK, supra note 8, § 769, at 1162–64; 2 FREEMAN, supra note 2, § 793, at 1681–85.

21 165 N.E. 456 (N.Y. 1929).

> A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. It is not conclusive, however, to the same extent when the two causes of action are different, not in form only, but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined. . . .
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> . . . .
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> Cases in this court may seem upon a hasty reading to uphold a stricter rule. Analysis will show that the conflict is unreal. The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. An estoppel is not avoided in such circumstances by mere differences of form between the one action and the other. Thus, in Reich v. Cochran[22] an order in summary proceedings awarding possession to a landlord for nonpayment of rent was held to bar a suit in equity to declare the lease a mortgage and avoid it on the ground of usury. The relief decreed by the order, the award of possession to one adjudged to be a landlord, would have been nullified altogether, if the same person might thereafter have been declared to be no landlord, but a mortgagee, wrongfully in possession under an agreement void in its inception. So in Blair v. Bartlett[23] the same professional services were the subject of the two actions, the first by the physician to recover their value, in which action value was adjudged, and the second by the patient to recover damages on the ground that they were without value and harmful.[24]

But the advance was what was unreal. By approving *Blair*'s malpractice result, Chief Judge Cardozo proved that he was still thinking in terms of issue preclusion from a default judgment. Then, oddly, in the case before him, he allowed the later action to rescind a contract for mutual mistake, after an earlier litigated case had awarded judgment on the contract.[25]

What were the other sages saying about this subject at the time? Unanimity did not prevail. On the one hand, although Professor Vestal disapproved the most extreme New York precedent, he retreated from it only slightly; he too addressed the problem by applying issue preclusion to a default judgment, unless the default was not in the

22 49 N.E. 367 (N.Y. 1896); *see also* discussion *supra* note 8.

23 75 N.Y. 150 (N.Y. 1878); *see also* discussion *supra* note 15.

24 *Schuylkill*, 165 N.E. at 457–58 (citations omitted).

25 *Id.* at 458–59.

nature of a deliberate admission.[26] On the other hand, Professor Millar, as part of his proposal generally to apply res judicata only to a judgment's "conclusion" and not to its "premises," had sharply rejected the New York precedent; he looked abroad for his narrow approach, observing with approval that "the Roman principle operated to bar a new action upon the same demand, and probably, also, it was this principle that precluded an unsuccessful defendant from controverting by a new action the right thus adjudicated."[27]

The First Restatement of Judgments less radically avoided the overbreadth of the New York approach by adopting the actually-litigated-and-determined requirement for issue preclusion;[28] but it seemingly instructed that a default judgment cut off defenses only as defenses:

> Where the plaintiff brings an action upon the judgment, the defendant cannot collaterally attack the judgment. The defendant cannot avail himself of defenses which he might have interposed in the original action. It is immaterial whether he did in fact interpose such defenses in the original action or whether he failed to do so. An action can be maintained upon the judgment even though the defendant defaulted in the original action . . . . In an action on the judgment the defendant may . . . interpose a counterclaim. It is immaterial that he might have interposed a counterclaim in the original action if he did not do so, except where by statute compulsory counterclaim is provided for.[29]

Professor James approved the First Restatement's approach to the problem, but he stressed that the defendant cannot use equitable defenses, as distinguished from counterclaims seeking "genuinely affirmative relief," to attack or defeat the operation of a judgment in a later action.[30]

II. RESTATEMENT REFORMULATION

Onto this scene strode Shapiro. His resolution in the Second Restatement provides that the defendant is free to withhold a counterclaim for assertion in a later action, unless a compulsory counterclaim statute or rule of court states otherwise or unless the "relationship be-

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26 *See* ALLAN D. VESTAL, RES JUDICATA/PRECLUSION 196–203 (1969).

27 Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 238, 239 (1940).

28 *See* RESTATEMENT OF JUDGMENTS §§ 68, 70 (1942).

29 *Id.* § 47 cmt. e (cross-referencing *id.* § 58); *see id.* § 68 cmt. e. *But see id.* § 66 (indicating that the defendant loses an equitable defense in a merged procedural system).

30 *See* FLEMING JAMES, JR., CIVIL PROCEDURE 570 (1965).

tween the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action."[31] The new, quoted provision is the so-called common-law compulsory counterclaim rule.[32]

The evident rationale of this common-law compulsory counterclaim rule is that claim preclusion simply must apply when the effect

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31 RESTATEMENT (SECOND) OF JUDGMENTS § 22 (1982). The quoted provision constitutes the black-letter section 22(2)(b). Its comment (f) explains in essence:

> *f. Special circumstances under which failure to interpose a counterclaim will operate as a bar.* Normally, in the absence of a compulsory counterclaim statute or rule of court, the defendant has a choice as to whether or not he will pursue his counterclaim in the action brought against him by the plaintiff. There are occasions, however, when allowance of a subsequent action would so plainly operate to undermine the initial judgment that the principle of finality requires preclusion of such an action. This need is recognized in Subsection (2)(b).
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> For such an occasion to arise, it is not sufficient that the counterclaim grow out of the same transaction or occurrence as the plaintiff's claim, nor is it sufficient that the facts constituting a defense also form the basis of the counterclaim. The counterclaim must be such that its successful prosecution in a subsequent action would nullify the judgment, for example, by allowing the defendant to enjoin enforcement of the judgment, or to recover on a restitution theory the amount paid pursuant to the judgment (see Illustration 9), or by depriving the plaintiff in the first action of property rights vested in him under the first judgment (see Illustration 10). Ordinarily the conclusion that the subsequent action could not be maintained under Subsection (2)(b) would not be reached unless the prior action had eventuated in a judgment for plaintiff since only in such a case would there be the threat of nullification of the judgment or of impairment of rights to which the Subsection is addressed.

Id. § 22 cmt. f.

32 The reporter's note to the Second Restatement's section 22, comment (f), states:

> *Comment f* and Illustrations 9 and 10 are new. These materials, and Subsection (2)(b) itself, represent an effort to articulate the bases in precedent and policy for what might be termed a "common-law compulsory counterclaim rule." It is perhaps impossible to define the scope of this concept with precision and in any event the problem is one of decreasing importance with the growth of compulsory counterclaim statutes and rules of court. Yet there do appear to be at least two situations where the need for such a common-law rule is clear, and identification of those situations may afford guidance in more difficult cases.

Id. § 22 cmt. f, rptr. note. The reporter's note goes on to discuss those two situations, which appear as illustrations (9) and (10). *See supra* notes 9–10 and accompanying text. The reporter's note closes by citing "an extremely difficult case," *Statter v. Statter*, 143 N.E.2d 10 (N.Y 1957); RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f, rptr. note (1982); *see infra* notes 45–47 and accompanying text.

of the defendant's collaterally asserted defense would be to nullify the earlier judgment for the plaintiff.[33] Note first that this rule applies whether or not a compulsory counterclaim statute or rule of court exists. That fact explains why its very name declares it to be a common-law doctrine. Note also that the rule applies whether or not the prior judgment was by default. The rule indeed is especially important because it works to guarantee that even default judgments mean something and cannot normally be undone by later litigation.

Thus, a defendant is precluded from bringing an action for a declaratory judgment of nonliability after the plaintiff has obtained a judgment on the same transaction, regardless of the jurisdiction's compulsory counterclaim provision. So also, an uncontested judgment quieting title to real estate in the plaintiff precludes a later action by the defendant to claim title based on facts existing at the time of the earlier judgment.

Note finally that this rule is narrow, applying only when the relief sought in the second action would inherently undo the first judgment. Thus, in the absence of a compulsory counterclaim statute or rule of court, the defendant may default in the plaintiff's personal injury action and then bring a separate action against the plaintiff for the defendant's injuries sustained in the same accident, the idea being that a judgment for the defendant would not nullify the plaintiff's prior judgment.[34] The defendant's recovery might be logically and practically incompatible, but it does not undo the prior judgment. So also, although a defendant purchaser of goods should be precluded from suing for restitution in an action based on fraud in the inducement after the plaintiff seller had obtained and executed on a default judgment for the price,[35] an action by the defendant seeking damages from the fraud should not be precluded in the absence of compulsory counterclaim statute or rule of court.[36]

The virtues of the Second Restatement's resolution are manifold.[37] The formulation is relatively workable. Its narrow scope of

33 *See* CASAD & CLERMONT, *supra* note 1, at 111–12; RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 688–89 (8th ed. 2003); DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 39 (2001); 18 WRIGHT ET AL., *supra* note 3, § 4414, at 325–37 (providing case citations). The rule nevertheless goes ignored in Lawrence B. Solum, *Claim Preclusion and Res Judicata*, *in* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.21[5] (3d ed. 2003).

34 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. b, illus. 1 (1982).

35 *See* Massari v. Einsiedler, 78 A.2d 572 (N.J. 1951).

36 *See* Linderman Mach. Co. v. Hillenbrand Co., 127 N.E. 813 (Ind. App. 1920).

37 *See generally* CASAD & CLERMONT, *supra* note 1, at 29–38 (discussing the policy considerations animating res judicata rules).

preclusion avoids the costs of unnecessarily foreclosing issues and claims that were not actually litigated and determined. Those costs lie not only in the inefficiency of undesirably intensifying the original litigation and in the inaccuracy of fictionally treating as established certain propositions that were never adjudicated, but also in the simple unfairness to the defendant. Under the common-law compulsory counterclaim rule, defendants get better notice of what they will lose by default. Plaintiffs can still seek wider preclusion by an action for declaratory judgment.

Another advantage of the new approach is that it illuminates some mysteries in older cases, including a few of our more famous chestnuts. Consider *Mullane v. Central Hanover Bank & Trust Co.*[38] The question there was whether New York, in a judicial settlement of accounts brought by the trustee of a common trust fund, had territorial jurisdiction to cut off the nonresident and nonappearing beneficiaries' rights to sue the trustee for mismanagement. How exactly would the expected judgment cut off this right? The answer is by the common-law compulsory counterclaim rule. If there was jurisdiction, as the Supreme Court held,[39] then notified beneficiaries could not thereafter sue without running into the insurmountable defense of bar, because allowing their suit would nullify the prior judgment settling accounts.

An additional illustration is *Chicot County Drainage District v. Baxter State Bank.*[40] There the prior judgment had canceled a group of Chicot's bonds held by defendants, some of whom had litigated and some had defaulted but none had challenged subject matter jurisdiction.[41] Baxter, a notified but defaulted defendant, later sued on its bonds. Chicot pleaded res judicata.[42] How so? Chicot was implicitly relying on the common-law compulsory counterclaim rule to bar Baxter's suit. To avoid that rule, Baxter collaterally attacked the prior judgment, as subject matter jurisdiction had apparently been lacking. The Supreme Court ultimately rejected the collateral attack, holding that the rendering court had had jurisdiction to determine jurisdiction.[43]

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38 339 U.S. 306 (1950).

39 *Id.* at 311–13.

40 308 U.S. 371 (1940).

41 *Id.* at 375.

42 *Id.* at 373.

43 *Id.* at 376. Still another example of the explanatory power of the common-law compulsory counterclaim rule lies in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961) (jurisdictional amount, then $10,000, exists where workers' compensation insurer sues to set aside administrative award of $1050 and claims no liability, and workman counterclaims for his full claim of $14,035). Ordinarily, counterclaims do

Consider finally *Statter v. Statter*,[44] which the Second Restatement's reporter's note termed "an extremely difficult case," parenthetically describing it as "husband's successful action for separation on grounds of abandonment bars wife's subsequent action for annulment on ground that husband had another wife living at the time of purported marriage."[45] The difficulty, I think, comes from a result that seemed unfortunate. But the result flowed from New York's extreme position of giving preclusive effect to the unlitigated finding of a valid marriage.[46] The result would not follow from the common-law compulsory counterclaim rule. Allowing an annulment would not nullify the separation. Thus, the decision under the proper rule would not be so difficult to stomach.

To be sure, Shapiro admitted in that reporter's note to not having settled all problems in this area.[47] It is obvious that the scope of the common-law compulsory counterclaim rule is tricky. Centrally, what does "nullify" mean precisely? The word has an unavoidable fuzziness that will trouble courts,[48] while both leaving defendants in doubt about their exposure ex ante and also providing them room for manoeuver in structuring their claims for relief ex post.

Nevertheless, the fuzziness does not deserve exaggeration. The most distinguished commentators summarize the rule thus:

> It is difficult to formulate a rule that expresses the principle suggested by these cases. The underlying purpose is to protect the repose that should be established by the first judgment. It remains necessary to determine the measure of repose that should be protected. Close analysis of many more cases may well show that the measure of repose should be affected by the course of the first case. Different consequences may be suggested by default, settlement, dismissal upon motion, full trial while a prior action remains pending, and so on. For the present, all that can be said with confidence

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not count toward satisfying the jurisdictional amount requirement. But common-law compulsory counterclaims like the one in *Horton* help to define the amount of the main claim and so should receive consideration, not as a counterclaim but as an aid in measuring the main claim.

44 143 N.E.2d 10 (N.Y. 1957) (6-1 decision); *see* discussion *supra* note 33.

45 RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f, rptr. note (1982).

46 The court relied on both *Gates* and *Schuylkill*. *Statter*, 143 N.E.2d at 12–13; *see supra* text accompanying notes 14–26.

47 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f, rptr. note (1982) ("[It is] perhaps impossible to define the scope of this concept with precision . . . .").

48 *See, e.g.*, *In re* Iannochino, 242 F.3d 36 (1st Cir. 2001) (deciding that allowing a malpractice claim would nullify a bankruptcy judgment awarding legal fees, given the peculiarities of bankruptcy procedure).

> is that a judgment will be protected against the most obvious assaults of former defendants.[49]

Taking a wider view of the rule's purposes and of its genesis, however, helps in determining its proper scope. Recall that it emerged as a specific aspect of the broad principle whereby a valid and final judgment generally precludes the defendant from later asserting mere defenses to the claim. Therefore, the defendant cannot later pursue an action that is essentially a way to defend anew against an already adjudicated claim. Still fuzzy, this wider view indicates at least that the application of the rule to a judgment should not "be affected by the course of the first case" in terms of default, dismissal, or the like.

III. POST-RESTATEMENT APPROACH

Despite all its virtues, the common-law compulsory counterclaim rule, tucked away in an unfrequented cul-de-sac of the Second Restatement, does not seem to be sweeping the country. The Westlaw database indicates that only twenty-one cases have used the term "common-law compulsory counterclaim" in the thirty-one years since the rule's publication.[50]

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49 18 WRIGHT ET AL., *supra* note 3, § 4414, at 337. Those authors implicitly raise another difficulty, by citing with apparent approval *Olmstead v. Amoco Oil Co.*, 725 F.2d 627 (11th Cir. 1984) (precluding defendant even though he asserted the counterclaim in the prior action and the court dismissed it as untimely), 18 WRIGHT ET AL., *supra* note 3, § 4414, at 335 & n.22, while citing as "[t]roubling preclusion denials" *Edwards v. Ark. Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982) (allowing defendant to withdraw counterclaim without prejudice), and *Joseph L. v. Office of Judicial Support*, 516 F. Supp. 1345 (E.D. Pa. 1981) (abstaining while state court rendered judgment), 18 WRIGHT ET AL., *supra* note 3, § 4414, at 336 n.24. It seems, however, that *Olmstead* is the more troubling precedent. Once one accepts the common-law compulsory counterclaim rule, then one should apply all the ordinary exceptions to claim preclusion, such as judicial permission to split. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

50 Chitwood v. McLemore, No. 88-6203, 1990 WL 75237, at *3 (6th Cir. June 6, 1990); Rudell v. Comprehensive Accounting Corp., 802 F.2d 926, 928 (7th Cir. 1986); Circle v. Jim Walter Homes, Inc., 654 F.2d 688, 691 (10th Cir. 1981); Martino v. McDonald's Sys., Inc., 598 F.2d 1079, 1083 (7th Cir. 1979) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 56.1(2)(b) cmt. f, rptr. note (Tentative Draft No. 1, 1973)); Fullin v. Martin, 34 F. Supp. 2d 726, 736 (E.D. Wis. 1999); R & B Group, Inc. v. BCI Burke Co., 982 F. Supp. 549, 554 (N.D. Ill. 1997); Franklin's Sys., Inc. v. Infanti, No. 94-C-3830, 1995 WL 505930, at *3, *5 (N.D. Ill. Aug. 17, 1995); Hill-Harriss v. Gingiss Int'l, Inc., No. 91 C 6682, 1992 WL 22705, at *5 (N.D. Ill. Feb. 5, 1992), *reconsideration granted* 1992 WL 57925 (N.D. Ill. Mar. 20, 1992); USM Corp. v. SPS Techs., Inc., 102 F.R.D. 167, 171 (N.D. Ill. 1984); Hemmings v. C.I.R., 104 T.C. 221, 232 (1995); Sengupta v. Univ. of Alaska, 21 P.3d 1240, 1252 (Alaska 2001); Andrews v. Wade & De Young, Inc., 950 P.2d 574, 579–80 (Alaska 1997); Fairfax Sav., F.S.B. v. Kris Jen Ltd.

Now, that total might not be surprisingly small, because one would not expect many cases involving the rule to arise. After all, defendants should not be flocking to waste their money on obvious assaults on judgments by means of resurrecting dead defenses, especially in a way that would test the limits of the narrow scope of preclusion blessed by the common-law compulsory counterclaim rule. Moreover, the now widely adopted compulsory counterclaim statutes and rules of court would dispose of most such attacks. Finally, courts might utilize issue preclusion to handle any remaining attacks, except those in which the prior judgment went by default.

So perhaps the common-law compulsory counterclaim rule is one of those rules constantly invoked in planning and discussing litigation, even though it seldom figures in a judicial opinion. But the rule does not appear to be in ubiquitous play, at least on any conscious level above intuition. For one thing, the twenty-one cases are concentrated geographically. Fifteen of them come from Wisconsin or the Seventh Circuit.[51] The fact that the rule appears in opinions there but not elsewhere implies that the rule has not really caught on in the rest of the country. For another thing, the academy is not abuzz. The Westlaw database indicates that before this article catapulted the rule to title status, only two law review articles had used the term in any way.[52]

P'ship, 655 A.2d 1265, 1276 (Md. 1995); Nat'l Operating, L.P. v. Mut. Life Ins. Co., 630 N.W.2d 116, 140 (Wis. 2001); A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A., 515 N.W.2d 904, 907–08 (Wis. 1994); Estate of Burgess v. Peterson, 571 N.W.2d 432, 437 (Wis. Ct. App. 1997); Pekay Specialty Contracting, Inc. v. Madson Tiling & Excavating, Inc., No. 97-2200-FT, 1997 WL 757570, at *2 (Wis. Ct. App. Dec. 10, 1997); Sommers Estates Co. v. City of New Berlin, No. 95-2024, 1996 WL 442087, at *2 (Wis. Ct. App. Aug. 7, 1996); Roeming v. Peterson Builders, Inc., No. 95-2099-FT, 1995 WL 759997, at *5–6 (Wis. Ct. App. Dec. 27, 1995); Marten Transp., Ltd. v. Rural Mut. Ins. Co., 543 N.W.2d 541, 542 (Wis. Ct. App. 1995); Green Spring Farms v. Spring Green Farm Assocs. Ltd. P'ship, 492 N.W.2d 392, 395 (Wis. Ct. App. 1992). For a fair number of additional citations to the pertinent subsection of the Second Restatement, see the appendix volumes to RESTATEMENT (SECOND) OF JUDGMENTS (1982–2003).

51 *See* 18 WRIGHT ET AL., *supra* note 3, § 4414, at 331 (noting the popularity of this doctrine in the Seventh Circuit).

52 Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 65 (1982) (describing the rule briefly in a section on the general principles of preclusion); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 978 n.172 (1998) (mentioning it once in a "*but see*" citation).

Indeed, many of the courts that used to decide this sort of case the wrong way are seemingly continuing to mishandle the problem.[53] New York courts remain completely unimpressed by the Second Restatement's common-law compulsory counterclaim rule, never having even cited it. Instead, cases like *Harris v. Stein*[54] happily cite their ancient precedent in allowing a doctor's default judgment for the price of medical services to collaterally estop a patient's subsequent malpractice action.[55]

Still, the creation of the common-law compulsory counterclaim rule has worked some good, and with time should work a lot more. For one thing, it has benefited the development of res judicata doctrine in general. Issue preclusion, as we have seen, is the vehicle that courts will use to reach the intuitive result if they do not have the common-law compulsory counterclaim rule in their theoretical arsenal. The Second Restatement's formulation of that rule has helped to relieve this undesirable pressure on courts to extend issue preclusion to issues that were never actually litigated and determined.[56] Therefore, academics and courts, at least outside New York, seem to be increasingly less willing to neglect the actually-litigated-and-determined requirement, which should lead to a decrease in wrongly decided cases.[57] For another thing, the common-law compulsory counterclaim rule has undoubtedly contributed more directly to the right decision in at least a few specific cases.

Consider *Henderson v. Snider Bros.*,[58] which involved a prior judgment of uncontested foreclosure and dollar deficiency obtained by the seller of real estate against the buyer, followed by a fraud action brought by buyer against seller for restitution of amounts paid. The District of Columbia Court of Appeals first held no preclusion, capably dissecting the problem but ultimately saying, "No other rule would be logical; barring a permissive counterclaim would, in effect, estab-

53 *See, e.g.*, Shin v. Portals Confederation Corp., 728 A.2d 615, 624 (D.C. 1999) (applying preclusion, with dissent citing RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) (1982)).

54 615 N.Y.S.2d 703 (N.Y. App. Div. 1994).

55 The court relied on both *Gates* and *Blair*. *Id.* at 704–05; *see supra* note 15 and accompanying text.

56 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e, rptr. note (1982).

57 *See generally* CASAD & CLERMONT, *supra* note 1, at 123–27 (discussing the actually-litigated-and-determined requirement as "[t]he defining requirement of issue preclusion").

58 409 A.2d 1083 (D.C. 1979) (2-1 decision), *rev'd en banc*, 439 A.2d 481 (D.C. 1981) (6-2 decision). Both decisions allowed to proceed a quite separate claim by the buyer for breach of fiduciary duty and misrepresentation.

lish a compulsory counterclaim rule."[59] The American Law Institute then promulgated the Second Restatement, which cited that opinion with the parenthetical of "good analysis reaching probably wrong result."[60] Next, on rehearing en banc, the court reversed its course, applying preclusion because the new

> claim necessarily involves an attack on the validity of the sales price and therefore goes to the validity of the promissory notes involved in the foreclosure. The evidence necessary to support a judgment for appellants in this action for damages for fraud would have sufficed to establish a defense of fraud in the foreclosure action.[61]

Its partial reliance on issue preclusion, rather than invocation of the common-law compulsory counterclaim rule, sounds like "weak analysis reaching probably right result." The court was a bit foggy on the precise nature of the fraud claim. The majority did not cite the Restatement.

Then along came *Carey v. Neal, Cortina & Associates*,[62] presenting virtually identical facts. The Illinois Appellate Court held no preclusion, but only after carefully analyzing the buyers' action as one that sought damages for fraud, but one that neither asserted any rights to the property nor questioned liability on the note. This court quoted and discussed at length the Second Restatement's common-law compulsory counterclaim rule, concluding:

> In light of the pending controversy it could be argued that they should have defended against the foreclosure action and asserted fraud as a means of rescinding the real estate transaction. But as long as the pending suit is not a means by which the [prior] judgment is nullified, we believe it preferable to allow the suit to proceed. Rather than rescission and restitution, plaintiffs are seeking damages arising out of a fraudulent scheme that the [sellers] allegedly perpetrated.[63]

The court's analysis stands as a model of thoughtfulness and understanding. "Courts should carefully examine the circumstances presented in a specific case to ensure that a party is not precluded from litigating a claim simply because it 'might have' been raised, if the nature of the claim is sufficiently separate from that which was actually litigated."[64]

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59 *Id.* at 1090.

60 RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f, rptr. note (1982) (promulgated in 1980).

61 Henderson v. Snider Bros., 439 A.2d 481, 485 (D.C. 1981) (en banc).

62 576 N.E.2d 220 (Ill. App. Ct. 1991).

63 *Id.* at 228.

64 *Id.*

CONCLUSION

Professor David Shapiro introduced the law to the idea of the common-law compulsory counterclaim rule—under which failure to assert an available counterclaim will preclude bringing a subsequent action thereon if granting relief would nullify the judgment in the initial action. Although the law might initially seem a reluctant audience, his idea will end up making res judicata not only better but more elegant.[65]

65 *Cf.* T.S. ELIOT, *The Waste Land*, *in* THE WASTE LAND AND OTHER POEMS 55, 59 (Frank Kermode ed., Penguin Books 2003) (1922). The poem states, but with a note of sarcasm lacking here: "It's so elegant. So intelligent."