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Restatement (Second) of Judgments: An Overview

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THE *RESTATEMENT (SECOND) OF JUDGMENTS:* AN OVERVIEW

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Those who write introductions to symposia on Restatements cannot escape their duty to advert to the question of the proper function of a Restatement. Should a Restatement confine itself to restating the law, or should it state "what some members [of the American Law Institute] think it should be"?[1] The director of the American Law Institute has made it clear that he inclines toward stating what the law ought to be rather than what the cases say it is.[2] Some commentators have assumed that a Restatement should, at the least, predict what will, if not what should, be the law.[3] Others have made it clear that they take seriously the "restate" in "restatement."[4] The problem is especially acute when the law is uncertain. Professor Ehrenzweig's criticisms of the *Restatement (Second) of Conflict of Laws,*[5] for example, were premised in large part on his contention that the restaters had insufficient law to restate. His creative solution to the problem, given the inaccuracy of the first *Restatement of Conflict of Laws,* was to "repeal" the first Restatement without adopting another.[6]

Perhaps the most curious position ever taken regarding the proper function of a Restatement was oblique rather than direct. Justice Traynor remarked in *Grant v. McAuliffe*[7] that many cases had held in favor of a certain proposition and that "[t]he Restate-

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[1] Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute,* 13 ST. LOUIS U.L. REV. 185, 189 (1968) (quoting brief written by the Defense Research Institute, Inc., against the RESTATEMENT (SECOND) OF TORTS (1971)).

[2] *Id.* at 189-90.

[3] *See, e.g.,* Christie, *Defamatory Opinions and the Restatement (Second) of Torts,* 75 MICH. L. REV. 1621, 1622 (1977).

[4] *See, e.g.,* Helms, *The Restatements, Existing Law or Prophecy,* 56 A.B.A.J. 152 (1970); Wechsler, *supra* note 1, at 188-89 (discussing brief written by the Defense Research Institute, Inc. against the RESTATEMENT (SECOND) OF TORTS (1971)). Professor Ehrenzweig feared that foreigners might interpret a normative restatement as a descriptive one. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal,* 113 U. PA. L. REV. 1230, 1232 (1965).

[5] Ehrenzweig, *supra* note 4, at 1232; Ehrenzweig, *The "Most Significant Relationship" in the Conflict Law of Torts,* 28 LAW & CONTEMP. PROB. 700 (1963).

[6] Ehrenzweig, *supra* note 4, at 1232.

[7] 41 Cal. 2d 859, 264 P.2d 944 (1953).

ment of the Conflict of Laws, section 390, is in accord."[8] He went on, however, to dismiss, or at least minimize, the import of the cases by saying, "It should be noted, however, that the majority of foregoing cases were decided after drafts of the Restatement were first circulated in 1929. Before that time, it appears that the weight of authority [was to the contrary]."[9] Thus, Traynor apparently believed not only that Restatements should not depart from the case law, but also that when they do, they—and the courts that they have misled—should be ignored.[10]

The *Restatement (Second) of Judgments,* happily enough, will not generate many contests between the champions of the descriptive and the normative approaches. Although the law of judgments has not been static since the promulgation of the first *Restatement of Judgments,*[11] it has hardly been marked by the turmoil that characterizes the conflicts area. Nor have commentators been berating the courts for failure to blaze new trails. Thus, there have been few opportunities for divergence between the normative and the descriptive. In fact, apart from questions of who should be bound by the rules of collateral estoppel, the changes in this area of the law are clearly evolutionary rather than revolutionary. Even when it considered mutuality of estoppel, the Institute faced the less than cosmic problem of whether to adopt a majority or minority approach to the issue, not whether to break new ground.

The observations of the other contributors to this Symposium underscore the point. Their criticisms are perceptive but do not raise fundamental objections. The possible exception is Professor Clermont's treatment of territorial jurisdiction,[12] but that area is one in which the Supreme Court's recent activism virtually guarantees, for better or worse, far more intense concentration on the case law, and scholarly reaction to it, than on the efforts of restaters.

What issues did the Institute address in the *Restatement Second?* Chapter one is a lengthy introduction that discusses the contents of the entire *Restatement Second* and contrasts it with other works. Chapter two addresses questions of notice and juris-

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[8] *Id.* at 863, 264 P.2d at 946-47.

[9] *Id.,* 264 P.2d at 946-47.

[10] Justice Traynor later defended the result in *Grant,* although with less enthusiasm for its reasoning. Traynor, *Is This Conflict Really Necessary?,* 37 TEXAS L. REV. 657, 670 n.35 (1959).

[11] RESTATEMENT OF JUDGMENTS (1942).

[12] *See* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts,* 66 CORNELL L. REV. 411 (1981).

dictional bases for valid judgments, including means of contesting jurisdiction. Chapter three examines subject matter jurisdiction and means of contesting it. Chapter four concerns parties and, among other topics, the difficult issue of mutuality of collateral estoppel. Chapter five concerns relief from judgments through both direct and collateral attack. The final chapter, "Special Problems Deriving From Nature of Forum Rendering Judgment," deals with the effect of decisions of administrative tribunals, arbitration awards, and criminal judgments in subsequent civil proceedings. It also examines the special considerations that arise when one of the courts in two different proceedings is federal and one is state. The *Restatement Second* excludes, for the most part, discussion of questions concerning the enforcement of judgments (of the type that would usually be considered in a creditors' rights course), criminal and administrative hearings (except as they may effect subsequent civil proceedings), and the special problems of recognition of sister state and foreign country judgments. These omissions are treated in other Restatements.

A Modest Proposal

In introducing the Symposium, I have the opportunity to comment on issues that cut across specific topics addressed by other contributors. I would like to use the opportunity to offer a "modest proposal" concerning redefinition of the terms "bar" and "merger." I recognize that the drafters are unlikely to recall their product in light of my suggestions to change their definitions, and I wish to make it clear that I am not criticizing the substance of the *Restatement Second.* Rather, I am making rather sketchy suggestions for a better conceptual organization in the area. My suggestions should serve as a conceptual tool to help rationalize the law of res judicata.

The *Restatement Second* retains the traditional definitions of "bar" and "merger" from the first *Restatement of Judgments.* Section 45 [section 17] states:

> A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:
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> (a) If the judgment is in favor of the plaintiff, the claim is extinguished and *merged* in the judgment . . . ;
>
> (b) If the judgment is in favor of the defendant, the claim is extinguished and the judgment *bars* a subsequent action on that claim . . . .[13]

[13] Restatement (Second) of Judgments § 45 (Tent. Draft No. 1, 1973) [§ 17] (empha-

This traditional terminology defines merger in terms of a plaintiff's victory and equates bar with a defendant's victory. The definitions of these terms should be recast to reflect their underlying justifications: that merger promotes efficiency and bar preserves consistency. Under this view, merger occurs when a party should have presented a matter at the first trial, and bar occurs when allowing a party to relitigate a matter might produce a result inconsistent with the outcome of earlier litigation. The suggested definition is not tied to which party has prevailed in the initial litigation, nor does it require entanglements in size or scope of a cause of action. Furthermore, it offers two specific advantages. First, it is more attuned to the mental processes that occur when people use this sometimes confusing terminology. It would therefore help avoid unnecessary confusion. Second, such a definition can make the rules simpler and more comprehensible for lawyers, judges, and not least, students.

To illustrate my first assertion, consider the application of the proposed definitions of bar and merger to a recent Michigan case. Michigan has an unusual rule, Michigan General Court Rule 203.1,[14] that requires a defendant to object to nonjoinder in the first action as a condition to obtaining dismissal of a claim in a second action on the ground that the claim was "merged" in the first judgment. The rule, in other words, recognizes the efficiency purpose behind the merger doctrine, but attempts to balance efficiency and fairness by requiring the defendant to raise the issue when the plaintiff still has an opportunity to join the claim in question. In *Rogers v. Colonial Federal Savings & Loan Association*,[15] the plaintiff sued a contractor and a bank, claiming fraud in connection with a renovation of her house. The plaintiff sought rescission of the bank's mortgage that helped finance the job, but the bank objected on the ground that it was ignorant of the contractor's fraud. Plaintiff consented to a voluntary dismissal with prejudice of the claim against the bank. Later, plaintiff sued the bank to rescind the mortgage on the ground that it violated the requirements of the Truth-in-Lending Act.[16] The bank contended that the plaintiff's "loss" in the first action through dismis-

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sis added) [Throughout this Article, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts.].

[14] MICH. GEN. CT. R. 203.1.

[15] 405 Mich. 607, 275 N.W.2d 499 (1979).

[16] 15 U.S.C. § 1635 (1976).

sal with prejudice barred the new claim. Plaintiff, however, argued that because the bank had not objected in the first action to her omission of the Truth-in-Lending claim, rule 203.1 permitted her to proceed. The bank answered that the rule was inapplicable because it provided that failure to object in the first action meant that the first judgment "shall not *merge* more than the claims actually litigated";[17] the bank, on the other hand, was attempting to defeat plaintiff's claim on the basis of "bar." The Michigan Supreme Court sided with the plaintiff, reasoning that the term "merge" should not be taken literally—sometimes rulemakers say "merger" when they mean "bar" and vice versa.[18]

Although I agree with the court's conclusion, I doubt that the drafters of rule 203.1 were simply careless with their usage. The result in the *Rogers* case could have been reached without imputing bad draftsmanship to the rules drafters and without wrangling over the technical meaning of merger and bar. The drafters' rule said that the defendant must object to nonjoinder of claims in the earlier action in order to invoke the rule of "merger" in a later action. Under the proposed functional definition of "merger," the drafters' rule would mean quite simply and reasonably what must always have been intended: that plaintiff's second action would not be prevented unless (1) defendant had objected to nonjoinder in the first action, or (2) the court were to find, upon applying the rule of bar, that the outcome of the second action might be inconsistent with the result of the first action.

The phenomenon illustrated by the *Rogers* case is probably not isolated. Formal adoption of the functional definitions of bar and merger would reduce confusion and accommodate the natural tendency to adopt functional definitions regardless of technical definitions. Under the current formulation in the *Restatement Second* this tendency may result in technical misusage by those who write rules or opinions, and in misinterpretations by those who must follow those rules or opinions.

The benefits of simplicity that flow from functional definitions are more significant. The *Restatement Second's* emphasis in defining these terms on who wins requires a group of special rules that would otherwise be unnecessary. Consider, for example,

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[17] MICH. GEN. CT. R. 203.1 (emphasis added).

[18] The court noted "that the concepts of merger and bar are almost identical despite their technical distinction. In fact the terms 'merger' and 'bar' are often used interchangeably to convey the same meaning." 405 Mich. at 622, 275 N.W.2d at 505 (footnote omitted).

Martino v. McDonald's System, Inc.[19] A franchisee had agreed with McDonald's that his family members would not set up competing franchises within a certain distance of his own franchise. McDonald's sued the franchisee for violating the agreement. Before the franchisee filed any pleadings, the parties settled pursuant to a consent judgment entered by the court. Under the judgment, the franchise was terminated. Later, the franchisee sued McDonald's for lost profits resulting from the termination, alleging that the territorial restriction in the original franchise agreement violated the antitrust laws. McDonald's moved to dismiss on the ground that the claim was a compulsory counterclaim under Rule 13(a),[20] and, in the alternative, under a res judicata theory.

The court found rule 13(a) inapplicable because it requires a "pleading" to state a counterclaim, and the franchisee had never filed pleadings before agreeing to the consent judgment. Nonetheless, the court dismissed the claim, finding that the franchisee's claim came within "a narrowly defined class of 'common law counterclaims.'"[21] The court cited the reporter's note to section 56.1(2)(b) [section 22] of the *Restatement Second*.[22]

Section 56.1(2)(b) states:

> (2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:
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> . . . .
>
> (b) The relationship between 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 iuitial action.[23]

A functional treatment of the concept of bar would make such a special provision unnecessary; because the parties to the two proceedings were the same, the second action might have been inconsistent with the rights established by the first action, and the doctrine of bar, appropriately defined, alone ought to preclude the second claim. The *Restatement Second* could not produce this result without special provision because it defines "bar" in terms of the

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[19] 598 F.2d 1079 (7th Cir.), *cert. denied*, 444 U.S. 966 (1979).

[20] FED. R. CIV. P. 13(a).

[21] 598 F.2d at 1083.

[22] RESTATEMENT (SECOND) OF JUDGMENTS § 56.1(2), Comment f (Tent. Draft No. 1, 1973) [§ 22].

[23] RESTATEMENT (SECOND) OF JUDGMENTS § 56.1(2)(b) (Tent. Draft No. 1, 1973) [§ 22].

defendant's victory in the first action.[24] But of course the victory in the first action was for the plaintiff (if there is technically any victorious party to a consent decree), and the doctrine was invoked against the defendant in the first action, not the plaintiff, as section 48 of the *Restatement Second* [section 19], "the general rule of bar," requires.

We can certainly live with the drafters' language, which is the traditional language in this arcane field, but I might express the faint hope for reform when the *Restatement (Third) of Judgments* is in the works.

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[24] *Id.* § 48 (Tent. Draft No. 1, 1973) [§ 19] provides:
"Judgment for the Defendant—The General Rule of Bar.
A valid and final judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."