NOTES

THE BENEFITS OF APPLYING ISSUE PRECLUSION TO INTERLOCUTORY JUDGMENTS IN CASES THAT SETTLE

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While all courts require that a judgment must be final in order to be issue preclusive, courts have diverged over what constitutes the appropriate level of finality. Courts confusingly have cited judicial economy as a reason both to extend issue preclusion to interlocutory judgments and not to extend issue preclusion to interlocutory judgments. In this Note, Seth Nesin argues that judicial economy will be enhanced by applying issue preclusion to interlocutory judgments in cases that later settle. Nesin reaches this conclusion by applying two behavioral models, and finding that each suggests that making such judgments preclusive will cause settlements to be made earlier and more frequently. Nesin then considers the impact of such a rule on judicial integrity and on fairness to litigants, and concludes that these factors do not suggest that courts should make all interlocutory judgments nonpreclusive.

INTRODUCTION

For fairness, efficiency, and consistency reasons, an issue that has been litigated and decided in one trial generally cannot be litigated again in a second trial.[1] Traditionally, this doctrine of issue preclusion (or "collateral estoppel")[2] precludes relitigation of an issue only when the judgment in the first trial is deemed to be "final."[3] While courts

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1 Infra notes 22-23 and accompanying text.

2 The terms "issue preclusion" and "collateral estoppel" are synonymous. See John J. Cound et al., Civil Procedure: Cases and Materials 1206 (7th ed. 1997). This Note uses the term "issue preclusion," which is more commonly used by modern courts and commentators. However, some of the cases and articles cited refer to the doctrine as "collateral estoppel." In addition, some of the older authorities cited in this Note fail to distinguish between claim preclusion and issue preclusion, referring to each as res judicata.

3 Under the common law, for relitigation of an issue to be precluded, there must be a final judgment in the first case. See Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995) (requiring "final judgment on the merits" to apply collateral estoppel); Schulman v. J.P. Morgan Inv. Mgmt., Inc., 35 F.3d 799, 806 (3d Cir. 1994) (same). There are also a number of other requirements that must be satisfied before issue preclusion can be used. The issue in the second case must be identical, in

have articulated this finality requirement in a number of different ways, each court has, to some degree, indicated that the finality determination is influenced by whether the prior judgment was appealed or could have been appealed.[4] Courts of appeal in the federal system are only given jurisdiction over "appeals from all final decisions of the district courts."[5] As a result, the ideas of finality and "appealability" naturally are associated in the judicial mind, despite the fact that there are some statutory and judicially-created exceptions to this "final decision" rule.[6]

However, the fact that courts consider the appealability of prior judgments before imposing issue preclusion creates a strategic opportunity for any party that loses an interlocutory judgment.[7] Interlocutory judgments generally can be appealed only after the case proceeds to final judgment.[8] The losing party, however, may settle the case

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every respect, to the issue in the first case. Comm'r v. Sunnen, 333 U.S. 591, 599-600 (1948) ("[Collateral estoppel] must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged."). In addition, the issue must have been actually litigated and have been essential to the prior decision. Id. at 601-02 ("[T]he legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment."). Lastly, the rule of mutuality at one time provided that a party could not benefit from a judgment unless it would have been bound if the judgment had gone the other way. Triplett v. Lowell, 297 U.S. 638, 644 (1936) (failing to collaterally estop relitigation of patent issue despite fact that same plaintiff lost exact same issue against different defendant before different circuit). The mutuality requirement has eroded over time, however. Infra notes 31-33 and accompanying text.

4 Infra note 47 (quoting various formulations of finality requirement by different courts).

5 28 U.S.C. § 1291 (1994).

6 E.g., 28 U.S.C. § 1292 (allowing interlocutory appeals for certain specified types of judgments or if district court certifies question); Kerr v. U.S. Dist. Court for the N. Dist. of Cal., 426 U.S. 394, 402 (1976) (describing use of writs of mandamus to appeal interlocutory judgments in "extraordinary situations"); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949) (holding that collateral orders that are not part of cause of action may be immediately appealable).

7 An interlocutory judgment is defined as "[a]n intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case." Black's Law Dictionary 847 (7th ed. 1999).

8 Infra note 42 and accompanying text (describing federal rule preventing appeals from interlocutory judgments and exceptions to rule). There are some states that allow interlocutory appeals to be taken at the discretion of the appellate court. E.g., Wis. Stat. Ann. § 808.03(2) (West 2000) (allowing appeals by permission when court finds appeal will meet at least one of three discretely outlined requirements); see also Howard B. Eisenberg & Alan B. Morrison, Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules, 1 J. App. Prac. & Process 285, 297-301 (1999) (recommending use of discretionary interlocutory appeals in federal system modeled on Wisconsin approach). This Note only addresses the question of whether interlocutory judgments should be made issue preclusive in jurisdictions, like the federal system, in which interlocutory appeals generally are not permitted.

before final adjudication, thereby making the judgment "unappealable," so that the party will not be bound by an adverse judgment in future lawsuits. If the party who won the interlocutory judgment has no expectation of ever being involved in another lawsuit involving the same issue, it is more than willing to settle and lose the benefit of issue preclusion.

Unfortunately, the transaction above may have negative externalities. The doctrine of issue preclusion can apply to identical issues even in cases that do not involve all the same parties.[9] Therefore, when a plaintiff agrees to a settlement that wipes away issue preclusion, she forces future plaintiffs and future courts to spend time and resources relitigating an issue that has already been decided. Unlike issue preclusion, this problem never would exist when dealing with claim preclusion, or res judicata, which prevents a plaintiff from suing the *same defendant* twice on issues related to the same claim.[10] It would be nonsensical for a defendant to agree to a settlement that was not claim preclusive—doing so would mean the plaintiff simply could turn around and sue him for the same thing all over again. But as illustrated above, it might very well be in a defendant's best interest to agree to a settlement that is not issue preclusive.

Courts use issue preclusion to prevent parties from having to relitigate issues[11] and to keep the judicial system from appearing arbitrary by reaching different results on the same issues.[12] But reliance on the fact that a settled interlocutory judgment is unappealable as the basis for determining whether the judgment is "final" sometimes can undermine these purposes. Parties may be forced to relitigate issues in which they have already been successful, and courts may render inconsistent verdicts.

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9 Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 349-50 (1971) (declaring demise of "mutuality" rule for federal system, thereby allowing defendants who did not participate in prior judgment to benefit from issue preclusion); Bernhard v. Bank of Am., 122 P.2d 892, 894-95 (Cal. 1942) (abandoning mutuality requirement for California state court system); see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (permitting federal courts "broad discretion" to allow nonmutual offensive collateral estoppel, meaning that plaintiffs who did not participate in prior judgment can benefit from issue preclusion).

10 Cromwell v. County of Sac, 94 U.S. 351, 352 (1876) ("[A] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them . . . .").

11 See *Parklane Hosiery Co.*, 439 U.S. at 326 ("Collateral estoppel . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").

12 Infra notes 100-02 and accompanying text.

The Fifth Circuit's decision in *Avondale Shipyards, Inc. v. Insured Lloyd's*[13] is an apt example. In that case, Avondale Shipyards brought suit in a Louisiana federal court against an insurer and an indemnifier to recover for a settlement that the company had paid to an injured worker.[14] In the original lawsuit brought by the injured worker, a U.S. district court in Mississippi found on a motion for partial summary judgment that the injury took place on a "vessel," as defined by law, and that Avondale was the owner pro hac vice of that vessel.[15] If that judgment were preclusive, as the Lousiana district court held, Avondale would have been barred from indemnification.[16] But the Fifth Circuit reversed the Louisiana district court's use of issue preclusion because, inter alia, the prior case had settled, and therefore the interlocutory order could not have been appealed.[17] As a result, Avondale was able to relitigate an issue it had already lost, and two different courts reached different judgments as to whether the ship was a "vessel" as defined by law and whether Avondale was owner pro hac vice of the ship.[18]

These purposes, however, are somewhat secondary to the most frequently cited reason for issue preclusion: judicial economy. Courts have struggled with the question of whether extending issue preclusion to interlocutory judgments would help or hinder judicial economy. Some courts have articulated the belief that "applying collateral estoppel [to an interlocutory judgment] might greatly hinder future settlements," because parties that are facing multiple lawsuits would

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13 786 F.2d 1265 (5th Cir. 1986).

14 Id. at 1268.

15 Id. at 1267-68 (citing partial, interlocutory summary judgment order of U.S. District Court for Southern District of Mississippi in original lawsuit).

16 Id. The Louisiana district court did hold, however, that Avondale was covered by its insurance policy and therefore was entitled to recover on that contract. Id.

17 Id. at 1269. The Fifth Circuit reasoned that allowing interlocutory orders to have preclusive effect would be inconsistent with another requirement of issue preclusion—that the issue must have been essential to the prior judgment. Id. at 1272-73. Much like the lack of precedential value for dicta in opinions, the essential issue requirement is based on the idea that nonessential judgments, such as consent judgments, may not have been as carefully considered, cannot be reviewed by an appellate court, and therefore are less reliable. Id. Similarly, the Fifth Circuit held that interlocutory judgments should not be granted preclusive effect because at the time of the judgment it is unclear whether they actually will be essential to the eventual outcome of the case. Id. A defendant might never have had the opportunity to appeal an adverse interlocutory judgment even if he did not settle, because he might have won the eventual trial on different grounds, thereby preventing him from appealing. This argument means that a settling litigant not only waives his right to appeal, but also waives his right to argue that a judgment rendered would not have been essential to any final judgment.

18 Id. at 1275.

be deterred from settling after they lose such a judgment.[19] Yet other courts facing the same situation have justified reaching the opposite result by reference to the same policy consideration—that "application of collateral estoppel [in such a situation] advances . . . judicial economy" because it will prevent the relitigation of issues.[20] So which is it? Would applying issue preclusion to interlocutory judgments in cases that later settle help or hinder judicial economy? This Note argues that across the range of cases, a rule that applies issue preclusion to interlocutory judgments would benefit judicial economy. In deference to this judicial economy finding, as well as other considerations, this Note proposes that courts should not consider judgments unappealable—and therefore nonfinal—when their lack of appealability is due to settlement.[21]

Part I of this Note gives background information on the evolution of the issue preclusion doctrine and its "final judgment" rule. Part II analyzes whether extending issue preclusion to interlocutory judgments that later settle would help or hinder judicial economy, and concludes that it would help. Part III looks at fairness and integrity concerns, and concludes that these considerations present less of a countervailing argument to applying issue preclusion to interlocutory judgments than many courts suggest.

I
THE EVOLUTION OF ISSUE PRECLUSION

The common-law doctrine of issue preclusion provides that when a competent court has decided a particular issue, that judgment is

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[19] Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1074-75 (Ariz. Ct. App. 1999) (explaining:

> [p]arties in General Motors' position would have less incentive to settle claims by one plaintiff in a multi-plaintiff lawsuit if they felt that interlocutory rulings would bind them in future cases arising from the same incident. . . . By settling early in the lawsuit and before trial, General Motors conserved judicial resources . . .).

[20] Ossman v. Diana Corp., 825 F. Supp. 870, 879 (D. Minn. 1993); see also Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421, 1435-37 (D. Colo. 1996) (arguing that failure to give preclusive effect to partial summary judgment orders in cases that settle "would be directly contrary to the goal of judicial economy that collateral estoppel is designed to promote," and concluding that extension of issue preclusion to interlocutory judgment in this case "will not dramatically affect settlement in most cases").

[21] This Note uses the term "interlocutory judgment" to refer to nonfinal judgments in general. While this Note concludes that making such judgments issue preclusive will benefit judicial economy, both the extent of judicial-economy savings and the fairness concerns depend heavily upon the type of interlocutory judgment in question. A judgment that requires significant judicial resources, such as a partial summary judgment, may result in greater judicial-economy savings if made issue preclusive, and it may be fairer to bind a party to a fully litigated partial summary judgment than to other interlocutory judgments.

binding on future litigation.[22] Issue preclusion essentially amounts to a directed verdict on a particular issue: Once a question has been litigated and decided, future courts, even in cases unrelated to the first suit, are bound by the first court's decision.[23] Thus, litigants need not argue over an issue that has already been decided once by a competent court. This tool for eliminating repetitive litigation has been of growing importance in an era of burgeoning work loads for judges.

A. The Expansion of Issue Preclusion

The most commonly cited reason for issue preclusion is judicial economy, and the increasing case loads facing judges have led to increased application of the doctrine.[24] Given the court system's limited resources, it is wasteful for the same issue to be litigated on numerous

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[22] The first Justice Harlan described issue preclusion in this way:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

S. Pac. R.R. v. United States, 168 U.S. 1, 48-49 (1897).

[23] The rule "provid[es] preclusive effect to a fact, question, or right determined in a prior case." Burlington N. R.R. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1231 n.2 (3d Cir. 1995). However, issue preclusion normally does not apply to "'unmixed questions of law' in successive actions involving substantially unrelated claims." Montana v. United States, 440 U.S. 147, 162 (1979) (quoting United States v. Moser, 266 U.S. 236, 242 (1924)). The Supreme Court has acknowledged, though, that it is not always clear what constitutes an unmixed question of law for purposes of issue preclusion. United States v. Stauffer Chem. Co., 464 U.S. 165, 170-71 (1984) (admitting uncertainty about application of *Moser* exception); *Montana*, 440 U.S. at 163 (stating that scope of *Moser* exception is "difficult to delineate").

[24] See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (mentioning that "promoting judicial economy" is one purpose of issue preclusion); First Jersey Nat'l Bank v. Brown, 951 F.2d 564, 570 (3d Cir. 1991) (applying issue preclusion because of "impact of the flood of litigation pouring in on the bankruptcy courts, a development that requires that they carefully husband their resources"); Allan D. Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1724 (1968) ("Judges, overwhelmed by docket loads, are looking for devices to expedite their work. Preclusion offers an opportunity to eliminate litigation which is not necessary or desirable.").

occasions.[25] Courts have imposed several strict requirements that limit the circumstances in which parties may take advantage of issue preclusion.[26] But, as the caseloads of courts have grown,[27] judges have become more concerned with promoting judicial economy[28] and gradually have expanded the number of situations in which issue preclusion can be applied.[29]

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[25] However, some commentators have argued that the looming threat of issue preclusion can cause parties to "overlitigate" by expending resources on cases or issues that are relatively unimportant for fear that an adverse judgment could bind them in a future lawsuit. Lisa L. Glow, Note, Offensive Collateral Estoppel in Arizona: Fair Litigation vs. Judicial Economy, 30 Ariz. L. Rev. 535, 538 (1988) (discussing overlitigation problem); cf. *Parklane Hosiery Co.*, 439 U.S. at 330 (giving judges discretion over when issue preclusion should be applied because "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable").

[26] See supra note 3.

[27] There is some consensus among commentators that the judiciary's dockets are being overwhelmed. See, e.g., Richard L. Marcus & Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 2 (1985) (describing "litigation boom"); Richard Posner, The Federal Courts: Crisis and Reform 59-77 (1985) (same); Robert H. Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 232-33 (1976) (describing rapid rise in litigation as major problem facing federal courts). But cf. Marc Galanter, Reading the Landscape of Disputes, 31 UCLA L. Rev. 4, 69-71 (1983) (disputing that increase in litigation is problematic).

It is difficult to pinpoint the precise cause of the overburdened court system. At least some commentators have suggested that the problem is duplicative litigation. E.g., Richard D. Freer, Avoiding Duplicative Litigation, 50 U. Pitt. L. Rev. 809, 811 (1989) (identifying duplicative litigation as source of increase in federal court dockets); Jack Ratliff, Offensive Collateral Estoppel and the Option Effect, 67 Tex. L. Rev. 63, 63 (1988) (same).

[28] See, e.g., United States v. Davis, 15 F.3d 1393, 1413 (7th Cir. 1994) (criticizing jury-sequestering policy because it "would be both very time consuming and unnecessary, especially in a world of ever-increasing court costs to the litigants and government and the ever-increasing scarcity of judicial resources caused by the litigation explosion"); Jones v. Winnepesaukee Realty, 990 F.2d 1, 5 (1st Cir. 1993) (describing "this age of burgeoning litigation expense and overcrowded dockets"); Ali v. Sims, 788 F.2d 954, 959 (3d Cir. 1986) ("Particularly in this age of overcrowded dockets and court backlogs, it is unreasonable to expect a court to expend its scarce resources on one who has blatantly disregarded the court's procedures.").

[29] One element of issue preclusion that has sometimes made it difficult to use is the requirement that issues only can be precluded if they were "ultimate facts" in the prior litigation. See Evergreens v. Nunan, 141 F.2d 927, 928-31 (2d Cir. 1944) (distinguishing between "mediate data" and "ultimate facts" and holding that only "ultimate facts" can preclude issues). However, this requirement has eroded over time. See, e.g., Synanon Church v. United States, 820 F.2d 421, 426-27 (D.C. Cir. 1987) (rejecting "ultimate fact" distinction in light of difficulty of application and lack of justification for doctrine); Phillips v. United States, 502 F.2d 227, 230 (4th Cir. 1974) (rejecting "ultimate fact" distinction in favor of "more practical approach"), vacated on other grounds, 424 U.S. 961 (1976); United States v. Kramer, 289 F.2d 909, 916-19 (2d Cir. 1961) (criticizing "mediate data"/"ultimate facts" distinction, especially in criminal context).

While the first Restatement of Judgments embraced the requirement that an issue must have been an "ultimate fact" in order to be preclusive, the Restatement (Second) of

The primary way by which courts have expanded the use of issue preclusion is by abandoning the mutuality rule. Under the mutuality requirement, issue preclusion only applied if the parties in the second action were the same as, or were in privity with, the parties from the first action.[30] This requirement limited the benefits of issue preclusion to litigants that would have been bound if the prior judgment had been adverse to their interests.[31] The federal system, and many state systems, have now wholly abandoned the mutuality requirement,[32] allowing plaintiffs that were not parties to a previous lawsuit to bind a

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Judgments has abandoned the requirement. Compare Restatement of Judgments § 68 cmt. p (Supp. 1948) (expressing that collateral estoppel did not extend to "evidentiary or mediate facts"), with Restatement (Second) of Judgments § 27 cmt. j (1982) (criticizing "mediate data" distinction and stating that "[t]he appropriate question . . . is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment"). Some states still follow the rule from the first Restatement. See, e.g., State v. Heigele, 789 P.2d 218, 219 (Kan. Ct. App. 1990) ("The doctrine of collateral estoppel . . . does not extend to evidentiary facts or mediate data, as distinguished from the ultimate facts involved.")

30 Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 320-21 (1971) (describing mutuality requirement as requiring that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action"); see also In re Smead's Estate, 28 P.2d 348, 350 (Cal. 1933) ("Estoppel by judgment can only arise and be invoked in subsequent actions where the subject-matter of the litigation and the parties are the same."); Wolff & Sons v. New Zealand Ins. Co., 58 S.W.2d 623, 624 (Ky. Ct. App. 1933) (discussing preclusion of insurance liability issue by declaring "[i]t is conceded, quite naturally, that in order to render a matter [estopped], among other things, there must be identity of parties or their privies").

31 Triplett v. Lowell, 297 U.S. 638, 642 (1936) ("Neither reason nor authority supports the contention that an adjudication adverse to any or all of the claims of a patent precludes another suit upon the same claims against a different defendant.").

32 *Blonder-Tongue Labs.*, 402 U.S. at 349-50 (abandoning mutuality requirement for federal system); Bernhard v. Bank of Am., 122 P.2d 892, 894-95 (Cal. 1942) (abandoning mutuality requirement for California state court system). The trend in state courts has been to follow the lead of California and the federal system in abandoning the mutuality requirement. Howard M. Erichson, Interjurisdictional Preclusion, 96 Mich. L. Rev. 945, 965 (1998) ("Following *Bernhard* and *Blonder-Tongue*, most of the states rejected the strict mutuality requirement for issue preclusion."); see, e.g., Murphy v. N. Colo. Grain Co., 488 P.2d 103, 104 (Colo. Ct. App. 1971) (adopting *Bernhard* rule for Colorado state courts); Crowall v. Heritage Mut. Ins. Co., 346 N.W.2d 327, 330 (Wis. Ct. App. 1984) ("Persuaded by the reasoning of those courts which have adopted the exception, we now expressly hold that the lack of mutuality of estoppel does not preclude the use of collateral estoppel . . . ."). However, the mutuality rule is still good law in a number of states. Erichson, supra, at 966-67 (noting that Alabama, Florida, Georgia, Kansas, Mississippi, North Dakota, Virginia, Louisiana, and Ohio generally adhere to mutuality requirement); see e.g., Jones v. Blanton, 644 So. 2d 882, 886 (Ala. 1994) ("Although many courts, including the Federal courts, have dispensed with the mutuality requirement, it remains the law in Alabama."); Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995) (indicating that "Florida has long required that there be a mutuality of parties in order for [collateral estoppel] to be applied," but noting that Florida statute "abrogates the requirement . . . in . . . civil actions brought by crime victims").

defendant to an adverse judgment on an issue that the defendant had unsuccessfully argued in a prior case.[33]

The demise of the mutuality rule meant that, for the first time, a losing defendant might be precluded from arguing certain issues against a different plaintiff. Thus, the losing defendant had a strong desire to eliminate the preclusive effects of an adverse judgment, while the winning plaintiff, if he had no expectation of a future lawsuit involving the issue, had no interest at all in the preclusive effects of the judgment. Since established practice required appellate courts to vacate lower court judgments whenever pending cases became moot,[34] parties who had received final judgments and were awaiting appeal could consent to a "stipulated reversal"—a settlement that was con-

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[33] The first Supreme Court case to chip away at the mutuality rule only dealt with "defensive" nonmutual collateral estoppel, by which a defendant in a lawsuit could defend on the basis that the plaintiff had unsuccessfully argued the same issue against a different defendant. *Blonder-Tongue Labs.*, 402 U.S. at 330 (noting that use of defensive nonmutual collateral estoppel "involves neither due process nor 'offensive use' questions"). It took eight more years before the Supreme Court gave approval to the more controversial practice of "offensive" nonmutual collateral estoppel, where a plaintiff who was not involved in the previous litigation could nonetheless use that judgment to bind the defendant who unsuccessfully argued the issue in the prior case. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (approving of "offensive collateral estoppel" where trial judge finds it appropriate).

For due process reasons, however, the Court never has extended preclusion against a party that was not involved in the prior litigation. Id. at 327 n.7. Therefore, a defendant who is sued by multiple plaintiffs still may be forced to litigate the same issue over and over, even if he is successful each time. See id. at 330. The unfairness resulting from a defendant relitigating an issue is thought by most to be outweighed by the importance of giving each party an opportunity to have a "day in court." James R. Pielemeier, Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation, 63 B.U. L. Rev. 383, 425-31 (1983) (arguing that it would be unfair, and possibly unconstitutional, to apply issue preclusion against nonparty plaintiffs). At least one commentator has suggested that the opposite is true. See Note, Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel, 105 Harv. L. Rev. 1940, 1958 (1992) (arguing that present preclusion regime unfairly disadvantages defendants and suggesting that binding nonparties is one method of curing this inequity).

The fact that nonparties can benefit from issue preclusion, but not be bound by it, has created a problem, illustrated most famously by Professor Brainerd Currie. In his example, a train crashes, injuring fifty people. The railroad successfully argues that it was not negligent in each of the first twenty-five cases and wins them all. The twenty-sixth jury, however, finds the railroad negligent, and therefore that one errant judgment means the next twenty-four plaintiffs are all automatically successful. Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281, 281, 285-86 (1957).

[34] United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) (stating that established practice in civil cases is to vacate lower court judgments in moot cases); Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936) ("Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.").

tingent upon vacatur by the court.[35] This satisfied both parties' interests by allowing the losing party to wipe out any preclusive effects of the judgment, while allowing the winning party to receive the amount of the judgment, or possibly more, without undertaking the time and cost of an appeal.[36] Despite the apparent advantage to both parties, the wisdom of stipulated reversals was the subject of debate in academic journals: While some commentators believed that stipulated reversals were a useful tool in facilitating settlement, other commentators believed that allowing litigants to wipe away preclusive effects through stipulated reversal was contrary to the public interest in having binding judgments.[37]

B. The Resistance to Application of Issue Preclusion to "Unappealable" Interlocutory Judgments

In 1994, the Supreme Court decided *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[38] which ended the stipulated reversal controversy for the federal system. In a unanimous decision written by Justice Scalia, the Court held that "mootness by reason of settlement

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[35] See Fed. Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277, 279-80 (Fed. Cir. 1987) (remanding case to administrative agency with instructions to vacate decision in light of fact that "[w]hen the parties have settled their differences, then the appropriate course of action is for the appellate court to dismiss the action and to vacate the judgment below"); Kennedy v. Block, 784 F.2d 1220, 1224-25 (4th Cir. 1986) (vacating trial court judgment after parties settled); Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 283-84 (2d Cir. 1985) (holding that trial court abused discretion by not vacating judgment after parties settled). Vacatur refers to "a rule or order by which a proceeding is vacated[,]" and to vacate is to "nullify or cancel; make void; invalidate." Black's Law Dictionary 1546 (7th ed. 1999).

[36] See Daniel Purcell, Comment, The Public Right to Precedent: A Theory and Rejection of Vacatur, 85 Cal. L. Rev. 867, 907 (1997) ("If [the losing party] offers enough money, presumably the other party agrees to the vacatur, and the law changes."); see also infra notes 103-04 and accompanying text (discussing costs to judicial integrity of allowing parties to buy away adverse judgments).

[37] Compare Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589, 641-42 (1991) (arguing that settlement vacatur distorts settlement and perverts judicial process), and William D. Zeller, Note, Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments, 96 Yale L.J. 860, 860-61 (1987) (arguing that settlement conditioned on vacatur should only be used in certain cases, and then only at discretion of trial judge), with Henry E. Klingeman, Note, Settlement Pending Appeal: An Argument for Vacatur, 58 Fordham L. Rev. 233, 250 (1989) (arguing in favor of vacatur because private litigants' interests in settling disputes outweighs public interest in maintaining preclusive effects), and Stuart N. Rappaport, Note, Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement, 1987 U. Ill. L. Rev. 731, 751-53 (favoring use of judgments vacated pursuant to settlement).

[38] 513 U.S. 18 (1994).

does not justify vacatur of a judgment under review."[39] The Court reasoned that: (1) the losing party voluntarily had forfeited its ability to appeal and receive a remedy when it settled; (2) there is a large benefit to resolving legal questions permanently; and (3) allowing vacatur after settlement could harm judicial economy by enabling parties to "roll the dice" rather than settle early, since they could always get a judgment vacated later.[40]

All three of the considerations cited by Justice Scalia in *U.S. Bancorp* also argue in favor of giving issue-preclusive effects to interlocutory judgments in cases that later settle. Courts can recognize such settlements as a waiver of appeal, questions can be resolved permanently, and parties can be discouraged from "rolling the dice." But courts always have treated interlocutory judgments differently, despite a gradual expansion of what constitutes a final judgment for purposes of issue preclusion—the logic of *U.S. Bancorp* has not changed this traditional view. The question of whether interlocutory judgments should be preclusive is considerably more difficult than the situation in *U.S. Bancorp*, because litigants may wish to settle after an interlocutory judgment for any number of reasons other than eliminating preclusive effects.

At one time, the prevailing view held that a "final judgment" for issue preclusion purposes was the same as a "final judgment" for pur-

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[39] Id. at 29. Despite the demise of stipulated reversals in the federal system, the practice is still embraced in some state court systems, including California and Texas. See, e.g., Neary v. Regents of Univ. of Cal., 834 P.2d 119, 121 (Cal. 1992) (maintaining presumption in favor of granting stipulated reversals); Panterra Corp. v. Am. Dairy Queen, 908 S.W.2d 300, 301 (Tex. App. 1995) ("The law in Texas requiring vacatur is long-standing and well-established by our supreme court . . . ."). The California Supreme Court held in *Neary* that "parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances." *Neary*, 834 P.2d at 121. Its decision was based on a number of considerations, including the court's view that postjudgment settlements are efficient and that fairness to the parties requires accomodation of their desire to settle. Id. at 121-23; cf. Brandon T. Allen, Note, A New Rationale for an Old Practice: Vacatur and the Rules of Professional Responsibility, 76 Tex. L. Rev. 661, 663-64, 683 (1998) (noting that some states, including California and Texas, have not adopted holding of *U.S. Bancorp*, and urging them not to do so); Steven R. Harmon, Comment, Unsettling Settlements: Should Stipulated Reversals be Allowed to Trump Judgments' Collateral Estoppel Effects Under Neary?, 85 Cal. L. Rev. 479, 540 (1997) (criticizing California Supreme Court's continued approval of stipulated reversals).

In jurisdictions where stipulated reversals are still sanctioned, the application of issue preclusion to interlocutory judgments in cases that later settle would be inconsistent with that policy. Therefore, this Note, while concluding that issue preclusion should be applied to such interlocutory judgments, speaks primarily to those jurisdictions that follow the *U.S. Bancorp* rule.

[40] *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25-28. But see Klingeman, supra note 37, at 249-50 (arguing, in vacatur context, that judicial economy savings from settling before appeal outweigh losses from relitigated issues).

poses of appellate jurisdiction.[41] However, today, most courts hold that finality in the issue preclusion context "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."[42] This change in judicial thinking has grown out of the recognition that the purposes behind the 28 U.S.C. § 1291 "final decision" rule are not the same as the purposes behind the "final judgment" requirement of issue preclusion, and therefore the finality required for each is not necessarily the same.[43] A common test used by courts to

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[41] See, e.g., Ford v. Doyle, 44 Cal. 635, 637 (1872) (noting that preclusion does not apply to motion dealing with writ of possession); Dollfus v. Frosch, 5 Hill 493, 494 n.a (N.Y. Sup. Ct. 1843) (indicating that preclusion does not attach to pretrial motion); Chichester v. Cande, 3 Cow. 39, 55 (N.Y. Sup. Ct. 1824) (noting that court order granting money to creditor did not have preclusive effect); Dickenson v. Gilliland, 1 Cow. 481, 495 (N.Y. Sup. Ct. 1823) ("Any decision of ours, on this summary application, will not be so far conclusive on the parties, as to prevent their drawing the same matters in question again . . . .").

[42] Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961); see also John Morell & Co. v. Local Union 304A, United Food & Commercial Workers, 913 F.2d 544, 563 (8th Cir. 1990) (stating that "finality for purpose of appeal under section 1291 is not necessarily the finality that is required for issue preclusion purposes"); Dyndul v. Dyndul, 620 F.2d 409, 412 (3d Cir. 1980) ("'Finality' for purposes of issue preclusion is a more 'pliant' concept than it would be in other contexts."); Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979) (quoting *Lummus Co.* with approval). Compare Restatement of Judgments § 69(2) (1942) ("Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."), with Restatement (Second) of Judgments § 13 (1982) ("[F]or purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.").

[43] Grimmett v. S&W Auto Sales Co., 988 P.2d 755, 759 (Kan. Ct. App. 1999) ("Because the underlying purposes of the [finality requirements for appeals and preclusion] are vastly different, finality need not be defined the same for both."). Interlocutory appeals generally are disfavored so as to avoid the delay, costs, and confusion that come with stopping and starting trial court proceedings while waiting for appellate review. Johnson v. Jones, 515 U.S. 304, 309 (1995) (asserting that interlocutory appeals are responsible for "delay, adding costs, and diminishing coherence"). Interlocutory appeals also are thought to interfere with the ability of trial judges to supervise trial proceedings properly, because of the uncertainty over whether their decisions actually will be upheld. Id. ("An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings."). Lastly, interlocutory appeals are thought to generate superfluous appellate work because they may lead to appellate court decisions based on incomplete records or decisions on issues that would have become moot if the case simply had proceeded to a final judgment. Id. A major presumption behind preventing interlocutory appeals is that the majority of pretrial orders of district judges eventually are affirmed, so waiting for a "final decision" before appealing will result in a relatively small number of reversals and subsequent retrials, but it will avoid a large number of wasteful interlocutory appeals. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 434 (1985) (stating that one rationale for limiting interlocutory appeals is that "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts" (citation omitted)); see also 15A Charles Alan Wright et al.,

decide whether a judgment is final enough to preclude an issue was articulated by Judge Friendly in *Lummus Co. v. Commonwealth Oil Refining Co.*:[44]

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing *and the opportunity for review*.[45]

Judge Friendly's opinion, as well as the similar position taken by the Restatement (Second) of Judgments,[46] has led virtually all courts to consider "appealability" when determining finality for issue preclusion.[47] Because of this well-established practice of heavily weighing

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Federal Practice and Procedure § 3907, at 275 (2d ed. 1992) (stating that "[m]ost trial court rulings are affirmed" (footnote omitted)).

By contrast, the requirement of finality for issue preclusion merely is intended to assure that issue preclusion does not attach to tentative judgments. Restatement (Second) of Judgments § 13 cmt. a (1982) (noting that "such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered"). Many of the considerations that lead to the disfavor of interlocutory appeals actually favor an expanded use of issue preclusion. For example, trials can be speedier if issues are decided in advance of trial, and judges may be able to assert control over litigants more effectively if the judge's rulings will be binding on future litigation.

[44] 297 F.2d 80 (2d Cir. 1961).

[45] Id. at 89 (emphasis added). This Note argues that the courts should not consider opportunity for review as a factor in determining whether, in a case that settles, an interlocutory judgment should be issue preclusive. However, it does not argue that all interlocutory judgments should be issue preclusive. Judges still should consider factors such as the adequacy of the hearing when determining whether an issue should be precluded.

[46] Restatement (Second) of Judgments § 13 cmt. g (1982) (stating fact "that the decision was subject to appeal or was in fact reviewed on appeal [is a factor] supporting the conclusion that the decision is final for the purpose of preclusion").

[47] E.g., Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994) (listing "opportunity for review" as factor in determining finality for issue preclusion (quoting *Lummus Co.*, 297 F.2d at 89)); Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 347 (4th Cir. 1992) ("Finality assumes that the parties are not denied the opportunity for appellate review."), vacated, No. 91-1873(L), 1993 WL 524680, at *1 (4th Cir. Apr. 7, 1993); *John Morell*, 913 F.2d at 563 ("The availability of judicial review is merely one factor to consider in determining whether issue preclusion applies."); O'Reilly v. Malon, 747 F.2d 820, 823 (1st Cir. 1984) (per curiam) (listing "opportunity for review" as factor in determining finality for issue preclusion (quoting *Lummus Co.*, 297 F.2d at 89)); *Miller Brewing*, 605 F.2d at 996 (stating "that [whether] the decision was subject to appeal or was in fact reviewed on appeal, [is a factor] supporting the conclusion that the decision is final for the purpose of preclusion" (quoting Restatement (Second) of Judgments § 41 cmt. g (Tentative Draft No. 1, 1973))); Am. Cas. Co. v. Sentry Fed. Sav. Bank, 867 F. Supp. 50, 56 (D. Mass. 1994) ("Most courts that have expanded the notion of finality have done so only where there has been an opportunity for appellate review."). It is rare for a court to find appealability irrelevant to a finality determination, but the Third Circuit appears to have done so in Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1233 n.8 (3d Cir. 1995) (stating that "the fact that the decision was not actually appealable is of little consequence in this action"). However, this is by no means a consistent pattern, since other Third Circuit cases find appealability to be a significant factor in supporting the final-

appealability, even in a post-*U.S. Bancorp* world, courts continue to consider interlocutory judgments in cases that settle to be unappealable and not final.[48] This persists despite the fact that if the parties had not settled and instead had proceeded to judgment, those judgments likely could have been appealed.[49]

The weight given to "unappealability" varies significantly among courts. Within the federal system, the Fifth Circuit has been most resistant to increasing application of issue preclusion to interlocutory judgments. Because partial summary judgment orders are interlocutory and not immediately appealable, the Fifth Circuit flatly has stated that "an order granting partial summary judgment 'has no res judicata or collateral estoppel effect.'"[50] By contrast, the Restatement takes the position that final judgments are any adjudications that are "sufficiently firm to be accorded conclusive effect."[51] The Ninth Circuit claims to follow the Restatement approach, but, like the Fifth Circuit, it consistently has resisted imposing issue preclusion on future litigants when a decision could not have been appealed.[52] Other courts have

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ity of a decision for purposes of issue preclusion. See, e.g., In re Brown, 951 F.2d 564, 569 (3d Cir. 1991) ("In determining whether the resolution was sufficiently firm, the second court should consider . . . whether that decision could have been, or actually was, appealed."); Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 474 n.11 (3d Cir. 1997) (citing Restatement (Second) of Judgments § 13 illus. 1 (1982) and *Brown*, 951 F.2d at 569, for proposition that appealability is factor in finality).

48 E.g., Continental Airlines, Inc. v. Am. Airlines, Inc., 824 F. Supp. 689, 706-08 (S.D. Tex. 1993) (describing partial summary judgment order as "unappealable" because parties settled after judgment); Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1074 (Ariz. Ct. App. 1999) (describing "lack of opportunity for appellate review" for motion in limine in case that settled afterwards).

49 However, it clearly is burdensome for litigants to forgo favorable settlements and engage in lengthy litigation in order to preserve their opportunity to appeal. Some state court systems allow litigants to bring discretionary interlocutory appeals in an effort to alleviate this problem, but the federal system has no similar provision. See supra note 8.

50 Avondale Shipyards, Inc. v. Insured Lloyd's 786 F.2d 1265, 1272 (5th Cir. 1986) (quoting Golman v. Tesoro Drilling Corp., 700 F.2d 249, 253 (5th Cir. 1983)); see also J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 n.2 (5th Cir. 1996) (following *Avondale* rather than Restatement position). Some state courts take the same position as the Fifth Circuit and refuse to apply issue preclusion to any unappealable judgments. E.g., Linder v. Missoula County, 824 P.2d 1004, 1005-07 (Mont. 1992) (refusing to apply issue preclusion in case where partial summary judgment on same issue was granted in different case but was followed by settlement).

51 Restatement (Second) of Judgments § 13 (1982).

52 E.g., St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420, 1425 (9th Cir. 1995) (claiming to be applying Restatement's "sufficiently firm" test, yet denying issue preclusion for partial summary judgment order because it could not have been appealed); Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983) (same). The Ninth Circuit's failure to apply issue preclusion to unappealable judgments has led at least one court to conclude that there is no difference between the positions taken by the Fifth and Ninth Circuits, despite the fact that the Ninth Circuit claims to follow the Restatement position, and the Fifth Circuit expressly disavows it. *Continental Airlines, Inc.*, 824 F. Supp. at 707

considered appealability to be a factor, but still have imposed issue preclusion in the absence of such appealability.[53]

The uncertainty regarding when interlocutory judgments will be issue preclusive creates real problems for litigants. For example, in a lawsuit in California federal district court, Continental Airlines alleged that other airlines were acting anticompetitively, and that the relevant market for determining anticompetitive activity was a particular route between cities.[54] After the issue was fully litigated, the California court held in a partial summary judgment order that as a matter of law, the only relevant market for judging anticompetitive activity in the air transportation industry was the national market.[55] After that adverse judgment, Continental had no way of knowing whether it would be in its interest to settle and risk being precluded on that issue in future litigation in certain jurisdictions, or to follow through to judgment and appeal in the hopes of getting the order overturned. Fortunately for Continental, although it settled its claims after receiving the adverse interlocutory judgment,[56] it did not face issue preclusion because it had the opportunity to relitigate exactly the same issue a few years later when it brought a different antitrust lawsuit in the Fifth Circuit.[57] However, if Continental had brought the suit in a different circuit, it might have been precluded from rearguing the issue.[58]

("In [this court's] view, the purported conflict between the decisions of the Fifth Circuit and the decisions of the Ninth Circuit does not exist.").

53 John Morell & Co. v. Local Union 304A, United Food & Commercial Workers, 913 F.2d 544, 563-64 (8th Cir. 1990) (noting that appealability is factor in issue preclusion determination, but holding that issue preclusion was appropriate in that case even without opportunity for review); O'Reilly v. Malon, 747 F.2d 820, 822-23 (1st Cir. 1984) (per curiam) (considering lack of opportunity to appeal, but still applying issue preclusion).

54 See In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1467 (C.D. Cal. 1988) (listing four markets that Continental alleged American to have attempted to monopolize).

55 Id. at 1468 ("Continental has failed to present evidence supporting its contention that a city pair or hub constitutes a relevant market in the air transportation industry.").

56 *Continental Airlines*, 824 F. Supp. at 706.

57 Id. at 713 (affirming district court's denial of summary judgment, and holding that plaintiffs, including Continental, "should not be estopped from relitigating the relevant market issue").

58 See, e.g., Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421, 1433 (D. Colo. 1996) (applying issue preclusion to partial summary judgment order not made final due to settlement); Ossman v. Diana Corp., 825 F. Supp. 870, 879 (D. Minn. 1993) (same). Of course, in a situation where a plaintiff could bring the same litigation in different jurisdictions, a forum-shopping plaintiff would choose the jurisdiction that would not apply issue preclusion against her. However, the common view is that the preclusive effect of a judgment is set by the law of the court that decides that judgment—if that jurisdiction would find the ruling preclusive, so should another jurisdiction. See 18 Charles Alan Wright et al., Federal Practice and Procedure § 4467, at 645 n.54, § 4469, at 674 n.33 (1981) (citing authorities expressing differing opinions on whether Constitution and 28

Undoubtedly, the failure to apply issue preclusion to interlocutory judgments in cases that later settle may cause relitigation of issues. But before a court can decide whether to grant such "unappealable" judgments issue preclusive effects, it must weigh a number of competing considerations. Part II examines how issue preclusion's primary goal—judicial economy—would benefit by applying it to interlocutory judgments. Part III then will examine other factors that may be relevant in a court's determination of whether interlocutory judgments should be given preclusive effects.

II
JUDICIAL ECONOMY

Most practitioners and academics consider it to be in the public interest to have disputes settled between parties without a judicial decision.[59] The first line of a prominent article on the issue stated it

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U.S.C. § 1738 prohibit second court from affording first judgment greater precluding effect than would be affected by laws of first forum state). Thus, forum shopping often may prove futile. But not all courts follow the prevailing view. See, e.g., Finley v. Kesling, 433 N.E.2d 1112, 1117 (Ill. App. Ct. 1982) (noting that "it has been recognized that the forum State may apply its own rules of collateral estoppel," and therefore concluding that issue resolved in Indiana divorce proceeding was issue preclusive in Illinois, despite fact that Indiana would not have applied preclusion due to mutuality requirement).

The fact that later courts may give the same judgment different preclusive effects may encourage forum shopping, which is disfavored because it is thought to undermine the laws of the jurisdiction where the litigation should have been brought, because it burdens certain courts, and because it may create an appearance of unfairness in the judicial system. See Note, Forum Shopping Reconsidered, 103 Harv. L. Rev. 1677, 1684 (1990) (noting reasons for disfavoring forum shopping, but arguing that in some cases forum shopping may serve interests of justice system). At least one court has made the argument that applying issue preclusion to interlocutory judgments may encourage forum shopping in itself, because "[o]ne plaintiff in a multi-party case could first bring suit in the forum most likely to give a favorable choice-of-law ruling; then counsel could attempt to use that ruling offensively in a subsequent suit to estop the defendant from raising a defense in another forum." Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1075 (Ariz. Ct. App. 1999). However, this criticism seems applicable to all intersystem preclusion, and there is no reason to suspect that preclusion from interlocutory judgments will be more pernicious than any other preclusion.

[59] E.g., Margaret Meriwether Cordray, Settlement Agreements and the Supreme Court, 48 Hastings L.J. 9, 36 (1996) ("Settlement is . . . 'indispensable to judicial administration.'" (quoting Janneh v. GAF Corp., 887 F.2d 432, 435 (2d Cir. 1989))); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 320 (1991) ("[L]awyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial."). However, there is a minority of dissenters with a preference for trial over settlement. E.g., Jules Coleman & Charles Silver, Justice in Settlements, 4 Soc. Phil. & Pol. 102, 104-05 (1986) (arguing that trials have oft-overlooked benefits that suggest policies encouraging settlement may be ill-advised); Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) (arguing that settlements are often unjust and that settlement should be "neither encouraged nor praised"); A. Mitchell Polinsky & Daniel L. Rubinfeld, The De-

most simply: "A trial is a failure."[60] There are a number of reasons underlying the preference for settlement over trial: Settlement saves the judicial system time and money that can be allocated elsewhere, it saves the parties time and litigation costs that can be split between them, and it allows the parties to avoid the uncertainty of litigation by making a mutually beneficial agreement.[61]

Due to the recognition that the public interest generally is advanced by settlement, our judicial system encourages settlements,[62] and indeed an overwhelming majority of cases are resolved by settlement.[63] But all settlements are not created equal. Setting issue preclusion rules so as to encourage early, rather than last-minute, settlements, will save the parties and court from expending valuable resources on discovery, pretrial activity, and trial preparation.[64]

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terrent Effects of Settlements and Trials, 8 Int'l Rev. L. & Econ. 109, 109-10 (1988) (suggesting that injurers would be deterred more if they had to go to trial every time they were sued, and that this fact should be accounted for when creating legal rules); see also Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L.J. 2663, 2665-66 (1995) (noting that "many legal scholars continue to express concern with the use of settlement," despite fact that "court administrators, judges, and some lawyers" favor it).

60 Gross & Syverud, supra note 59, at 320. But see Leandra Lederman, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 Notre Dame L. Rev. 221, 268-69 (1999) (arguing that value of precedent should be taken into account when analyzing general policy in favor of settlement).

61 Gross & Syverud, supra note 59, at 320 (noting benefits of settlement).

62 See e.g., Fed. R. Civ. P. 16(a)(5) (indicating that one objective of pretrial conferences is "facilitating the settlement of the case"); Fed. R. Civ. P. 26(b)(2) advisory committee's note (1970) (indicating, with regard to 1970 amendment, that one purpose for discovery of insurance agreements is that it will promote settlement in some cases). State court systems also have procedural rules in place to influence settlements. Deborah R. Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 Judicature 270, 271 (1986) (indicating that as of 1985, eighteen state court systems had instituted mandatory arbitration programs to promote settlement).

63 Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 Harv. Negot. L. Rev. 1, 1 (1999) ("Fewer than five percent of all civil cases will result in a verdict . . . ."); Samuel Issacharoff et al., Bargaining Impediments and Settlement Behavior, in Dispute Resolution: Bridging the Settlement Gap 51, 52 (David A. Anderson ed., 1996) (reporting that "[s]tudies suggest that trials occur in only a tiny fraction of tort disputes").

64 Of course, it would be bad policy to set rules that encourage early settlements that are unfair and do not reflect the merits of the disputes. For example, a procedural rule presumably could be made that forced parties to pay a prohibitively expensive court fee if they failed to settle quickly. While this rule might very well encourage early settlements, it also would encourage poorly-financed parties to enter into unfair settlements with their wealthier adversaries. Such a rule also might encourage unfair settlements, because a scarcity of pretrial information may make it difficult for parties to assess accurately the value of their claims. As this Part illustrates, however, making interlocutory judgments binding not only would encourage early settlements, but also would level the playing field between repeat-player defendants and one-time plaintiffs. This may increase the fairness of settlements for poorly financed parties.

Commentators have developed a number of basic models to help understand what makes some cases settle, while others do not.[65] Application of these models to the question of whether interlocutory judgments should be preclusive in cases that settle suggests that such a rule will cause settlements to be made more frequently, and at an earlier stage in the litigation.[66]

A. The Priest-Klein Model

A number of commentators have suggested that trials occur because parties inaccurately predict their likelihood of success at trial.[67] George L. Priest and Benjamin Klein developed an influential economic model that captures this perspective most clearly.[68] According to the Priest-Klein model, a rational plaintiff always will settle for any amount that is greater than what she expects to get at trial, minus her expected additional costs from litigation.[69] A rational defendant always will settle for any amount that is less than the amount she expects to pay to the plaintiff, plus the amount she expects to pay in litigation expenses.[70] Thus, in cases where plaintiffs and defendants

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[65] See e.g., Gross & Syverud, supra note 59, at 321 (describing two major frameworks); Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior, 1999 U. Ill. L. Rev. 43, 88-90 (noting two popular frameworks and introducing third based on regret avoidance).

[66] Bruce H. Kobayashi has performed an economic analysis of various issue preclusion rules and their impact on the likelihood and the value of settlements. Bruce H. Kobayashi, Case Selection, External Effects, and the Trial/Settlement Decision, in Dispute Resolution: Bridging the Settlement Gap, supra note 63, at 17. Kobayashi's analysis indicates that a rule requiring privity for issue preclusion results in more trials overall, the majority of which will be favorable to a repeat litigant; a rule requiring mutuality, but not necessarily privity, would result in an increase in the number of trials, if all else is held equal; and a rule allowing offensive nonmutual collateral estoppel creates marginal incentives for a defendant to settle. Id. at 34-35.

[67] E.g., John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279, 286 (1973) (arguing that settlement rather than trial will normally occur if parties agree on probability of outcome); William M. Landes, An Economic Analysis of the Courts, 14 J. L. & Econ. 61, 68 (1971) (applying similar model to criminal trials and concluding that chances of trial are increased where defendant is more optimistic about trial results than prosecutor thinks he should be); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399, 417-19 (1973) (asserting that litigation generally occurs only when parties diverge as to expectation of trial outcomes); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 16 (1984) (arguing that likelihood of litigation increases when differences in parties' outcome estimates increase).

[68] Priest & Klein, supra note 67; see also George L. Priest, Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes, 14 J. Legal Stud. 215, 215 (1985) (explaining premise of Priest-Klein model).

[69] Priest & Klein, supra note 67, at 12-13.

[70] Id. The Priest-Klein model has been criticized by scholars who believe that the core underlying assumption—that parties in a settlement negotiation act rationally—is simply untrue. E.g., Birke & Fox, supra note 63, at 1-2 (arguing that, contrary to idealized "ra-

have similar estimates of the result at trial, they will settle.[71] But, when one or both parties substantially overestimates its likelihood of success at trial, he or she will litigate the case fully.[72]

Application of the Priest-Klein model suggests two reasons why giving unappealable judgments preclusive effects would encourage more frequent and earlier settlement. The first is the role of differential stakes in the litigation. The basic Priest-Klein model is based on the premise that the stakes are even, i.e., the amount the plaintiff has

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tional decisionmaking" model, settlement negotiation is prone to subconscious biases that disrupt process); John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions, 86 Colum. L. Rev. 669, 690 (1986) (noting that lawyers on contingency fees have "incentive[s] to settle prematurely and cheaply"); Marc Galanter, Conceptualizing Legal Change and Its Effects: A Comment on George Priest's "Measuring Legal Change," 3 J.L. Econ. & Org. 235, 237 (1987) (arguing that lawyer's interests play significant role in client's estimates about trial outcome); Gross & Syverud, supra note 59, at 385 (using empirical study to contest assumption that settlement negotiations are characterized by "numerous individuals intelligently pursuing independent self-interests"); Guthrie, supra note 65, at 88-90 (proposing "Regret Aversion Theory" that indicates that settlement is encouraged, because litigants do not like unpleasant feelings of regret that would come from turning down settlement offer, then proceeding to trial and doing worse than that offer); Robert H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. Disp. Resol. 235, 242-43 (1993) (suggesting that litigation sometimes may be lawyer-motivated); Thomas S. Ulen, Still Hazy After All These Years, 22 L. & Soc. Inquiry 1011, 1031 n.22 (1997) (suggesting that way in which parties perceive litigation causes defendants to be irrationally litigation-prone and plaintiffs to be irrationally settlement-prone).

Even where litigants are in some sense acting rationally, critics argue that rationality may not be captured easily in an economic model. For example, the majority of doctors being sued for malpractice refuse to engage in any settlement negotiation, suggesting that they value factors such as reputation and self-image more than the financial benefits of settling. Gross & Syverud, supra note 59, at 362-63, 365-66 (reporting results that indicate 65.7% of doctors refuse to make any settlement offer at all). While doctors facing malpractice suits are not necessarily representative of all litigants, the Gross and Syverud study is a good example of how nonmonetary incentives may impact the trial/settlement decision. Parties also may have other noneconomic reasons, such as spite, to choose litigation over settlement. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 974 (1979) (suggesting that spite is one reason that divorcing couples go to court rather than negotiating settlement).

[71] In other words, if a plaintiff's estimation of her expected value at trial is $100,000, and her estimation of the additional attorney's fees she would have to pay if she pursued the litigation all the way to verdict is $20,000, then she would settle for any value over $80,000. If the defendant had the same estimations as to expected value and litigation costs, he would be willing to settle for anything less than $120,000. In this scenario, the parties would settle for a value between $80,000 and $120,000 and avoid trial. However, if the plaintiff's estimate of the outcome at trial exceeded the defendant's estimate by more than $40,000 (their combined litigation expenses), they would proceed to trial. Some empirical research seems to support this hypothesis. See Leandra Lederman, Which Cases Go To Trial?: An Empirical Study of Predictors of Failure to Settle, 49 Case W. Res. L. Rev. 315, 341 (1999) (using tax court data to conclude, inter alia, that "parties settle early in cases in which they have similar expectations about the outcome").

[72] Priest & Klein, supra note 67, at 15-16.

to gain from litigation is equal to the amount that the defendant has to lose.[73] But Priest and Klein also acknowledge that there are some disputes where one party has more to lose than the other has to gain—for example, if a defendant's reputation would be damaged by a loss.[74] In a situation where the stakes of litigation to a defendant are greater than to a plaintiff, the Priest-Klein model suggests that defendants will be willing to offer even more money to settle a dispute than if the stakes were equal.[75] This particular balance of interests leads to a greater likelihood that the defendant's maximum offer will exceed the plaintiff's minimum demand, and thus, settlement will take place more frequently.[76]

Such an asymmetry in the stakes of litigation is an apt description of a typical issue preclusion situation: where a repeat-player defendant is concerned about the preclusive effects of a judgment, but a one-time plaintiff is not. The Priest-Klein model suggests that issue preclusion probably has a positive influence on settlement taking place *before an interlocutory judgment ever is rendered*, since the asymmetry in interests is greatest at that point.[77] But this difference in interests only is significant if a defendant has a genuine fear of being bound to an adverse judgment. If a defendant believes that a judgment will not bind him, there is less reason to attach negative value to the interlocutory judgment.[78]

A second insight that the Priest-Klein model provides is that more settlements will take place if parties believe that litigation ex-

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[73] Id. at 24 ("The implications of the model to this point derive from the assumption that the stakes of the relevant disputes are symmetric to plaintiffs and defendants.").

[74] Id.

[75] Id. at 26 ("Where defendants stand to lose more from adverse verdicts than plaintiffs stand to gain . . . [d]efendants in general will be willing to offer greater amounts to settle disputes . . . .").

[76] Id. at 25-26 ("Where the stakes are greater for defendants than plaintiffs . . . the rate of litigation will decline."); see also Gross & Syverud, supra note 59, at 381 ("If one side stands to lose more from a defeat at trial than the other side gains, its success rate at trial will increase and the trial rate will decrease.").

[77] Of course, making interlocutory judgments binding may make settlement far less likely after interlocutory judgments in those cases where a repeat-player litigant receives an adverse ruling. As this Note argues, however, the positive settlement effects of the rule will outweigh this negative impact.

[78] The Priest-Klein model assumes that parties are risk neutral. To the extent that parties to litigation are risk averse, it seems even more likely that a defendant facing a potentially devastating interlocutory judgment may wish to settle and not take the chance, even if the judgment is likely to go his way. See Gould, supra note 67, at 287 (noting that risk averse individuals see settlement as optimal choice); Gross & Syverud, supra note 59, at 349 (noting that "personal injury plaintiffs are, in general, quite risk averse with respect to litigation costs").

penses will be high.[79] The more that parties believe they will save in litigation expenses by settling, the more generous their settlement offer will be to the other side. This insight indicates that settlements will be made earlier if preclusive effects are given to interlocutory judgments. In a world where interlocutory judgments are not preclusive, a defendant facing multiple lawsuits has limited costs by arguing the interlocutory issue, rather than settling beforehand: the attorneys' costs of researching, briefing, and arguing the issue; the cost of a less favorable settlement if the issue is decided adversely to his interest; and other marginal costs of delay.[80] However, if interlocutory judgments are preclusive, the defendant is forced to calculate the litigation costs of pursuing the trial to a final judgment and appealing it, since the appeals process then would be the only opportunity to prevent an adverse judgment from having a binding effect on future litigation. A plaintiff who is aware that the defendant she is suing had this consideration in mind also would increase her estimation of attorneys' fees. Because both parties would have a higher estimate of their likely attorneys' fees, it is more likely that they could find a mutually beneficial settlement figure before the interlocutory judgment is ever heard.

Despite the risk inherent in not settling prior to the interlocutory judgment, parties with very divergent estimates about the outcome of litigation still might not settle. Therefore, to conclude that making interlocutory judgments preclusive truly benefits judicial economy, the aforementioned saved judicial resources must outweigh the additional resources spent on (1) overlitigating interlocutory judgments for fear of preclusion[81] and (2) proceeding to trial and appealing adverse interlocutory judgments in cases that otherwise would have settled. Yet these judicial economy costs appear to be minor compared to the savings from earlier and more frequent settlements across the broad range of cases.[82] Even if an issue is, in some sense, overlitigated

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[79] Priest & Klein, supra note 67, at 20 ("Other things equal, there will be . . . a lower litigation rate . . . where litigation costs are high relative to settlement costs and where the judgment is low relative to these costs.").

[80] Although there is always the potential that a case may proceed to trial and appeal, even when interlocutory judgments are nonpreclusive, a party estimating its expected litigation costs would discount this number by the likelihood of trial. Because trials are such a rare occurrence in typical cases, see supra note 63 and accompanying text, a party often can assume that it might be able to settle pretrial.

[81] See supra note 25 (discussing fear of issues being "overlitigated" when there is threat of issue preclusion). This Note refers to the term "overlitigation" in the context of "the expenditure of more resources than the amount at risk normally would have warranted." David A. Brown, Collateral Estoppel Effects of Administrative Agency Determinations, 73 Cornell L. Rev. 817, 840 (1988).

[82] There is admittedly a lack of empirical evidence to back up this assertion fully because of the difficulty in determining when a particular case would have settled and of

in the first case, it eventually may save judicial resources if the resolution of that issue precludes its relitigation in future cases. By contrast, if parties can settle away preclusive effects, it may lead to the same issue being litigated multiple times, although possibly not as intensely each time.

The additional judicial resources spent when a defendant loses an interlocutory judgment and thereafter refuses to settle also may be relatively minor.[83] Any additional resources expended in the first case will be offset at least partially by the costs saved in later cases. If a judgment is affirmed at the appellate level, the parties in the second trial will be bound to that judgment, and therefore able to make even more accurate estimates of the outcome at trial.[84] In the terms of the Priest-Klein model, parties in the second (and all future cases) will have less divergent expectations of the outcomes of their trials. This will allow them to settle more easily. Thus, if an issue can be precluded for multiple future cases, the judicial resources saved become increasingly greater.

B. The Strategic Behavior Model

The Priest-Klein model, while highly influential, has been subjected to criticism by a number of commentators who have developed alternative models.[85] These alternative models share the Priest-Klein

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measuring the amount of resources a party might have expended on an issue depending on its preclusive effects.

[83] Note also that this only matters in the subset of cases where the repeat-player defendant loses the interlocutory judgment. If the defendant wins the interlocutory judgment, the parties can settle under either rule without concern for preclusive effects of the judgment.

[84] One court that held an interlocutory judgment to be preclusive made this same argument:

> [P]reventing settlement [after interlocutory judgments] may actually conserve judicial resources. The only parties that will be discouraged from settling will be those who fear future, related liability based on negative partial summary judgment orders. If such parties are encouraged by issue preclusion not to settle the first action and to appeal instead, litigants and the court in a subsequent action will be saved the time and expense to relitigate and second guess an already-decided issue. In addition, it may not result in additional appeals because the subsequent action is just as likely to be appealed as the first.

Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421, 1437 (D. Colo. 1996).

[85] Some of the criticisms are rooted in empirical data that appear to contradict Priest and Klein's expectations. See Gross & Syverud, supra note 59, at 321-22 (examining 529 civil jury trials and concluding that "several of Priest and Klein's hypotheses . . . are inconsistent with actual settlement negotiations and trial outcomes"); Donald Wittman, Is the Selection of Cases for Trial Biased?, 14 J. Legal Stud. 185, 185-86 (1985) (critiquing Priest and Klein article for resting on unrealistic assumptions and for failing to conduct empirical study). George Priest has attempted to respond to this criticism by both accusing his critics

assumption that parties generally act in their rational economic self-interest, but suggest that trials occur, not because of genuine differences between the parties with regard to the likely outcome at trial, but because of strategic behavior.[86] This strategic behavior model suggests that, even in cases where parties have similar estimates as to the result at trial, each side may act strategically in an effort to capture as much of the combined saved litigation expenses for themselves as possible.[87] The model suggests that in cases where there is informational asymmetry between the parties, each side may be hesitant to make a settlement offer early in the litigation because doing so might suggest to the other side that the offering party has a weak case.[88] Repeat-player defendants also may refuse strategically desirable settlements in an effort to scare future plaintiffs into accepting lesser settlements, or to influence potential plaintiffs not to bring suit at all.[89] Most importantly, a party may turn down a settlement offer that exceeds its estimation of the likely award at trial minus litigation costs because it believes that by adopting a wait-and-see approach it can get an even better offer from the other side.[90]

Application of this strategic behavior model, despite its conflicts with the Priest-Klein model, also supports the theory that granting preclusive effects to interlocutory judgments will encourage early settlements. This is due in large part to the wait-and-see problem. Regardless of preclusive effects, a litigant who has an urgent need to

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of misreading his litigation model and by showing how the allegedly contradictory data actually supports his hypothesis. Priest, supra note 68, at 215-16.

86 See Robert Cooter et al., Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. Legal. Stud. 225, 226 (1982) (asserting that trials are caused by problem of distributing stakes among participants, rather than "excessive optimism"); Mnookin & Kornhauser, supra note 70, at 972-76 (suggesting that one reason divorcing spouses fail to settle is strategic behavior). Note that these models also are subject to the criticism that litigants do not always behave rationally. See supra note 70.

87 See Cooter et al., supra note 86, at 246 (explaining that "a trial can occur even though neither party is optimistic about its outcome . . . because each party is uncertain about how much his opponent will concede in the course of negotiations").

88 Tai-Yeong Chung, Theoretical Analysis of Settlement Devices, in Dispute Resolution: Bridging the Settlement Gap, supra note 63, at 107, 108.

89 Cooter et al., supra note 86, at 241 ("[O]ur model predicts that a repeat player whose opponents are not repeat players will adopt a hard bargaining strategy.").

90 See id. at 228 ("The simplest characterization of the bargaining process is a sequence of offers and counteroffers for dividing the stakes."). The model articulated in Robert Cooter's article is based on the proposition that both parties would like to minimize the likelihood of trial (which is costly), while at the same time agreeing to the best possible settlement. This creates a tradeoff: If a plaintiff increases her demand, she will recover more if the parties are able to settle, but there is a smaller likelihood that settlement will take place. Therefore, a plaintiff's optimal demand is achieved when asking for one more dollar would increase her expected financial risk of trial by the same amount. See id. at 229.

resolve a dispute will be more conciliatory, and therefore more likely to settle the dispute quickly.[91] In contrast, a litigant who is in no rush to see the dispute conclude will continue to make offers and counter offers in an effort to capture as much benefit as possible.[92] However, if interlocutory judgments are binding, a defendant expecting to be sued on the same issue cannot afford to adopt a wait-and-see approach. While such a defendant potentially might improve his bargaining position with an interlocutory judgment in his favor, the negotiation benefit of a favorable judgment likely will be significantly less than the cost of an adverse judgment.[93]

The plaintiff also cannot adopt a wait-and-see approach, since her negotiating position may be strongest before the interlocutory judgment. After the judgment, the plaintiff would be facing either a defendant who won the interlocutory judgment, and therefore has a greater likelihood of prevailing at trial (so he can afford to be less conciliatory in negotiations),[94] or a defendant who lost the interlocutory judgment and therefore may be determined to continue on to trial and appeal in hopes of reversing it. Since both parties have a strong incentive to adopt more conciliatory negotiation strategies prior to the interlocutory ruling, it is more likely that they will settle.[95]

There is little to no additional cost of overlitigation from making interlocutory judgments binding under the strategic behavior model, since there will be overlitigation no matter which rule is chosen. This is because, if adverse judgments can be wiped away through settlement, a plaintiff who has won an interlocutory judgment will act strategically. Since the plaintiff knows that the defendant highly values getting rid of the preclusive effects, the plaintiff will attempt to cap-

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91 See id. at 238 (arguing that litigants under time pressure will settle more often and more quickly).

92 See id. at 235 (using example of divorce settlement to illustrate how wife with no time pressure will consistently increase her demands in response to her husband's urgent need to settle).

93 This is especially true because a win in an interlocutory judgment potentially will help the defendant in only this particular case, while a loss may harm him in all future cases. See supra note 33 (explaining principle that nonparties cannot be bound to adverse rulings from previous litigants). However, even though a defendant's winning judgment in one case may not be legally binding in a later case against a plaintiff who was not involved in the first case, it still may have some benefit to the defendant in future cases. A winning judgment may make it appear more likely that the defendant will win the identical issue in future cases, thereby causing both the defendant and future plaintiffs to adjust their expectations accordingly during settlement negotiations.

94 This situation arises whenever a defendant wins an interlocutory judgment, whether or not the judgment will be issue preclusive.

95 While early settlements are beneficial to judicial economy, pressuring parties to settle early has the potential to affect the size of settlements unfairly. For a discussion of the fairness of pressuring early settlement, see infra Part III.

ture as much of the value as possible by negotiating for a huge premium from the defendant. Because the defendant presumably knows ex ante that the plaintiff will do so, he has a large incentive to overlitigate these issues when the parties cannot reach settlement in advance.

Just as under the Priest-Klein model, under the strategic behavior model, the judicial economy costs caused by litigants refusing to settle after losing an interlocutory judgment are offset by the effects of a preclusive judgment on litigants in future cases. With one issue settled by the prior action, the subsequent case will be somewhat easier (and possibly less expensive) to litigate, and therefore there will be less of an incentive for parties to engage in lengthy settlement negotiations to capture the combined litigation costs.

III
JUDICIAL INTEGRITY AND FAIRNESS CONSIDERATIONS

Even if it is clear that extending issue preclusion to interlocutory judgments in cases that later settle will improve judicial economy, it does not necessarily mean that it is a good idea. After all, courts could improve judicial economy by extending issue preclusion against parties that were never part of the original litigation, but the judicial system's interest in due process outweighs its interest in judicial economy.[96] Gains in judicial economy must be considered along with other factors, such as judicial integrity and fairness to the parties. This Part examines these two considerations and concludes that, while courts may have reason to be concerned that extending issue preclusion to interlocutory judgments in cases that later settle may increase the risk of error, this concern is not sufficient to reject summarily applying issue preclusion in all such cases.

A. Integrity of the Judicial System

There are several reasons to believe that extending issue preclusion to interlocutory judgments in cases that later settle would improve the appearance of integrity for the judicial system. Such an extension of issue preclusion would reduce inconsistent judgments,[97] prevent the unseemliness of parties buying away preclusive effects,[98] and improve judicial decisionmaking by forcing judges to make careful and lasting rulings.[99]

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[96] See supra note 33.

[97] Infra notes 100-02 and accompanying text.

[98] Infra notes 103-04 and accompanying text.

[99] Infra notes 108-09 and accompanying text.

One of the purposes of issue preclusion is the prevention of instances where different courts reach different results on the same question.[100] Inconsistent results among courts can undermine the public's confidence in the judicial system by making decisions seem arbitrary.[101] Issue preclusion minimizes the number of instances where this problem occurs by binding courts to the decision of a prior court that has decided the same question.[102] Applying issue preclusion to interlocutory judgments similarly would alleviate the inconsistent judgment problem when dealing with interlocutory judgments.

The application of issue preclusion to interlocutory judgments also could improve the integrity of the courts by removing the ability of wealthy litigants to buy away unfavorable preclusive effects through settlement.[103] Both the Supreme Court and state courts have acknowledged this consideration when discussing the practice of stipulated reversals, in which parties settle after a trial for the express purpose of erasing the preclusive effect of an adverse judgment.[104] But it appears that only a small minority of courts have made the same observation when dealing with parties who settle before trial or during

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100 Schwartz v. Pub. Adm'r, 246 N.E.2d 725, 730 (N.Y. 1969) (describing inconsistent results as "blemish on a judicial system"); Allan D. Vestal, Res Judicata/Preclusion, at V-12 (1969) (noting that one purpose of issue preclusion is avoiding inconsistent judgments that diminish prestige of courts).

101 Cf. In re Dow Corning Corp., 211 B.R. 545, 588 (Bankr. E.D. Mich. 1997) (noting, in context of consolidation of breast implant claims, that "it is anything but just when presenting the identical proofs, one plaintiff suffering nearly identical injuries or illness, wins a multimillion dollar verdict against a defendant while another takes nothing").

102 See Montana v. United States, 440 U.S. 147, 153-54 (1979) (noting that issue preclusion "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). However, issue preclusion does not completely eliminate inconsistent decisions, because nonparties cannot be bound, see supra note 33, and because issue preclusion is waived if not raised in a timely manner. See Fed R. Civ. P. 8(c), (d) (listing "estoppel" as affirmative defense which must be timely pled or it is deemed admitted).

103 See Fisch, supra note 37, at 631 ("If a judicial system in which the rights of the parties are likely to depend more on their finances than on legal merit is to be condemned, a system in which wealthy litigants can use the process simply as a nonbinding gambling procedure is equally abhorrent."); Zeller, supra note 37, at 868 ("Settlement conditioned on vacatur . . . decreases public respect for the legal establishment by encouraging wealthy litigants to sue until reaching favorable outcomes, to conspire against the interests of unrepresented future litigants, and to utilize public resources and then discard the results.").

104 U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26-27 (1994) ("'Judicial precedents . . . are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))); Okla. Radio Assocs. v. FDIC, 3 F.3d 1436, 1444 (10th Cir. 1993) (recognizing problems with allowing parties to contract around existence of negative precedent through settlement and vacatur); Tausevich v. Bd. of Appeals, 521 N.E.2d 385, 388 (Mass. 1988) ("[I]f a case is settled after trial, without an appeal or entry of judgment, for the express purpose of avoiding issue preclusion, the attempt may well fail.").

trial for the purpose of negating a potentially issue preclusive judgment.[105]

The prevailing view appears to accept the notion that interlocutory judgments are the private property of litigants, and, as such, they can be bargained away by parties. In finding that issue preclusion does not apply to interlocutory judgments, courts routinely take into account the intent of the parties to rid themselves of any preclusive effects of prior judgments through settlement.[106] Allowing parties to bargain away preclusive effects permits a one-time player who wins an interlocutory judgment to sacrifice unrepresented public and private interests by extracting an oversized settlement from the other side, while also wasting the time and money of the courts and other parties who might benefit from preclusion.[107] This behavior is not only adverse to judicial economy, it is also damaging to the integrity of the courts because it diminishes the legal value of a court judgment.

Lastly, a clear rule that interlocutory judgments carry preclusive effects would improve judicial decisionmaking in two ways. First, it would avoid the need for a court to arrive at a somewhat arbitrary determination as to whether or not the order of a previous judge was

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[105] See, e.g., Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421, 1437 (D. Colo. 1996) ("The public interest would not be served by allowing parties to avoid the preclusive effect of adverse judgments so expediently."); Ossman v. Diana Corp., 825 F. Supp. 870, 879 (D. Minn. 1993) (holding that making interlocutory judgment issue preclusive satisfied two goals of issue preclusion, "preventing parties . . . from having more than one opportunity to litigate the same issue" and "judicial economy").

[106] E.g., Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1075 (Ariz. Ct. App. 1999) (refusing to apply issue preclusion in part because settlement release with injured plaintiff suggested that General Motors was not conceding any issues related to litigation and that parties "'intend merely to avoid further litigation and buy their peace'" (quoting release between parties)); Linder v. Missoula County, 824 P.2d 1004, 1006 (Mont. 1992) (failing to apply issue preclusion because, "looking at the settlement document set forth above, it is evident that the parties did not intend to create any finality with regard to the issues as they might arise in the Linder claim").

[107] If parties can contract around earlier orders, interlocutory judgments never will be binding in cases that settle, since any competent lawyer would insist on such an arrangement. *Siemens Med. Sys.*, 945 F. Supp. at 1435 ("If a partial summary judgment is never to have preclusive effect, a party involved in a series of suits against different litigants will have the option to avoid preclusive effects in future suits simply by settling the current suit whenever an unfavorable summary judgment order is issued."). Despite this concern, even courts that hold that interlocutory judgments may be binding still approve of the practice of contracting away preclusive effects. E.g., Cities Serv. Co. v. Gulf Oil Corp., 980 P.2d 116, 128 (Okla. 1999) (applying issue preclusion to judgment but noting that "we do not perceive that today's holding will dissuade parties from settling their difference *sans* trial, although it might encourage them to make certain that their settlement agreements address orders earlier entered by the court which could be afforded preclusive effect in later litigation").

too tentative to be considered final.[108] Second, applying issue preclusion to interlocutory judgments that settle likely would prevent a truly tentative judge from making potentially binding judgments.[109] To the extent that careful and lasting determinations by judges enhance the integrity of the judicial system, such a rule would be beneficial.

B. Fairness to Litigants

The question of whether imposing issue preclusion on judgments that later settle would be fair to individual litigants is much more difficult in the interlocutory context than in the vacatur context discussed in *U.S. Bancorp*.[110] There is a risk that applying issue preclusion to interlocutory judgments might increase the rate of judicial error. Courts have pointed out that application of issue preclusion to interlocutory judgments would: (1) cause tentative decisions to be preclusive;[111] (2) cause unreviewable and inaccurate decisions to be binding;[112] (3) influence parties to agree to unjust settlements;[113] and (4) prevent parties who wish to settle their disputes from doing so.[114] Yet each of these arguments may only increase the risk of error incrementally, and courts should be wary of overestimating their importance when weighing these factors against the judicial economy and integrity benefits of preclusion.[115] As long as the issue was heard adequately, the fact that it cannot be appealed due to settlement should not act as a bar to applying issue preclusion.

Several courts have argued that it is unfair to make an interlocutory judgment binding because the trial court could have revised the

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108 Of course, the opposite rule, holding that interlocutory judgments are never preclusive, is equally clear. However, the nonpreclusive rule is less desirable in light of the judicial economy, integrity, and fairness rationales outlined in this Note.

109 This rule would not prevent judges from being flexible, since a judge would still be able to reconsider her rulings if she wished. But as soon as a judgment is made, it would become binding if settlement were reached. By contrast, allowing judges to label certain rulings as tentative would reduce the incentives of parties to settle early, because parties would not know ex ante that an interlocutory judgment would be binding on them.

110 See supra notes 38-40 and accompanying text.

111 See infra note 116 and accompanying text.

112 See infra note 120 and accompanying text.

113 See infra note 122 and accompanying text.

114 See Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1074-75 (Ariz. Ct. App. 1999) (suggesting that defendants facing multiple claims would not settle after adverse interlocutory rulings).

115 Furthermore, judicial economy should not be juxtaposed against "justice" or "fairness" as just another competing policy objective. Judicial economy is in the best interests of all litigants, because when the caseload of a court is too heavy, justice is frequently delayed or less adequate. Cf. Ortiz v. Fibreboard Corp., 527 U.S. 815, 867-68 (1999) (Breyer, J., dissenting) (noting that "the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court" due to, inter alia, "long delays").

order at any time had settlement not intervened.[116] The Federal Rules of Civil Procedure make interlocutory orders "subject to revision at any time before the entry of judgment."[117] Yet, due to the paucity of interlocutory orders that are actually revisited, at least one judge has written, "it would be pedantic to contend that all interlocutory orders are . . . 'tentative' in any real sense."[118] Furthermore, if a litigant believes that an interlocutory judgment is wrong, and that the judge might be willing to change her mind, the litigant is permitted under the Federal Rules of Civil Procedure to postpone settlement and ask the judge to reconsider the ruling.[119] Because of the opportunity for litigants to ask for reconsideration of erroneous rulings and the infrequency with which judges revisit their earlier rulings, there is only a minimal additional risk that "revisable" rulings will be erroneous more often than other rulings.

Courts also are wary of applying preclusion to any issue that did not withstand appellate review.[120] However, while appellate review itself may protect against trial court error, it has never been a requirement for issue preclusion. A litigant may be bound to an erroneous decision on which he simply waived appeal.[121] As long as the judicial system continues to bind parties to erroneous decisions because they choose not to appeal, it is no more unfair to bind a litigant to an erro-

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116 E.g., St. Paul Fire & Marine Ins. Co. v. F.H., 55 F.3d 1420, 1425 (9th Cir. 1995) (holding that partial summary judgment order was not final because it was "subject to reconsideration on proper motion"); Aetna Cas. & Sur. Co. v. Fairchild, 620 F. Supp. 1245, 1249 (D. Idaho 1985) (holding that partial summary judgment order was not issue preclusive because it could have been reconsidered), rescinded on other grounds, 624 F. Supp. 567, 568 (D. Idaho 1986).

117 Fed. R. Civ. P. 54(b). Most state systems have similar rules. See, e.g., Ohio R. Civ. P. 54(b) ("[T]he order or other form of decision is subject to revision at any time . . . ."); S.C. R. Civ. P. 54(b) (same).

118 Siemens Med. Sys., Inc. v. Nuclear Cardiology Sys., Inc., 945 F. Supp. 1421, 1435 (D. Colo. 1996).

119 See Fed. R. Civ. P. 54(b); see also supra note 117.

120 See Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994) (listing "'opportunity for review'" as factor in determining finality for issue preclusion (quoting Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d. Cir. 1961))); Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 347 (4th Cir. 1992) ("Finality assumes that the parties are not denied the opportunity for appellate review."), vacated, No. 91-1873(L), 1993 WL 524680, at *1 (4th Cir. Apr. 7, 1993).

121 The courts that have held that interlocutory judgments in cases that later settle have a preclusive effect have done so because they found no distinction between settling before opportunity to appeal and waiving appeal. Greenleaf v. Garloc, Inc., 174 F.3d 352, 359 (3d Cir. 1999) (noting that "[p]ursuant to the settlement, the Greenleafs voluntarily surrendered their right to further review"); *Siemens Med. Sys., Inc.*, 945 F. Supp. at 1436 (finding issue preclusion appropriate because defendant "chose to settle the entire action and, thus, relinquished its opportunity for appeal"); Ossman v. Diana Corp., 825 F. Supp. 870, 878 (D. Minn. 1993) (noting that "defendants had a full and fair opportunity to litigate the issue on which preclusion is sought").

neous decision when it waives its right to appeal by settling. On the other hand, there is some danger that a party may have to settle after an erroneous interlocutory ruling because it cannot afford the expense of pursuing trial and appeal. For this reason, courts should pay special attention to the adequacy of the hearing when determining whether to extend issue preclusion to interlocutory judgments in cases that settle.

An additional concern about making interlocutory judgments binding is that, in some cases, doing so may create a high-stakes race to settle quickly, which will result in an agreement that does not adequately reflect the true value of the claim.[122] But this fear seems contrary to evidence that has been compiled about settlement negotiations. Settlement studies have indicated that repeat-player defendants, when litigating against one-time plaintiffs, get superior settlements due to the fact that they are less risk averse and less willing to adopt conciliatory negotiating strategies with their current adversaries because they want to gain a reputation as hard bargainers.[123] Yet applying issue preclusion to interlocutory judgments may alter this power inequity, because defendants with a lot at risk in future litigation may be just as risk averse as plaintiffs.[124] In this regard, it appears that issue preclusion increases the fairness of settlement negotiations.[125]

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122 Cf. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (noting concern that defendants facing huge class action may "be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

123 Cooter et al., supra note 86, at 241 (concluding that repeat players litigating against one-time players are likely to adopt tough bargaining strategies).

124 Cf. Bruce L. Hay, Some Settlement Effects of Preclusion, 1993 U. Ill. L. Rev. 21, 21-22 (arguing that preclusion rules do not necessarily influence settlement but do cause settlements to reflect dispute's merits). A defendant normally may choose to be a firm negotiator, even in cases where he has little chance of success, just to influence future parties to settle cheaply. See Cooter et al., supra note 86, at 241 ("A player with a future interest [in litigation] must also take into account that a harder bargaining strategy today will cause his future opponents to adopt softer strategies."). However, this problem does not take place when the power is shifted to one-time plaintiffs, since they do not have the luxury of taking a hard-line stance in one case in hopes of reaping the rewards in a future case. A rational plaintiff would not take such a tough negotiating stance, lest the defendant decide to risk trying the interlocutory motion. If the parties do not agree to settle in advance of the interlocutory judgment, the plaintiff will either hurt her bargaining position by losing the judgment, or she will win the judgment, which may cause the defendant to refuse to negotiate altogether.

125 There is concern that, in some cases, making interlocutory judgments issue preclusive may give plaintiffs facing a repeat-player defendant an unfair negotiating position that allows the plaintiff to receive more than the merit of her claim. These benefits presumably will lead to defendants passing their additional costs onto consumers. While there is some injustice in this outcome, there is an even greater injustice in the windfall to certain plaintiffs when interlocutory judgments are not issue preclusive. In a nonpreclusive jurisdiction, negotiations prior to the interlocutory judgment typically will favor the defendant, because of his ability to adopt a tough negotiating position. Supra note 123 and accompanying text.

The final fairness concern is that a party wishing to settle for reasons other than wiping out preclusive effects will be disinclined to do so if he knows that an interlocutory judgment will be binding.[126] However, if a party believes his other reasons for settling the claim outweigh the fact that the interlocutory judgment will be binding on future litigation, then the party still will be inclined to settle.[127] Moreover, it is not unfair to bind a party to an issue that he has litigated and lost; the justice system does this all the time.[128]

CONCLUSION

Applying issue preclusion to interlocutory judgments in cases that settle would have desirable effects on judicial economy and judicial integrity. Any potential for unfairness to individual litigants resulting from such application of issue preclusion must be weighed against

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However, negotiations after an interlocutory judgment that the plaintiff wins will result in a windfall to the plaintiff, since the defendant will be willing to pay more than the claim is worth to avoid being bound to the judgment.

By contrast, a jurisdiction in which interlocutory judgments are preclusive will create the opposite power structure. Negotiations prior to the interlocutory judgment should favor the plaintiff, because the defendant may be willing to pay more than the value of the claim in order to avoid the risk of being bound to an unfavorable judgment. However, negotiations after an interlocutory judgment that the plaintiff wins are less likely to be successful, because defendants will not wish to settle without the right to appeal, so as to avoid binding effect in future litigation.

Therefore, issue preclusion always will benefit some plaintiffs: Where interlocutory judgments are nonpreclusive, the benefits likely will be paid as windfalls to certain plaintiffs who do not settle before the judgment and are successful on the interlocutory judgment; but where such judgments are issue preclusive, this benefit will be spread among the many plaintiffs who settle early.

126 This concern distinguishes the interlocutory judgment issue from the stipulated reversal issue. A losing party who settles contingent upon vacatur after a full trial has little incentive to settle except as an attempt to wipe away preclusive effects. Therefore, preventing that litigant from settling does not offend any freedom of contract notions of fairness.

127 When interlocutory judgments are issue preclusive, they likely will create a greater number of precedents, which is advantageous to the judicial system in that it gives more guidance to courts and litigants. However, if parties settle or choose not to appeal, there is concern that bad precedents might remain, which would be to the detriment of justice. Given that many cases will settle prior to an interlocutory judgment being rendered, and that judgments adverse to a repeat-player defendant seem likely to be appealed, this appears to be only a modest concern.

128 These fairness considerations also suggest why interlocutory judgments that truly cannot be appealed, through no fault of the parties, often should not carry preclusive effects. Much like vacatur, issue preclusion is an equitable doctrine that judges should wield with discretion. It is unfair to apply issue preclusion to a judgment if the losing party lost its right to appeal through no fault of its own. Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994) ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.").

these attractive outcomes. In cases where the costs in fairness are small and the judicial economy and integrity gains are large, courts should consider applying issue preclusion, even to "unappealable" interlocutory judgments. In addition, those courts that continue to hold that interlocutory judgments are nonpreclusive should recognize that their decisions come at an overall cost to judicial economy and integrity.