

Limited Appearances and Issue Preclusion: Resetting the Trap

Ernest L. Schmider

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Ernest L. Schmider, *Limited Appearances and Issue Preclusion: Resetting the Trap*, 66 Cornell L. Rev. 595 (1981)
Available at: <http://scholarship.law.cornell.edu/clr/vol66/iss3/8>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTES

LIMITED APPEARANCES AND ISSUE PRECLUSION: RESETTING THE TRAP?

Section 75(c) of the *Restatement (Second) of Judgments*¹ provides that when a court renders judgment in a quasi in rem action, determinations of issues actually litigated shall have preclusive effect in subsequent suits between the parties. Comment d suggests that when a litigant defends on the merits in a limited appearance,² he may be precluded from relitigating issues³ in a

¹RESTATEMENT (SECOND) OF JUDGMENTS § 75(c) (Tent. Draft No. 7, 1980) [§ 32] [Throughout this Note, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts.] states:

A valid and final judgment begun by attachment, garnishment, or similar process (traditionally described as "quasi in rem") in which jurisdiction is exercised only with respect to the thing proceeded against and in which the plaintiff seeks not to determine the existence of interests in the thing but rather to apply the thing to the satisfaction of a claim against the defendant:

....

(c) Is conclusive between the parties, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

² RESTATEMENT (SECOND) OF JUDGMENTS § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32]. A "limited appearance" is a defendant's appearance in court to contest a quasi in rem claim on the merits without submitting to the court's general personal jurisdiction. In jurisdictions permitting the practice, *see* note 10 *infra*, the defendant's potential liability will not exceed the value of the attached property. *See, e.g.*, RESTATEMENT OF JUDGMENTS § 40 (1942). A "limited appearance" is distinguishable from a "special appearance," in which a defendant challenges a court's personal or subject matter jurisdiction over him, without submitting to the court's jurisdiction through his appearance. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 11, Comment g (Tent. Draft No. 5, 1978) [§ 8]; Note, *Limited Appearances*, 7 UTAH L. REV. 369 (1961).

³ Issue preclusion operates to preclude relitigation of particular issues that were actually litigated and determined in a prior action, and the determination of which was essential to the previously rendered judgment. The *Restatement Second* states the rule: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973) [§ 27].

For example, suppose driver A sues driver B in tort, alleging that B drove negligently and caused a crash in which A sustained personal injuries. B raises the defense that A was contributorily negligent. The jurisdiction recognizes contributory negligence as a total bar to recovery. After hearing the merits of the case, the jury returns a verdict for A. If B subsequently sues A to recover for damage to B's car arising from the same accident, A may invoke issue preclusion to prevent B from relitigating the question of A's negligence; the verdict for A in the first suit necessarily meant that A was found not negligent.

subsequent suit.⁴ If the basis for preclusion is the defendant's limited appearance in a prior quasi in rem action, however, the policies of *res judicata* do not support application of the *Restatement's* rule.⁵ Moreover, preclusion may run afoul of the due process clause of the Constitution.⁶

I

THE RATIONALE FOR LIMITED APPEARANCES

When a plaintiff commences a quasi in rem action⁷ by attaching the defendant's property, the defendant faces a dilemma. He may either default and forfeit the seized property, or appear in court to defend the underlying claim on the merits, thereby submitting to the court's general personal jurisdiction and risking potentially unlimited liability.⁸ To alleviate the harshness

⁴ Comments accompanying section 75 state that "[i]t is not necessary to allow [the defendant] the . . . benefit of relitigating issues he has chosen to litigate in the initial proceeding." *RESTATEMENT (SECOND) OF JUDGMENTS* § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32]. Section 75(c) arguably applies when the defendant makes a limited appearance in an initial action. Courts unquestionably would construe any other type of appearance by the defendant to argue the claim's merits as a general appearance exposing the defendant to unlimited potential liability in personam. See 2A *MOORE'S FEDERAL PRACTICE* ¶ 12.13 (2d ed. 1980). In such circumstances, the rules of bar and merger for personal judgments would determine *res judicata* effects. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 75, Comment c (Tent. Draft No. 7, 1980) [§ 32]; *RESTATEMENT OF JUDGMENTS* §§ 48, 48.1 (1942).

⁵ See, e.g., Cleary, *Res Judicata Reexamined*, 57 *YALE L.J.* 339, 344 (1948); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 *IOWA L. REV.* 217, 219-22 (1954); *Developments in the Law—Res Judicata*, 65 *HARV. L. REV.* 818, 827 (1952); Note, *Collateral Estoppel By Judgment*, 52 *COLUM. L. REV.* 647, 648-49 (1952). See notes 18-21 and accompanying text *infra*.

⁶ U.S. CONST. amend. XIV, § 1; notes 32-47 and accompanying text *infra*.

⁷ In *Freeman v. Alderson*, 119 U.S. 185 (1886), the Supreme Court emphasized that the scope of quasi in rem actions is limited: "[A]ctions *quasi in rem*, . . . though brought against persons, . . . only seek to subject certain property of those persons to the discharge of the claims asserted." *Id.* at 187. In such actions, the Court stated, "the judgment . . . binds only the parties in their relation to the property." *Id.* at 190.

⁸ Although a court exercising quasi in rem jurisdiction generally has power to render judgment only for the amount of the attached property's value, a defendant, by making a general appearance, may give the court complete power over his person. This converts the quasi in rem action to one in which a resulting judgment can reach all of the defendant's assets. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32]; see, e.g., *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956), *cert. denied*, 352 U.S. 968 (1957); *U.S. Indus., Inc. v. Gregg*, 58 F.R.D. 469 (D. Del. 1973); *Campbell v. Murdock*, 90 F. Supp. 297 (N.D. Ohio 1950); *Bede Steam Shipping Co. v. New York Trust Co.*, 54 F.2d 658 (S.D.N.Y. 1931); *Sands v. Lefcourt Realty Corp.*, 117 A.2d 365 (1955).

of this dilemma,⁹ various jurisdictions¹⁰ permit the defendant to make a limited appearance, which protects him from a personal judgment while he defends the quasi in rem action on the merits.¹¹

These jurisdictions justify limited appearances on several grounds. First, a court that otherwise has no power over a defendant's person should not suddenly arrogate such power merely because the defendant seeks to protect his property from a potentially unfounded and frivolous claim.¹² Second, the fortuity of owning property in a possibly distant state should not force a defendant to choose between forfeiting the property through default or submitting personally to the court's jurisdiction and risking an in personam judgment against him that may far exceed the value of the attached property.¹³ Finally, basic notions of due process and fairness suggest that if the defendant chooses to litigate, his risk should not be disproportionate to the power the court has over him through his attached property.¹⁴

⁹ One commentator suggests that "an attempt to force defendant to choose between abandonment of his property without defense and submission to the jurisdiction of the court for all purposes contravenes the constitutional guarantee of due process of law." Taintor, *Foreign Judgment In Rem: Full Faith and Credit v. Res Judicata In Personam*, 8 U. PITT. L. REV. 223, 226 (1942). See also Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 950-53 (1960). But see RESTATEMENT OF JUDGMENTS § 40, Comment a (1942) (state's refusal to allow limited appearance not violative of constitutional due process).

¹⁰ See, e.g., McQuillen v. National Cash Register Co., 112 F.2d 877 (4th Cir.), cert. denied, 311 U.S. 695 (1940); Simmons v. Cowper, 233 La. 397, 96 So. 2d 646 (1957); Miller Bros. Co. v. State, 201 Md. 535, 95 A.2d 286 (1953), rev'd on other grounds, 347 U.S. 340 (1954); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916); Osborne v. White Eagle Oil Co., 355 P.2d 1041 (Okla. 1960).

¹¹ See, e.g., Dry Clime Lamp Corp. v. Edwards, 389 F.2d 590 (5th Cir. 1968) (prohibiting in personam judgment against litigating nonresident defendant except as affecting interest in seized property); Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (6th Cir. 1922) (defendant's participation in trial on merits not effecting general appearance or altering in rem nature of actions); Miller Bros. Co. v. State, 201 Md. 535, 547, 95 A.2d 286, 291-92 (1953) ("a defendant whose property has been attached . . . [may] appear in the action solely for the purpose of protecting his property and without subjecting himself personally to the jurisdiction of the court, even though in order to protect his property he contests the validity of the plaintiff's claim"), rev'd on other grounds, 347 U.S. 340 (1954); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

¹² See, e.g., McQuillen v. National Cash Register Co., 112 F.2d 877 (4th Cir.), cert. denied, 311 U.S. 695 (1940) (jurisdiction over stockholder claims against company limited to actions in rem); Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co., 285 F. 214 (6th Cir. 1922); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

¹³ See, e.g., Dry Clime Lamp Corp. v. Edwards, 389 F.2d 590 (5th Cir. 1968); Miller Bros. Co. v. State, 201 Md. 535, 95 A.2d 286 (1953), rev'd on other grounds, 347 U.S. 340 (1954).

¹⁴ See Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

II

THE APPLICABILITY OF ISSUE PRECLUSION
TO ISSUES ADJUDICATED IN LIMITED APPEARANCES

Section 75(c) of the *Restatement (Second) of Judgments*¹⁵ generally would preclude relitigation of issues previously litigated and determined in a quasi in rem action,¹⁶ even if the defendant made a limited appearance and his potential liability was limited to the value of the attached property.¹⁷ Application of the general rule of issue preclusion in this situation contravenes the policies of res judicata and may suffer constitutional infirmities.

A. *Conservation of Judicial Resources*

The doctrine of issue preclusion is designed to conserve judicial resources.¹⁸ Application of issue preclusion to issues litigated

¹⁵ RESTATEMENT (SECOND) OF JUDGMENTS § 75(c) (Tent. Draft No. 7, 1980) [§ 32].

¹⁶ The *Restatement Second* recognizes that particular circumstances may justify exceptions to issue preclusion. Section 68.1(e) [§ 28], for example, authorizes relitigation of an issue when 1) the public interest requires; 2) the significance of an issue in subsequent actions was unforeseeable in the first action; or 3) the defendant did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *See id.* at § 68.1 [§ 28]. Although this section arguably protects defendants making limited appearances from collateral estoppel, courts may decide otherwise.

Moreover, it is anomalous to impose on the defendant making a limited appearance the burden of persuading courts in later actions that he falls within the "insufficient incentive" exception to the rule of preclusion. *See id.* § 68.1(e)(iii) [§ 28]. This effectively makes the limited appearance option itself conditional on the defendant's ability to persuade a later court that he did not have the incentive to litigate fully the initial quasi in rem action. *See note 24 infra.* In such circumstances, the defendant is uncertain about the risk of appearing in the initial suit, and thus about his appropriate defense strategy. Non-availability of issue preclusion should be the rule, not the exception, for cases involving limited appearances.

¹⁷ *See* RESTATEMENT (SECOND) OF JUDGMENTS § 75(c), Comment d (Tent. Draft No. 7, 1980) [§ 32].

¹⁸ Courts are struggling with increasing docket congestion. From 1960 to 1978, the backlog of pending cases in the United States district courts increased 171.8%. JUDICIAL CONFERENCE REPORTS 177 (1978). The broad doctrine of res judicata, including bar, RESTATEMENT (SECOND) OF JUDGMENTS § 48 (Tent. Draft No. 1, 1973), merger, *id.* § 47, and issue preclusion, *id.* § 68, seeks to prevent wasteful and repetitious litigation. *See, e.g.,* Montana v. United States, 440 U.S. 147, 153 (1979) (res judicata protects adversaries from expense and vexation of multiple lawsuits, conserves judicial resources, and reduces frequency of inconsistent judgments); Wilson v. United States, 166 F.2d 527, 529 (8th Cir. 1948); note 5 *supra*. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 11.2-.3 at 529-33 (2d ed. 1977). Because courts have only limited resources with which to handle growing caseloads, the orderly administration of justice requires that issues previously litigated in a full and fair hearing on the merits not be litigated again.

In *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939), *aff'd on rehearing*, 195 So. 322 (Miss. 1940), the plaintiff-creditor brought a quasi

in a limited appearance, however, may encourage protracted litigation.¹⁹ The foresighted defendant, with one eye upon the quasi in rem suit in progress and the other on possible future in personam suits, will litigate more extensively than the limited value of the property at stake in the quasi in rem action warrants, aware that every issue in the initial suit could bind him in a subsequent action.²⁰ If the parties never engage in related litigation

in rem action in Louisiana to enforce a chattel mortgage on a dredge that the defendant had purchased from him. The trial court denied the defendant's motion to dismiss for want of jurisdiction. After hearing the merits of the case, the trial court ordered the machine sold and entered a personal judgment against the defendant. On appeal, the Supreme Court of Louisiana affirmed part of the judgment, but reversed the personal judgment on the ground that the lower court lacked personal jurisdiction over defendant. The appellate court effectively treated the defendant's initial appearance as a limited appearance. In a subsequent in personam suit in Mississippi to recover the balance of the purchase price of the dredge, the plaintiff-creditor argued that the defendant was estopped from invoking defenses that had proved unsuccessful in the Louisiana foreclosure action. The court found that because the second suit reflected "no difference in quality, person, or cause of action," rehearing the defendant's defense would have repeated needlessly the first action's proceedings. *Id.* at 96, 191 So. at 99.

It is unclear whether the Mississippi court intended to treat the defendant's appearance in the first suit as a limited appearance. The Louisiana Supreme Court had affirmed *only* the in rem portion of the judgment against the defendant. Nevertheless, the Mississippi court noted that the defendant "did not in the trial or appellate courts of Louisiana rest its defense upon the want of jurisdiction to enter a personal decree against it. . . ." *Id.* at 93, 191 So. at 97.

One commentator has argued that the desire to save judicial resources does not by itself justify applying the doctrine of res judicata. *See* Cleary, *supra* note 5, at 348. In his view, "[c]ourts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong." *Id.*

¹⁹ This Note focuses on the impropriety of allowing issue preclusion against a limited appearance defendant in subsequent actions. Different considerations may be relevant, however, when the issue is whether issue preclusion should apply against the *plaintiff* after a defendant's limited appearance. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32]. The fact that the plaintiff chooses the forum and presumably pursues his claim fully, supports binding him in subsequent suits on issues previously litigated in a suit where defendant made a limited appearance. Because courts generally have abandoned the requirement of mutuality of estoppel, binding the plaintiff but not the limited appearance defendant in subsequent suits probably poses no problem. *See, e.g.,* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Federal Sav. and Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973); Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery*, 64 CORNELL L. REV. 1002 (1979). *But see* Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. Dist. Ct. App. 1971); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972).

²⁰ In *Garraway v. Retail Credit Co.*, 244 Miss. 376, 141 So. 2d 727 (1962), the court considered the permissibility of giving preclusive effect to a prior determination on the issue of whether the defendant exhibited malice and bad faith in the preparation of mercantile credit reports. In the plaintiff's prior equitable action to compel documentary discovery, the court held that because the plaintiff had failed to show that the defendant issued the disputed reports with malice and in bad faith, the reports were privileged and

again, the additional expenditure of judicial resources will have been completely unnecessary. At best, the application of issue preclusion in this context only shifts the burden of litigation to the court that hears the initial suit; at worst, it creates wasteful litigation.²¹

B. *Fairness*

The *Restatement Second* observes that a defendant who has once "had his full day in court" does not deserve another hearing on issues that he already litigated.²² This rationale derives in part

nondiscoverable. See *Retail Credit Co. v. Garraway*, 240 Miss. 230, 126 So. 2d 271 (1961). In the plaintiff's subsequent libel action against the same defendant, the Mississippi appellate court concluded that the plaintiff could relitigate the issue of malice and bad faith. The court stated that "[a]pplication of collateral estoppel to a prior action seeking purely discovery in equity would in the future have the coercive effect of forcing litigants to full-scaled effort over minor disputes . . . , and would act to increase rather than contract the extent of litigation." 244 Miss. at 386, 141 So. 2d at 731. See also Note, *supra* note 5, at 650.

²¹ For example, suppose plaintiff P brings an action against a non-resident defendant D, seeking \$100,000 damages for breach of contract. P cannot secure in personam jurisdiction over D, but succeeds in obtaining quasi in rem jurisdiction (despite recent limitations on quasi in rem jurisdiction, discussed in note 40 *infra*) by attaching D's in-state property. D elects to make a limited appearance so that his potential liability will not exceed the value of the attached property.

If the attached property is a yacht worth \$35,000, D may defend vigorously. In such a case, the possibility of later issue preclusion pursuant to § 75(c) [§ 32] arguably would not affect D's litigation strategy. If, however, the attached property is a rowboat worth only \$800, the possibility of issue preclusion on the issue of liability may compel D to either (1) default, in which case the absence of "actual litigation" will render issue preclusion inapplicable, see RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27], or (2) defend zealously, as if his interests at stake were substantial. If D defends vigorously and a subsequent suit arises in which P invokes issue preclusion, the latter court will expend less resources in adjudicating the claim. Nevertheless, because the earlier court bore the substantial burden of D's precautionary litigation, there probably will be no net savings of judicial resources. Alternatively, if D defends vigorously and no subsequent suit arises, D will have litigated excessively; both D and the court will have expended time and resources unnecessarily.

²² See RESTATEMENT (SECOND) OF JUDGMENTS § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32] "[I]t is difficult to see why he should be allowed to relitigate an issue as to which he has had his full day in court. . . .". In *United States v. Balanovski*, 236 F.2d 298 (2d Cir. 1956), *cert. denied*, 352 U.S. 968 (1957), defendants argued that the court could not constitutionally treat their appearance to protect attached funds as a general appearance subjecting them to in personam liability. The court disagreed, stating that "[t]he parties cannot complain of inconvenience, since they have come into the jurisdiction. They have had their day in court on the issues which would settle both the right to the [attached] funds and personal liability. . . ." *Id.* at 302. See generally *Polasky, Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954). See also *A. VESTAL, RES JUDICATA/PRECLUSION V-80 to 81* (1969).

from notions of fairness: a party should not have more than "one bite of the apple."²³

Unfortunately, the facile phrase "had his day in court" begs the question: is it ever true that a defendant who makes a limited appearance has had a full and fair day in court? The very essence of a limited appearance is that it is not full, because the defendant will litigate the underlying claim only to an extent commensurate with his interest in the attached property. The purpose of a limited appearance is to insure that the initial suit will not subject the defendant to personal liability exceeding the value of seized property. Accordingly, a defendant making a limited appearance will be unlikely to litigate as extensively as he would if his potential liability were unlimited.²⁴ Even though the defendant actually liti-

²³ The *Restatement* and various commentators argue for according broad effect to a quasi in rem judgment. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 75, Comment d (Tent. Draft No. 7, 1980) [§ 32]; 2A MOORE'S FEDERAL PRACTICE ¶ 12.13 (2d ed. 1980). Professor Moore states: "[T]he defendant, being willing to come in and litigate this claim in part so as to protect any interest in the property, should have to let such a defense on the merits determine the entire personal rights between the parties." *Id.* ¶ 12.13 n.16 (quoting 1 MOORE'S FEDERAL PRACTICE ¶ 12.04 (1938)). However, Professor Moore's assertion that the defendant is "willing" to litigate in a foreign forum is misleading; typically, the defendant appears reluctantly. Particularly if the property's value warrants protection, the defendant sees no reasonable choice. His compulsion to protect his property interest should not make his defense on the merits determine the entire personal rights between the parties. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 953 (1960).

²⁴ For discussion of the economics of litigation, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 429-58 (2d ed. 1977). Professor Posner states that "[t]he party optimizes his litigation expenditures by spending up to the point where a dollar in such expenditures increases the expected value of the litigation to him by just a dollar." *Id.* at 445. In allocating resources to litigation, a rational party will take into account the value of his property at stake and his probability of success in the action. When a limited appearance insures that the defendant's liability cannot exceed the value of attached property, the defendant is unlikely to litigate issues as extensively or zealously as he would if his potential liability could equal the value of all his assets. A limited appearance thus imposes a ceiling on the defendant's economic interest in the litigation.

Recognition of this phenomenon underlies the principle that collateral estoppel should not bind parties on litigated issues in unforeseeable subsequent suits. In *Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), cert. denied 323 U.S. 720 (1944), the court cautioned that "[d]efeate in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train." *Id.* at 929 (L. Hand, J.). See also *Developments in the Law—Res Judicata*, supra note 5, at 842-43. The *Restatement Second* includes unforeseeability as an exception to the general rule of issue preclusion:

[R]elitigation of the issue in a subsequent action . . . is not precluded [when] . . . [t]here is a clear and convincing need for a new determination of the issue . . . because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action.

RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(e)(ii) (Tent. Draft No. 3, 1976) [§ 28]. Particularly where a defendant believes his appearance creates the potential for only limited liability, the possibility of unfair surprise from issue preclusion in subsequent suits is great.

gates and the court renders a determination²⁵ on an issue essential to the judgment, subsequent courts should not preclude re-litigation because the resolved issue was contested and decided only in the narrow context of a limited appearance.

C. *Finality and Consistency of Judgments*

Probably the strongest argument for precluding relitigation of issues determined in limited appearances is the interest in promoting finality and consistency of judgments.²⁶ Social stability requires the prompt and final resolution of disputes so that parties may act with confidence that their obligations and rights have been established permanently.²⁷ Confidence depends on perceived consistency; parties and the general public must rely on judgments to guide their future conduct. Inconsistent judgments create confusion for litigants and others seeking to plan transactions. Moreover, public respect for the judicial system suffers when courts reach conflicting determinations.²⁸ Issue preclusion promotes consistency by denying a court in a second suit the opportunity to make a determination inconsistent with that made in the initial suit.

Public respect for the judicial system diminishes, however, when the price for consistency and finality is manifest injustice to

Nevertheless, a defendant making a limited appearance should not be forced to rely upon the possibility of his successful invocation of this exception to the general rule of issue preclusion in order to avoid potentially unlimited liability. *See also* note 16 *supra*.

²⁵ *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973) [§ 27]; RESTATEMENT OF JUDGMENTS § 68(1) (1942).

²⁶ In *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 74, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 962 (1969), the New York Court of Appeals called the incidence of inconsistent results in lawsuits "a blemish on [the] judicial system." *See also* *Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969); Cleary, *supra* note 5, at 344; von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929); *Developments in the Law—Res Judicata*, *supra* note 5, at 320.

²⁷ *See, e.g.*, von Moschzisker, *supra* note 26, at 300; Polasky, *supra* note 5, at 219-20.

²⁸ *Res judicata* doctrines generally seek to avoid inconsistent judgments. For example, the *Restatement Second* provides that when confronted with two inconsistent judgments, a court in a third action should accord *res judicata* effect to the latter judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41.2 (Tent. Draft No. 1, 1973) [§ 15]. But courts themselves lack discretion to invoke *res judicata*, and parties must plead the doctrine as an affirmative defense. *See, e.g.*, FED. R. CIV. P. 8(c). This suggests that the problem of inconsistent judgments is not critical. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41.2, Comment b (Tent. Draft No. 1, 1973) [§ 15]. Nevertheless, the increasing frequency with which courts allow a nonparty to the initial suit to invoke collateral estoppel in a later action suggests that courts are becoming more aware of the problem. *See, e.g.*, *Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969).

litigants. Precluding the relitigation of issues determined in a limited appearance may create such injustice. Jurisdictions that authorize limited appearances recognize the unfairness of subjecting the defendant to in personam liability when jurisdiction rests only on the presence of the defendant's property in the forum.²⁹ If a court later precludes relitigation of issues determined in the first action, it expands the effect of the first judgment and effectively destroys the protection of the limited appearance.³⁰ This seems a particularly cruel trap to set for the defendant who, lured into defending on the merits by the promise of limited liability, later finds himself bound by the determination in an in personam action. Such judicial double-talk will hardly enhance public respect for the judicial system.³¹

D. Preclusion and Due Process

The value of the property attached in the initial quasi in rem action may provide the defendant incentive to litigate the claim

²⁹ The Fourth Circuit stated: "[I]t would indeed be an unfair attitude were the federal courts . . . too prone to treat a special appearance as a general appearance." *McQuillen v. National Cash Register Co.*, 112 F.2d 877, 881. Although the court spoke in terms of a "special appearance," its holding, which limited jurisdiction in the case to the in rem claims, recognized the defendant's right to a limited appearance.

Quoting an earlier Massachusetts case, the court in *Cheshire Nat'l Bank v. Jaynes* stated, "It would be unreasonable to oblige any man living in one state and having effects in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached." 224 Mass. at 18, 112 N.E. at 502. See also *Miller Bros. Co. v. State*, 201 Md. 535, 95 A.2d 286 (1953).

³⁰ Several commentators have addressed this irony. See, e.g., R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 738-39 (2d ed. 1975); Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 384 (1963); von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1139 n.38 (1966). One commentator has stated: "It would seem . . . that collateral estoppel should not be applied when the defendant has put in a limited appearance, for to do so defeats the purpose behind permitting such an appearance: to confine to the value of the property the risk that the defendant incurs in protecting it." *Developments in the Law—Res Judicata*, *supra* note 5, at 835 (footnote omitted).

³¹ For example, a defendant may decide to make a limited appearance to defend his interest in an \$800 rowboat. See note 21 *supra*. Relying on the shelter of a limited appearance, he conducts the litigation as if only \$800 were at stake. Such limited incentive to litigate fully during the limited appearance is typical; the property attached frequently is the defendant's sole contact with the jurisdiction and less valuable than all of the defendant's assets that remain outside the reach of the court's quasi in rem jurisdiction. See note 40 *infra*. But if the same issues arise in a subsequent in personam suit in which his potential liability is much greater, D will have a substantially greater interest in obtaining a favorable determination. He will suffer unfair surprise if collateral estoppel precludes him from relitigating the issues. He should not in such instance be required to rely upon the *Restatement Second's* general issue preclusion exceptions for lack of incentive to litigate, see note 16 *supra*, and unforeseeability, see note 24 *supra*.

vigorously.³² Nevertheless, the application of issue preclusion in any subsequent in personam action may exceed the constitutional limits of court power and jurisdiction.³³

A court's exercise of personal jurisdiction traditionally depended on the court's territorial power.³⁴ The Supreme Court, however, gradually recognized that considerations of "fair play and substantial justice" are prerequisites for personal jurisdiction.³⁵ In *International Shoe Co. v. Washington*,³⁶ the Supreme Court held that subjecting a defendant not present within the territory of the forum to an in personam judgment could be consistent with due process, provided he had contacts with the forum such that the maintenance of the suit would not be

³² See note 31 *supra*. It is, of course, unclear how often attached property will have a value substantial enough to motivate a limited appearance defendant to litigate fully, but not so substantial as to suggest the presence of other contacts between the defendant and the forum sufficient to support in personam jurisdiction. See note 40 *infra*.

³³ In *Combs v. Combs*, 249 Ky. 155, 60 S.W.2d 368 (1933), the defendant (who had been a plaintiff in a prior out-of-state quasi in rem action) sought to preclude relitigation of issues against the plaintiff, who had defaulted as defendant in the prior action. The court declined to accord preclusive effect to the previous determinations, declaring that "[s]uch adjudications in so far as they affect the personal obligations and rights of the parties were and are not binding upon plaintiffs herein, nor do they operate as a res adjudicata in any future action." *Id.* at 162, 60 S.W.2d at 371.

The plaintiff's prior default made collateral estoppel inappropriate because the disputed issues had not actually been litigated in the previous action. See RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27] (preclusion does not arise from default judgment). Consequently, the case is distinguishable from one in which the previous defendant had made a limited appearance on the merits. *But see* R. CRAMTON, D. CURRIE & H. KAY, *supra* note 30, at 738-39.

Nevertheless, the court in *Combs* appeared to recognize implicitly the close functional similarity between the direct exercise of in personam personal jurisdiction and the indirect exercise of personal jurisdiction through issue preclusion in a later action. The court's denial of preclusion on issues previously decided in another state, moreover, comports with the view that one state should not give, through collateral estoppel, a sister state's judgment greater effect than the judgment could have had in the state of the rendering court. *But see* Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 530 (1981). Arguably, when a court in one jurisdiction intends to adjudicate a limited appearance defendant's liability only for the value of the attached property, the conclusiveness of its determinations should not expand subsequently to dictate complete in personam liability in another jurisdiction's courts. See notes 44-47 and accompanying text *infra*.

³⁴ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.")

³⁵ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See also Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 601 (1977).

³⁶ 326 U.S. 310 (1945).

unfair.³⁷ In *Shaffer v. Heitner*,³⁸ the Court applied the "minimum contacts" and "fairness" standards for jurisdiction articulated in *International Shoe* to quasi in rem actions.³⁹ Because of the restrictions established in *Shaffer*, courts will likely exercise quasi in rem jurisdiction less frequently,⁴⁰ and thereby diminish the importance of limited appearances.

Shaffer did not, however, sound a death knell for quasi in rem jurisdiction.⁴¹ The court arguably left open the possibility that fewer contacts will satisfy the *International Shoe* minimum contacts standard when a court seeks to exercise quasi in rem jurisdiction than would be necessary for in personam jurisdiction.⁴² Several courts appear to have adopted this view.⁴³ Thus, if the

³⁷ *Id.* at 316. The Court specifically found that the in-state activities of a foreign corporation, including the exhibition of merchandise samples and the solicitation of orders from prospective buyers, were "systematic and continuous" and thus sufficient to support in personam jurisdiction over the corporation in a suit to enforce an obligation arising out of those activities. *Id.* at 320.

³⁸ 433 U.S. 186 (1977).

³⁹ *Id.* at 207-12. The court declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212 (footnote omitted).

⁴⁰ See RESTATEMENT (SECOND) OF JUDGMENTS § 11, Comment g (Tent. Draft No. 5, 1978) [§ 8]. The necessity for courts exercising quasi in rem jurisdiction to comply with the *International Shoe* "minimum contacts" and "fairness" standards, see Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981), should diminish the number of suits commenced by the attachment of property wholly unrelated to the underlying claim. Writing before the Supreme Court's decision in *Shaffer*, one commentator observed that "the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff." Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 306 (1962). Those cases presumably will disappear in light of *Shaffer*, because such exercise of jurisdiction probably would not satisfy due process requirements.

⁴¹ Quasi in rem jurisdiction may still be available to a plaintiff who cannot obtain jurisdiction over defendant's person in any other forum. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court noted, "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.* at 211 n.37.

⁴² Such a two-tiered approach would accord with *International Shoe*, because arguably a court's exercise of quasi in rem jurisdiction can be "reasonable and just, according to our traditional conception of fair play and substantial justice," 326 U.S. at 320, even when the same contacts would not make an exercise of in personam jurisdiction fair. See Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 72 (1978). But see RESTATEMENT (SECOND) OF JUDGMENTS § 11, Comment g (Tent. Draft No. 5, 1978) [§ 8]; Casad, *supra* note 33, at 531.

⁴³ See, e.g., *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017, 1022-23 (2d Cir. 1978) (recognizing quasi in rem jurisdiction without determining existence of in personam jurisdiction); *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1274, 1277-79 (S.D.N.Y. 1977) (holding foreign corporation not amenable to in personam jurisdiction but subject to quasi

requisite contacts for in personam jurisdiction are lacking, *International Shoe's* due process requirement should preclude any quasi in rem judgment from determining the defendant's total in personam liability.⁴⁴

When a defendant's contacts with the forum state suffice to permit the court to exercise quasi in rem jurisdiction, but not in personam jurisdiction over him, the due process clause will not permit the court's judgment to affect more than the defendant's interest in attached property.⁴⁵ Due process requirements that restrict a court's power to bind a defendant directly through an in personam judgment similarly limit the court's power to bind the defendant indirectly through the application of issue preclusion.⁴⁶ Thus, where a court cannot constitutionally exercise in personam jurisdiction, precluding relitigation of issues determined in a quasi in rem action violates constitutional due process.⁴⁷

CONCLUSION

As long as courts exercise quasi in rem jurisdiction, the preclusive effect of determinations made in such actions remains uncertain. Some courts will treat any appearance by the defendant

in rem jurisdiction); *Hall, Morse, Gallagher & Anderson v. Koch & Koch*, 406 A.2d 962, 966 (N.H. 1979) (exercising quasi in rem jurisdiction pursuant to long-arm statute where in personam jurisdiction lacking).

⁴⁴ In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-99 (1980), the Court held that the occurrence of an automobile mishap in Oklahoma did not alone provide a constitutional basis for in personam jurisdiction in Oklahoma over the New York automobile dealer who had sold the plaintiff the car involved in the accident. The Court emphasized that the requirement of "reasonableness" articulated in *International Shoe* limited, in accordance with constitutional due process restrictions, the availability of in personam jurisdiction over non-residents lacking in-state contacts. Such clarification of the limitations on in personam jurisdiction refutes any assertion that the effective equivalent of in personam jurisdiction should become available against defendants making limited appearances, solely by the invocation of issue preclusion in a later suit.

⁴⁵ One commentator has stated that "the propriety of exercising quasi-in-rem jurisdiction in regard to tangibles may depend on limiting the effect of the resulting judgment to the thing sued." Smit, *supra* note 35, at 620.

⁴⁶ The *Shaffer* Court pointed out that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." 433 U.S. at 209.

⁴⁷ This possibility concerned the Second Circuit in *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). New York plaintiffs seeking damages for injuries sustained in an auto accident attached nonresident defendant's interest in a liability insurance policy issued by an insurance company doing business in New York. The court, after observing that any recovery would necessarily be limited to the face value of the policy even if defendant motorist defended on the merits, held that the exercise of

to defend on the merits as a general appearance. Such courts need not look to section 75(c) of the *Restatement Second* because every contested action will be treated as in personam.⁴⁸ Courts that permit limited appearances, however, must decide whether a defendant is precluded from relitigating in a subsequent action issues that were litigated and determined in a limited appearance.

The application of issue preclusion to determinations made in limited appearances cannot be justified on grounds of judicial economy. Such application also contravenes fundamental notions of fairness and constitutional due process. Defendants should be entitled to rely on the promise of limited liability offered by the limited appearance. Courts should not apply a rule that transforms the promise into a sham.

Ernest L. Schmider

jurisdiction did not violate due process. The Second Circuit added, however, that "the troubling issue is whether a state could deem [a decision granting recovery] effective as a collateral estoppel." The court resolved the "troubling issue" by concluding "we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so." 410 F.2d at 112 (emphasis added). See also *Rush v. Savchuk*, 444 U.S. 320 (1980) (attachment of nonresident defendant's interest in liability insurance policy issued by resident insurer held violative of due process); *Clermont*, *supra* note 40, at 459 n.231.

⁴⁸ See note 2 *supra*.