Res Judicata Effects of Unappealed Independently Sufficient Alternative Determinations

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RES JUDICATA EFFECTS OF UNAPEPELED, INDEPENDENTLY SUFFICIENT ALTERNATIVE DETERMINATIONS

INTRODUCTION

Adopting the reasoning of the Second Circuit decision in Halpern v. Schwartz, the Restatement (Second) of Judgments advocates a blanket exception to res judicata for unappealed, independently sufficient alternative determinations. The Second Restatement position reflects three arguments against preclusion raised in Halpern: first, parties may lack the incentive or opportunity fully to litigate alternative determinations; second, a court that relies more heavily on one ground may not adequately reason the alternative ground; and third, res judicata treatment of alternative determinations may foster cautionary appeals by parties fearing future litigation. The Second Restatement also argues that alternative determinations, like nonessential determinations, are not necessary to the result and, therefore, do not merit res judicata treatment. The Second Restatement contends that considerations of "predictability and simplicity" justify its uniform treatment of unappealed, independently sufficient determinations.

The Second Restatement's uniform and mechanical exception to res judicata is objectionable because alternative determinations do not automatically trigger the concerns recognized in Halpern. Furthermore, the rule that a determination must be essential for collateral estoppel to apply should not disqualify alternative determinations; the Second Restatement implies too narrow a definition of "essential" to so restrict the doctrine. The First Restatement's position, giving full res judicata effect to unappealed, independently sufficient alternative determinations, coupled with discretionary exceptions triggered by the presence of the considerations outlined in Halpern, better protects the interests of the litigants and the

1 426 F.2d 102 (2d Cir. 1970). For a discussion of Halpern, see infra notes 27-40 and accompanying text.
2 See Restatement (Second) of Judgments § 27 comment i (1980).
3 See id. § 20 reporter's note; Halpern, 426 F.2d at 105-06.
4 See Restatement (Second) of Judgments § 27 comment i.
5 See id.
6 Id.
7 See infra notes 46-51 and accompanying text.
8 See infra notes 84-89 and accompanying text.
9 See Restatement of Judgments § 68 comment n (1942).
courts. Under this approach, therefore, a court should give res judicata effect to an alternative determination unless the dangers of incomplete litigation, inadequate reasoning, or purely speculative appeals require otherwise. A general rule of res judicata for alternative determinations, with discretionary exceptions, would encourage resolution in the first action by requiring a losing party who chose not to appeal to raise substantive fairness considerations in the second action or face preclusion.

I

BACKGROUND: THE RES JUDICATA DOCTRINE

The doctrine of res judicata binds litigants and their privies to prior valid and final judgments rendered by a court of competent jurisdiction. "The sum and substance of the whole rule is that a matter once judicially decided is finally decided." Because res judicata allows a litigant only one opportunity to litigate an issue, a party must rely on an appeal, not relitigation, to correct errors in the first judgment.

The doctrine protects a broad spectrum of interrelated interests. The Supreme Court has identified the role res judicata plays in protecting litigants from unwarranted litigation and promoting judicial economy. Res judicata protects both the courts and individuals from the burdens of repetitive litigation. Res judicata fosters repose by settling issues between litigants and creating

10 See infra notes 52-82, 108-10 and accompanying text.
12 BLACK'S LAW DICTIONARY, supra note 11, at 1174.
15 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 11, § 4403, at 11.
16 See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (both direct and collateral estoppel protect litigants and courts from burdensome suits); Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971) (relitigation of issues diverts resources from alternative uses).
17 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 11, § 4403, at 17. "[C]ourts have repeatedly recognized that res judicata is not defeated by error in the initial judgment." Id. However, error may be a factor in limiting the preclusive effect of a judgment. Id. at 18.
18 Id. at 15.
“certainty in legal relations.” In addition, the consistency between resolutions promoted by res judicata furthers respect for the law and protects individuals from contrary results.

Courts possess some discretion to decide whether res judicata precludes a particular action. The danger of perpetuating an erroneous determination in subsequent litigation, the spectre of unfairness, and the increased incentive for parties to protract litigation militate against strict application of the doctrine. Generally, the Second Restatement grants a discretionary exception to res judicata when a party, because of “special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.” The special circumstances enumerated by the Second Restatement that would qualify as grounds for an exception to res judicata include unavailability of appeal, inability to litigate completely in the prior action, substantial differences between the initial and subsequent claims or the “legal context” in which they arise, differences in the burden of persuasion between the two actions, and inability of a party to foresee sufficiently the initial action’s role in subsequent litigation.

The Second Restatement advocates a nondiscretionary exception to res judicata when a party loses an issue on the basis of unappealed, independently sufficient alternative determinations. If A

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22 The Court also warns against use of res judicata when it would encourage increased litigation. Parklane Hosiery Co., 439 U.S. at 329-30. One district court refused to give offensive collateral estoppel effect to a consent decree because the application would eliminate the incentive to end litigation. In re Cenco Inc. Sec. Litig., 529 F. Supp. 411, 415-16 (N.D. Ill. 1982) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 68 comment c (Tent. Draft No. 4, 1977) as reason for according special treatment to consent decrees).
23 RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1980).
24 Id. § 28.
24 RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i, discusses unappealed, independently sufficient alternative determinations in the context of issue preclusion. Section 20 comment e covers alternative determinations in the context of claim preclusion. A prior judgment does not bar a subsequent action on the same claim when one of
sues B to recover interest due on a note, and the court determines that A used fraud to induce B to execute the note and also executed a binding release of the obligation to pay interest, then judgment is for B.\(^25\) The alternative determinations of fraud and release separately support the judgment. In a later action, if A sues B upon maturity for the principal and B, relying on the prior determination of fraud as res judicata, defends with a motion for summary judgment, under the Second Restatement the court should deny B's motion\(^26\) because the prior determination of fraud is not a conclusive determination, standing alone, in the second suit.

II

RATIONALES FOR A RULE OF NONPRECLUSION FOR ALTERNATIVE DETERMINATIONS

A. The Substantive Considerations of Halpern v. Schwartz

The Second Circuit's opinion in Halpern v. Schwartz\(^27\) provided the rationales underlying the Second Restatement's rule of nonpreclusion for unappealed, independently sufficient alternative determinations.\(^28\) In the first action Halpern and her husband lost an involuntary bankruptcy proceeding brought by their creditors.\(^29\) The court concluded that an assignment of property by Halpern and her husband to their son constituted an "act of bankruptcy" on three alternative statutory grounds.\(^30\) Of the three alternative determinations, only one required a finding that the Halperns acted "with intent to hinder and delay creditors."\(^31\) An appellate court affirmed without opinion.\(^32\) In the second action, Halpern sought discharge in bankruptcy. In a motion for summary judgment denying discharge, the trustee, Schwartz, argued that a bankrupt who in-
tentionally attempted to frustrate creditors by secreting property was statutorily ineligible for discharge. The trustee argued that the third alternative determination in the initial action conclusively proved that Halpern and her husband intentionally had attempted to delay the creditors; thus, res judicata governed and barred Halpern's second action.

The court rejected the trustee's argument, concluding that a judgment resting on three independently sufficient grounds did not necessarily bar a subsequent action implicating only one separate ground. The Halpern court considered alternative determinations suspect for two reasons. First, a court might make an alternative determination using incomplete analysis, "confiden[t] that nothing turned on the decision." Second, alternative determinations might inhibit a party from appealing the judgment of the initial action. A party, perceiving as insurmountable one of several findings, has no incentive to appeal from an adverse judgment that also rests on weaker alternative grounds. Even if the losing party did appeal, the alternative determinations might not be fairly litigated; the appellee's argument might be based on only the strongest alternative determination, or the appellant might argue that the judgment should be reversed without specifically referring to each of the alternative determinations.

The Halpern court considered the likelihood of perpetuating error through inadequate review or incomplete adversarial process too strong to treat the determination of intent as res judicata.

The Halpern court also raised an efficiency argument for denying preclusive effect to independently sufficient alternative determinations. Res judicata "would, in effect, require cautionary appeals litigating issues on appeal for their possible effect on future indeterminate collateral litigation, which neither party can be sure will occur. The rule at best would preclude some future trial litigation at the expense of currently creating extra appellate litigation."

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33 426 F.2d at 103-04.
34 Id. at 104.
35 Id. at 105. The court refused to follow the position of the Restatement of Judgments § 68 comment n (1942) (advocating preclusion for unappealed, independently sufficient alternative determinations). See infra notes 90-92 and accompanying text.
36 426 F.2d 102, 105 (footnote omitted).
37 Id. at 106.
38 Id. For example, in the first action Halpern neglected to argue on appeal lack of intent, arguing instead that there had been no assignment of property. Id.
39 Id. at 107.
40 Id. at 106. The court noted that it would be particularly onerous to require financially-strapped debtors like Halpern to avoid res judicata in future discharge proceedings by appealing bankruptcy adjudications that an appellate court might simply affirm on an alternative ground. Id.
B. The "Nonessential" Nature of Alternative Determinations

In addition to the considerations raised by Halpern, the Second Restatement argues that a res judicata exception for alternative determinations is consistent with the requirement of issue preclusion that only determinations "essential" to the judgment have res judicata effect. The Second Restatement states that "[t]here are . . . persuasive reasons for analogizing the case [of the alternative determinations] to that of the nonessential determination." Nonessential determinations are not "necessary to the result, and in that sense [they have] some of the characteristics of dicta." The Second Restatement does not explicitly categorize alternative determinations as "nonessential" but does depart from the First Restatement's position. Therefore, insofar as the Second Restatement considers alternative determinations "nonessential," the general rule limiting issue preclusion to essential determinations mandates the exception to res judicata.

III
CRITICISMS OF THE SECOND RESTATEMENT EXCEPTION

A. The Substantive Worth of the Prior Decision

The Second Restatement drafters chose to apply their rule denying preclusive effect to unappealed, independently sufficient alternative determinations in all cases. Although the drafters acknowledged that in some cases the prior action is so vigorously contested that the Halpern concerns are absent, they favored a uniform rule "in the interest of predictability and simplicity." When courts apply the Second Restatement approach to cases lacking the Halpern con-
cerns, therefore, they ignore the substantive worth of the prior adjudication and contradict the res judicata goal of encouraging full and fair litigation. On the other hand, inconsistent application of nonpreclusion exceptions would be unfair to parties relying on the Second Restatement's general rule. Thus, the problem with the Second Restatement approach stems from the nonpreclusion rule itself, not from an unwillingness to deviate from that rule.

In Malloy v. Trombley the New York Court of Appeals rejected mechanical application of the Second Restatement’s nonpreclusion rule. The court examined a prior judgment in the New York Court of Claims resting on alternative grounds to see if it would be unfair to the losing party to apply res judicata in a second action. The court applied issue preclusion against Malloy who had lost in the first action. The court of appeals did not “inten[d] to enunciate any broad rule” for alterative determinations, but noted that blanket application of a res judicata exception disregarded the substantive worth of the prior judgment. The Malloy court rejected the Second Restatement’s approach, instead favoring res judicata for alternative determinations where the concerns raised in Halpern did not exist.

The litigation in Malloy resulted from an automobile collision involving Malloy, Trombley, and a police officer. Malloy and Trombley sued each other in New York Supreme Court for injuries and at the same time brought individual actions against the state in the New York Court of Claims. The court of claims tried the actions against the state jointly and held that each plaintiff had failed to prove negligence of the police officer. The court, “aware of the

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49 See infra note 55 and accompanying text; infra notes 75-80 and accompanying text.
50 See F. James & G. Hazard, Civil Procedure § 11.2 (2d ed. 1977) (“it is the aim of a system of procedure to permit full development of the contentions and evidentiary possibilities of the various parties with the aim of deciding the case upon the merits”).
51 See supra notes 16-29 and accompanying text. The criticism here focuses on the adoption of a general exception, not the uniform application of that exception. Because a general exception to res judicata for alternative determinations would, itself, diminish the incentive to appeal, it would be unfair to deny that exception to a party who had relied on the general rule. The losing party could rightly complain that he lacked full incentive to litigate in the first action and full opportunity to do so in the second. See supra text accompanying note 22. Having chosen nonpreclusion as a general rule, uniform application was the only fair option. This may explain what the reporters meant by “predictability and simplicity.” See supra text accompanying notes 46-48. This Note, however, criticizes the initial choice of a nonpreclusion general rule as unnecessary.
53 Id. at 50, 405 N.E.2d at 215, 427 N.Y.S.2d at 971-72.
54 Id. at 52, 405 N.E.2d at 216, 427 N.Y.S.2d at 973.
55 Id. at 59, 405 N.E.2d at 214, 427 N.Y.S.2d at 971.
56 Id. at 48, 405 N.E.2d at 214, 427 N.Y.S.2d at 970.
57 Id.
58 Id. at 49, 405 N.E.2d at 214, 427 N.Y.S.2d at 971.
pending Supreme Court actions, also found both Trombley and Malloy contributorily negligent. Neither party appealed.\(^{60}\)

Thereafter, Trombley, the defendant in Malloy's supreme court suit, moved for summary judgment on the ground that the prior determination of Malloy's contributory negligence collaterally estopped that issue's relitigation.\(^{61}\) The trial judge denied Trombley's motion but was reversed by the appellate division. The court of appeals affirmed the appellate division, ruling that it would not be unfair to preclude Malloy's claim. The court of appeals reached this result even though the court of claim's determination that the police officer was not negligent was independently sufficient to support the judgment in that first case.\(^{62}\)

In *Malloy* the Court of Appeals found unwarranted the *Second Restatement*’s concern that the prior court may not have reached the alternative determinations with adequate care.\(^{63}\) The court of claims, knowing that litigation in the pending supreme court actions might “turn” on its findings, had carefully considered the issue of Malloy's contributory negligence. Furthermore, the parties in the first action had fully litigated this issue.\(^{64}\) Malloy did not argue that the existence of independently sufficient alternative holdings had dissuaded him from appealing the first court’s determination that he had been contributorily negligent.\(^{65}\) The Court of Appeals also disputed the *Second Restatement*’s efficiency argument,\(^{66}\) contending that “an appeal would be less time consuming and at a less beleagured level of our court system than would be true in consequence of [a] new trial.”\(^{67}\)

Although the New York Court of Appeals refused to state a general rule for the res judicata effects of independently sufficient alternative determinations,\(^{68}\) it rejected a blanket application of the *Second Restatement*’s approach. The court's evaluation of Malloy's opportunity to litigate his assertion that he was not contributorily negligent, and of the adequacy of appellate review, demonstrate the

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) *Id.* at 50, 405 N.E.2d at 214, 427 N.Y.S.2d at 972. “The care and attention devoted to the issue by [the trial judge] in this instance saps such a contention of any vitality.” *Id.*

\(^{64}\) *Id.*, 405 N.E.2d at 214, 427 N.Y.S.2d at 971.

\(^{65}\) *Id.* at 51, 405 N.E.2d at 215-16, 427 N.Y.S.2d at 972.

\(^{66}\) *See Restatement (Second) of Judgments* § 27 comment i (1980) (“If [the losing party] were to appeal solely for the purpose of avoiding . . . issue preclusion, then the rule might be responsible for increasing the burdens of . . . courts . . . .”).

\(^{67}\) *Malloy*, 50 N.Y.2d at 51-52, 405 N.E.2d at 216, 427 N.Y.S.2d at 972.

\(^{68}\) *See supra* note 54 and accompanying text.
court's recognition that the prior decision had substantive worth. The court's detailed opinion attempted to both guarantee fairness to the plaintiff, Malloy, and, at the same time, free the lower courts from entertaining unnecessary litigation.

The Minnesota Supreme Court's decision in Goblirsch v. Western Land Roller Co.\(^6^9\) also supports the view that mechanical application of a res judicata exception for alternative determinations unnecessarily ignores the substantive worth of the prior decision. The plaintiff in Goblirsch sued the Western Land Roller Co. after injuring his hand at work in a grinding machine the company manufactured.\(^7^0\) Goblirsch lost the case; the jury submitted a special verdict including findings that the manufacturer was not negligent and not strictly liable and that Goblirsch had assumed the risk of his injury.\(^7^1\) Goblirsch then initiated a suit against his employers.\(^7^2\) The defendants moved for summary judgment, arguing that "the jury's special verdict in the [prior case] that [Goblirsch] assumed the risk of injury from the grinder" collaterally estopped him from relitigating his claim for damages.\(^7^3\) The trial judge agreed and decided the case in the employers' favor. The Minnesota Supreme Court consolidated Goblirsch's appeals from these separate decisions.\(^7^4\)

A holding of nonpreclusion in Goblirsch would have ignored the value of the first court's opinion in a case lacking many of the Halpern considerations. The Goblirsch case, for example, lacked the Halpern concern that a judge might rely too heavily on one independently sufficient determination and consequently decide another without adequate care.\(^7^5\) In Goblirsch the alternative determinations in the first action were by jury special verdict, rather than by a judge.\(^7^6\) The Minnesota rule controlling jury special verdicts specifically prohibits either the court or counsel from "inform[ing] the jury of the effect of its answers on the outcome of the case."\(^7^7\) A jury is, therefore, less likely than a judge to consider one factual

\(^6^9\) 310 Minn. 471, 246 N.W.2d 687 (1976). This decision appeared prior to publication of the Second Restatement but subsequent to the Halpern decision.

\(^7^0\) Id. at 473, 246 N.W.2d at 689.

\(^7^1\) Id. at 472-73, 246 N.W.2d at 688.

\(^7^2\) Id. at 473, 246 N.W.2d at 689.

\(^7^3\) Id. at 477, 246 N.W.2d at 691.

\(^7^4\) Id. at 472, 246 N.W.2d at 688.

\(^7^5\) See supra note 36 and accompanying text.

\(^7^6\) Special verdicts generally require that a jury make specific findings on each factual issue relevant in a case. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2508 (1971) ("better practice is to simplify the questions by confining each to a single issue").

\(^7^7\) MINN. R. CIV. P. 49.01. An exception in the rule, permitting the judge to inform the jury that findings on corporate negligence may affect a party's recovery, was not relevant to Goblirsch.
determination less carefully because of the presumed legal effect of another.

Lack of an incentive to litigate at trial or on appeal is another factor missing in Goblirsch. Goblirsch sued the “deep pocket” manufacturer in his first action and lost. He then appealed the decision, indicating that the alternative grounds for the first decision did not dissuade him from full litigation. Goblirsch’s failure to challenge on appeal the first court’s finding that he had assumed the risk of his injury does not raise the Halpern concern that the litigants could overlook an alternative determination. Goblirsch predicated his appeal on assertions that the trial judge gave erroneous instructions and that the jury was improperly influenced. These allegations, even if true, would not win a reversal if they were harmless. Goblirsch had to argue further that there was insufficient “credible evidence to support the jury’s verdict on the liability issues.” Thus, his appeal necessarily raised the assumption of risk issue. Furthermore, Western Land Roller Co. would not have overlooked its defense of assumption of risk. The first court’s finding on this issue, therefore, could not have suffered from inadequate litigation by either party.

The efficiency considerations raised in Halpern also favor res judicata in Goblirsch. The Goblirsch jury did not find the plaintiff negligent, so he was not forced into a cautionary appeal to protect against future collateral litigation. A res judicata exception, however, would have rewarded Goblirsch for not joining his employers in the first suit by allowing him to relitigate a liability issue he had already lost. The tactic of shifting adversaries to relitigate before a new jury is undesirable. Nonpreclusion in Goblirsch, therefore, would have been an unnecessary waste of judicial resources.

78 Although Goblirsch appealed the first judgment, the appeal had not been decided at the time of the second judgment. In such a situation, the first judgment is considered final for purposes of res judicata. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment o; infra note 87 and accompanying text.

79 Goblirsch argued on appeal that remarks by a spectator had unfairly influenced the jury and that the trial judge erred by not instructing the jury on theories of breach of express and implied warranty. Goblirsch, 310 Minn. at 473, 246 N.W.2d at 689.

80 Id. at 474, 246 N.W.2d at 689.

81 Id. at 472-73, 246 N.W.2d at 688.

82 See Lucas, The Direct and Collateral Estoppel Effects of Alternative Holdings, 50 U. CHI. L. REV. 701, 721-22 (1983) (tactic of shifting adversaries “just the sort of case that gave impetus to the abandonment of the mutuality requirement”). In Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971), the Supreme Court criticized the requirement of mutuality of estoppel:

"Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.""

Id. at 329 (citing Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)).
B. The Definition of "Essential" for Purposes of Collateral Estoppel

The Second Restatement's requirement that a determination be "essential" in a prior action to be used for collateral estoppel should not disqualify independently sufficient alternative determinations. Although an alternative determination is in one sense nonessential because the judgment could stand without it, several authorities reject such a strict definition. These authorities agree that a determination is "essential" if it is not immaterial or incidental to the judgment.

The Second Restatement's refusal to consider alternative determinations "essential" because they are not strictly necessary to the result is erroneous. The drafters' comparison of alternative determinations to "mere dictum" fails because, among other reasons, alternative determinations are reviewable on appeal, whereas nonessential ones are not. Furthermore, such a strict construction of "essential" is inconsistent with other sections of the Second Restatement. For example, section 27, comment o of the Second Restatement gives collateral estoppel effect to alternative determinations that are affirmed on appeal. Similarly, section 27, illustration 16,
advocates preclusive effect for alternative determinations that, taken together, "necessarily adjudicated the issue."\(^7\) According to this illustration, if a plaintiff sues to recover interest on a note, and the defendant wins on the alternative grounds of fraud and release of the obligation to pay interest, then the plaintiff can be collaterally estopped from suing on a subsequent installment.\(^8\) The Second Restatement reaches this result although neither the determination of fraud nor release alone is "essential" in the sense that the judgment in the first action could not have been reached without it.

IV

A Res Judicata Rule for Alternative Determinations

A. The General Rule

The 1942 Restatement of Judgments gave res judicata effect to unappealed, independently sufficient alternative determinations.\(^9\) This general rule acknowledges the substantive worth of the prior adjudication. The First Restatement reasons that where a judgment is based on alternative determinations it "is not based on one of the issues more than the other; . . . either . . . both are material to the judgment or . . . neither is material. It seems obvious that it should not be held that neither is material, and hence both should be held to be material."\(^10\) The First Restatement also distinguishes alternative grounds from "mere dictum," giving them the same deference for res judicata purposes that they would enjoy for stare decisis purposes.\(^11\) A general rule of preclusion for alternative determinations recognizes the substantive worth of the prior decision and is more consistent with the policies of res judicata than a rule of nonpreclusion.

Some courts and commentators support res judicata for alternative determinations.\(^12\) Even "[t]he Second Circuit has twice re-

\(^7\) CORNELL LAW REVIEW [Vol. 70:717

\(^8\) Id. In this situation the defendant asserts all alternative determinations, as distinguished from the case in which only one ground is asserted as conclusive. Cf. supra text accompanying notes 24-26.

\(^9\) Id. § 68 comment n. According to the First Restatement, determinations material to the judgment qualify as "essential determinations." See id.

\(^10\) Id. "The distinction as to the application of the doctrine of res judicata [for alternative determinations] is not unlike the distinction [in the doctrine of stare decisis] between alternative grounds for a decision and mere dictum." Id.

\(^11\) See Moore, supra note 84, \(\#\) 0.443[5.-2], at 791 (endorsing the First Restatement position and stating "[N]o other court of appeals has adopted [the Halpern] position without qualification.") (footnote omitted); see also Lucas, supra note 82 (favoring general rule of res judicata for alternative determinations).
jected the Halpern formulation as a general governing rule . . . .”

In Williams v. Ward the plaintiff was pursuing the two actions simultaneously and thus could fully anticipate the potential barring effect of the earlier judgment in deciding not to appeal . . . .”

Refusing to apply Halpern, the Williams court noted that the Halpern court had limited its decision to the facts before it, and also that Halpern’s substantive and efficiency considerations did not exist in the case at bar. In Winters v. Lavine the Second Circuit again refused to extend Halpern beyond bankruptcy proceedings. The court stated that Halpern is an exception to “the traditional proposition that an alternative ground upon which a decision is based should be regarded as ‘necessary’ for purposes of . . . res judicata.” Thus, some authority since the Second Restatement favors as a general rule res judicata for alternative determinations.

A general rule of preclusion for independently sufficient determinations more satisfactorily handles situations where the Halpern considerations of adequate reasoning and litigating are unconvincing. The mere existence of alternative grounds does not mean that the factfinder or parties will overlook a determination. For example, a party must separately plead, and the court separately pass upon, an affirmative defense; therefore, it receives individual attention. In cases like Malloy and Goblirsch the alternative grounds are clearly distinct. The situation in Halpern is not necessarily typical.

Efficiency considerations may also favor res judicata treatment for alternative determinations. As the Malloy court noted, the advantages of relitigation foreclosure may well outweigh the disadvantages of cautionary appeals. Furthermore, Goblirsch is illustrative of situations in which a nonpreclusion rule would encourage relitigation rather than appeal, contrary to the goals of res judicata.

The Second Restatement position encourages a losing plaintiff like

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94 See Moore, supra note 84, ¶ 0.443[5.-2], at 791 (footnote omitted).
95 556 F.2d 1143 (2d Cir. 1977).
96 Id. at 1154.
97 Id.
98 574 F.2d 46 (2d Cir. 1978).
99 Id. at 67.
100 Id.
101 See Moore, supra note 84, ¶ 0.443[5.-2], at 792.
102 Moore states that Halpern was unusual because the three alleged grounds of bankruptcy were not clearly distinct. Id. at 792 n.7. Moore contrasts the Second Restatement’s own example, see supra text accompanying notes 24-26, in which the alternative grounds are fraud and release: “Fraud is an affirmative defense, and must be pleaded with particularity, and neither the court nor the parties could possibly pass over it lightly.” Moore, supra note 84, ¶ 0.443[5.-2], at 792 (footnote omitted).
103 See supra note 67 and accompanying text.
104 See supra notes 81-82 and accompanying text.
105 See supra notes 12-20 and accompanying text.
Goblirsch not to appeal the issues decided alternatively against him where the ground he needs to relitigate in the second action appears unlikely to be reversed in the first.\textsuperscript{106} He is better off suing other defendants. Thus,

\textit{[u]nder the Restatement (Second) formulation . . . the plaintiff would be permitted to relitigate the common element or defense against any number of blameless defendants so long as he continued to lose on both issues. Such a rule would plainly discourage joinder of defendants, which ought to be encouraged, and encourage dogged pursuit of a hopeless claim, which ought to be discouraged.}\textsuperscript{107}

Therefore, considerations of efficiency, as well as full litigation, can run in favor of, rather than against, res judicata for alternative determinations.

**B. Discretionary Exceptions Handling the Halpern Concerns**

The Second Restatement allows exceptions to res judicata on a discretionary basis if a party can show a "clear and convincing need for a new determination of the issue"\textsuperscript{108} because of "[in]adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."\textsuperscript{109} Thus, where the Halpern considerations of adequate reasoning and full litigation in the prior actions pertain, a party may escape a general rule of preclusion for alternative determinations. Where valid grounds exist for relitigation a party would be free to argue that res judicata would be unfair. Under this discretionary approach, the mere existence of alternative grounds for a decision would not trigger an exception.

Consistent with the Second Restatement's treatment of discretionary exceptions,\textsuperscript{110} the losing party to the first action should come forward with a substantive reason why res judicata should not be applied in his case. This discretionary approach to res judicata for

\textsuperscript{106} See Lucas, supra note 82, at 723.
\textsuperscript{107} Id. at 725.
\textsuperscript{108} RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1980).
\textsuperscript{109} Id. § 28(5)(c).
\textsuperscript{110} For example, on the subject of exceptions to issue preclusion, the Second Restatement states:

\textit{[T]he policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception, and litigation to establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one.}

\textit{Id. § 28 comment g.}
unappealed, independently sufficient alternative determinations encourages complete litigation and review by appeal in initial actions. The discretionary approach also allows exceptions to res judicata whenever fairness so requires.

In *Hicks v. Quaker Oats Co.* these fairness considerations persuaded the Fifth Circuit Court of Appeals to deny an offensive application of collateral estoppel to an alternative ground. An employee, Workman, had sued Quaker Oats for failure to provide expected retirement plan benefits; he won under two theories: breach of contract and detrimental reliance. Quaker Oats did not appeal although 132 other employees had been eligible for the company's initial retirement plan. Subsequently, fourteen of those eligible employees sued Quaker Oats for their benefits. The employee plaintiffs in *Hicks* prevailed on a summary judgment motion by arguing that the prior decision conclusively established the existence of a binding bilateral contract. The Court of Appeals for the Fifth Circuit reversed. The court argued that, in the case of offensive collateral estoppel, the existence of alternative determinations in the first action increased the likelihood that a defendant lacked incentive to appeal. According to the court, "the arguments against the 'alternative ground' rule are made more persuasive when estoppel is used offensively. . . . [T]he traditional arguments concerning the unfairness of offensive collateral estoppel are bolstered when the estoppel used is an alternative ground." The *Hicks* court believed that the application of offensive collateral estoppel would be unfair because Quaker could not appeal the breach of contract ground alone.

Even in the case of offensive collateral estoppel, a court should consider the incentive to litigate fully in the first action provided by the certain prospect of future litigation. For example, in *Hicks*, had Quaker Oats been defending both actions simultaneously, the company would have been fully aware of the potential collateral effects of the determinations against it in the suit won by Workman. Under these circumstances, its incentive to appeal the initial action would have been much greater. Thus, the potential estoppel effects of an

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111 662 F.2d 1158 (5th Cir. 1981).
112 *Id.* at 1161.
113 *Id.* at 1161-62.
114 *Id.* at 1162.
115 See *id.* at 1171 n.12.
116 *Id.* at 1159.
117 *Id.* at 1170.
118 An appeal of only the breach of contract issue might have been dismissed as moot. See Lucas, *supra* note 82, at 728 n.134. Lucas agrees that application of res judicata in *Hicks* would have been unfair. *Id.* at 728.
alternative determination in simultaneous litigation should provide the requisite incentive to appeal.\textsuperscript{119} Therefore, when a party is involved in simultaneous litigations it may, on balance, be appropriate to give offensive collateral estoppel effect to an alternative determination.\textsuperscript{120}

**CONCLUSION**

Although *Halpern v. Schwartz* raised valid concerns about the res judicata effect of unappealed, independently sufficient alternative determinations, a general rule of nonpreclusion unnecessarily undermines the valid objectives of res judicata. A general rule of res judicata with discretionary exceptions would promote complete litigation in the first action, yet avoid unfairness. Parties would not be able to use alternative determinations to sidestep res judicata unless they had a substantive reason (incomplete litigation by the parties, inadequate reasoning by the court of first decision, or purely cautionary appeal) caused by the existence of the multiple grounds. Discretionary exceptions to preclusion adequately handle these situations. Absent these circumstances, a general preclusion rule would promote full and fair resolution of the initial action, consistent with the goals of res judicata.

*E. William Stockmeyer*

\textsuperscript{119} Cf. Winters v. Lavine, 574 F.2d 46, 68 (2d Cir. 1978) (refusing to grant exception to defensive collateral estoppel where plaintiff pursued two actions simultaneously and, therefore, had sufficient incentive to appeal first action despite alternative grounds). The court stated

> [W]e see no reason to depart from [the rule that a decision based on alternative grounds bars relitigation of any of those grounds] in an instance where the plaintiff was pursuing the two actions simultaneously and thus could fully anticipate the potential barring effect of the earlier judgment in deciding not to appeal from [that decision].

*Id.* (citing Williams v. Ward, 556 F.2d 1143, 1154 (2d Cir. 1977)).

\textsuperscript{120} In some situations future litigation of the same issues may be virtually certain, even though separate suits are not brought concurrently. For example, in *Hicks*, Quaker Oats had 132 eligible employees with potentially the same cause of action as the plaintiff, Workman. *See supra* text accompanying note 115. The *Hicks* court, however, did not consider whether the virtual certainty of future litigation ameliorated any potential unfairness.