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Res Judicata Effects of Involuntary Dismissals When Involuntary Dismissals Based Upon Prematurity or Failure to Satisfy a Precondition to Suit Should Bar a Second Action

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SYMPOSIUM NOTES

RES JUDICATA EFFECTS OF INVOLUNTARY DISMISSALS: WHEN INVOLUNTARY DISMISSALS BASED UPON PREMATURITY OR FAILURE TO SATISFY A PRECONDITION TO SUIT SHOULD BAR A SECOND ACTION

The determination of whether res judicata will apply to an involuntary dismissal should reflect an optimal balancing of three interests: fairness to the plaintiff, fairness to the defendant, and judicial economy. Reflexive application of res judicata to involuntary dismissals may serve judicial economy and favor the defendant, but such a strict res judicata approach may foreclose a plaintiff from receiving "at least one decision on a [substantive right] between the parties."[1] Conversely, a reluctant application of res judicata to involuntary dismissals favors the plaintiff's interests but may undermine judicial economy and the defendant's interest in not being subjected to duplicative preparations to meet the merits of the plaintiff's claim.[2] Courts confronting the question of whether to apply res judicata to involuntary dismissals must find an appropriate midpoint between these extremes.

This Note examines how courts have balanced these interests in applying res judicata to involuntary dismissal cases. The Note con-

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[1] Haldeman v. United States, 91 U.S. 584, 585 (1875). The *Haldeman* view that a plaintiff has a right to a decision on a substantive right is no longer accurate. Angel v. Bullington, 330 U.S. 183, 190 (1947) ("It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation."); Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 (2d Cir. 1977) ("[t]he more modern view . . . expands the category of judgments that will be considered res judicata to include dismissals on other than traditionally 'substantive' grounds"). *See also* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4435 (1981) ("it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.") (footnote omitted).

[2] The defendant's interest extends not only to avoiding a second ordeal with commensurate financial costs, but also to being free of the uncertain prospect of future litigation which exacts an emotional cost from the defendant. In addition, the defendant who has won an involuntary dismissal requires protection from wealthy, wishful, or paranoid plaintiffs. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (citing Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971)) (collateral estoppel and res judicata have " '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.' "); *see generally* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 4403.

tends that most courts neglect the defendant's interests, and it proposes an analysis which better serves those interests and fosters judicial economy. Part I analyzes the law of res judicata regarding involuntary dismissals.[3] It focuses on rule 41(b) of the Federal Rules of Civil Procedure and interpretative case law which together provide four basic exceptions to the rule that an involuntary dismissal precludes a subsequent suit.[4]

Part II argues that courts have attempted to accord greater protection to the interests of the defendant and judicial economy than existing judicial mechanisms provide.[5] In a number of cases, courts have applied res judicata to an involuntary dismissal even though the basis for the dismissal might be characterized as an unsatisfied precondition to suit. The courts appear to have been very concerned about judicial economy and the fairness of subjecting the defendant to another lawsuit. The fact that the courts must bend the res judicata rules in order to achieve an appropriate result suggests that a workable defendant fairness exception is needed in cases involving dismissals based upon unsatisfied preconditions to suit.

Part III examines one attempted formulation of a defendant fairness exception to the rule that a dismissal based upon prematurity of suit or failure to satisfy a precondition to suit will not be res judicata in a subsequent suit.[6] This defendant fairness exception gives preclusive effect to such a dismissal when it would be "manifestly unfair" to subject the defendant to another suit.

Finally, Part IV suggests a viable means of protecting a defendant's interests and serving judicial economy without unduly sacrificing the rights of plaintiffs.[7] The proposal places the burden of proof on the defendant to convince the trial judge that the dismissal should be "with prejudice"[8] on grounds of unfairness to the defendant. Only if the defendant establishes the three components of the unfairness standard will the "with prejudice" label attach and the dismissal receive res judicata effect.[9] If the unsatisfied precondition

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3 *See infra* notes 10-51 and accompanying text.

4 *See infra* text accompanying note 12.

5 *See infra* notes 52-116 and accompanying text.

6 *See infra* notes 117-42 and accompanying text.

7 *See infra* notes 143-52 and accompanying text.

8 A court always has discretion to specify that a dismissal is "without prejudice." If a court does not specify that the dismissal is without prejudice and it falls within the last sentence of rule 41(b), the dismissal is deemed to be "with prejudice." The three stated exceptions to this rule are dismissals for lack of jurisdiction, improper venue, and failure to join a party under rule 19. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2369, 2373 (1971).

9 Rule 41(b) dictates that when a dismissal is "without prejudice," res judicata should not apply. FED. R. CIV. P. 41(b); Comment, *Federal Rules of Civil Procedure—Rule 41(B)—Res Judicata Effect of Involuntary Dismissal With Prejudice,* 19 J. PUB. L. 423, 425 (1970). The effect of a dismissal "with prejudice" is much less certain. Some authority

does not appear until the case is appealed, the appellate court should consider remanding the action to the trial court for a determination of whether fairness to the defendant warrants a dismissal with prejudice. Acceptance of this proposed means of protecting fairness to the defendant and judicial economy will add needed flexibility to this area of the law of res judicata.

I
RES JUDICATA AND INVOLUNTARY DISMISSALS

In the federal courts, rule 41(b) of the Federal Rules of Civil Procedure and its interpretative case law govern the question of whether res judicata should bar a plaintiff whose initial suit ended in an involuntary dismissal from proceeding with a subsequent suit on the same claim.[10] Rule 41(b) establishes that an involuntary dismissal generally will bar a subsequent suit, but both the rule and court decisions create exceptions where res judicata does not apply.

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suggests that a reviewing court should not look behind the trial court's specification. *See* Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970) (dismissal specified to be with prejudice entered after full trial and complete findings; conclusions should not be reexamined); *see also* Comment, *supra*, at 430 ("all dismissal orders that specify as to prejudice should be given effect by what they say on their face"). The better view, however, is that reviewing courts should look behind the "with prejudice" specification at least to the extent necessary to determine that applying res judicata to the dismissal would not have an effect contrary to statutes, rules of court, or other rules of law operative in the jurisdiction. RESTATEMENT (SECOND) OF JUDGMENTS § 20 comment d (1982). For example, under rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19 may not act as a bar regardless of the "with prejudice" specification. *Id.* This Note proposes that a "with prejudice" dismissal on grounds of fairness to the defendant should be reviewed on the clearly erroneous standard of rule 52(a). *See infra* text accompanying note 145.

10 Rule 41(b) provides as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FED. R. CIV. P. 41(b).

Rule 41(b) has its counterpart in a majority of states. RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982); *see also* R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 988 (5th ed. 1984).

A. Res Judicata Effects of Involuntary Dismissals Under Rule 41(b)

Rule 41(b) is the focal point for a discussion of when res judicata will prevent a plaintiff from proceeding in a subsequent suit following an involuntary dismissal of the original suit. The rule has two components. First, rule 41(b) provides three grounds for ordering an involuntary dismissal. These grounds are failure of the plaintiff to prosecute, failure of the plaintiff to comply with the Federal Rules of Civil Procedure or any order of court, and failure of the plaintiff to show by the close of his evidence a right to relief based upon the facts and the law.[11] Second, rule 41(b) specifies that all 41(b) dismissals and "any dismissal not provided for in this rule" are to operate as adjudications on the merits *except* for four types of dismissals. The four exceptions are (1) dismissal for lack of jurisdiction, (2) dismissal for improper venue, (3) dismissal for failure to join a party under rule 19, (4) dismissal that the court in its order specifies to be without prejudice.[12]

The significance of the second part of rule 41(b) can only be understood in the context of the "general rule" of res judicata. The "general rule" provides that

> when a court of competent jurisdiction has entered a final judgment *on the merits* of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."[13]

Read in conjunction with the general rule, the rule 41(b) definition of a dismissal "on the merits" results in a very broad res judicata doctrine: all involuntary dismissals will preclude a subsequent suit except the four types of dismissals exempted by rule 41(b).[14]

B. *Costello v. United States* and the Expansion of "Jurisdictional" Dismissals

In *Costello v. United States*[15] the United States Supreme Court refused to construe the exceptions to rule 41(b) literally.[16] By reading the "dismissal for lack of jurisdiction" exception to "on the merits" determinations expansively, the Court established precedent for

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11 FED. R. CIV. P. 41(b).

12 *Id.*

13 Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)) (emphasis added).

14 9 C. WRIGHT & A. MILLER, *supra* note 8, § 2373.

15 365 U.S. 265 (1961).

16 *Id.* at 285 (citing United States v. Zucca, 351 U.S. 91 (1956)).

lower courts to find a variety of involuntary dismissals to be "jurisdictional" within the meaning of that term in rule 41(b). Thus, *Costello* reduced the types of involuntary dismissals that would be given preclusive effect in a subsequent suit.

The facts of *Costello* illustrate both the new type of "jurisdictional" dismissal and the potentially harsh consequences triggered by a literal reading of the four exceptions to rule 41(b). In the first denaturalization proceeding against Costello, the government's suit was ultimately dismissed by the United States Supreme Court because the government had failed to file an affidavit of good cause with the complaint as required by statute.[17] On remand the district court specifically declined to enter an order of dismissal "without prejudice" and entered an order which did not specify whether it was with or without prejudice.[18] Without appealing this dismissal, the government filed the requisite affidavit and brought a new proceeding to revoke Costello's citizenship.[19] The district court found for the government, holding that Costello had willfully and fraudulently misrepresented his true occupation when applying for citizenship.[20] The court of appeals affirmed,[21] and the Supreme Court once again granted certiorari to hear the case.[22]

Costello argued that dismissal of the first suit should be deemed "with prejudice" under the terms of rule 41(b) because the order did not specify that it was without prejudice, and the dismissal for failure to file an affidavit of good cause was not for "lack of jurisdiction or for improper venue."[23] Costello was probably correct in his assertion that the dismissal must have been "on the merits," because a dismissal for failure to file an affidavit is not within any of the exceptions to rule 41(b). Furthermore, on remand in the first action, the district court had specifically declined to dismiss the suit "without prejudice."[24] The Court, however, rejected such a narrow reading of the "jurisdictional" dismissal exception:

> [A] dismissal for failure to file the affidavit of good cause is a dismissal "for lack of jurisdiction," within the meaning of the exception under rule 41(b) . . . . It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment

17 356 U.S. 256, 257 (1958). The failure to file an affidavit of good cause was not considered by the lower courts. 365 U.S. at 268.

18 365 U.S. at 268.

19 *Id.*

20 171 F. Supp. 10, 26 (S.D.N.Y. 1959).

21 275 F.2d 355 (2d Cir. 1960).

22 362 U.S. 973 (1960).

23 365 U.S. at 284.

24 *Id.* at 268.

> void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter.[25]

Through its expansive reading of the "jurisdictional" exception to rule 41(b), the Court both avoided the necessity of barring the government's case and broadened the concept of a dismissal "for lack of jurisdiction" in the rule 41(b) context.[26]

The *Costello* Court guided the interpretation of the new scope of the "jurisdiction" exception by offering both specific examples and a general standard. With respect to the former, the Court explicitly recognized four types of dismissals that are to have res judicata consequences and one type of dismissal that is within the broadened "dismissal for lack of jurisdiction" exception and, therefore, should not preclude a subsequent suit. First, the Court indicated that, unless the dismissal is expressly "without prejudice," res judicata consequences adhere to the three types of dismissals specified under rule 41(b): dismissals for failure of the plaintiff to prosecute, dismissals for failure of the plaintiff to comply with the Federal Rules of Civil Procedure or any order of court, and dismissals for failure of the plaintiff to show by the close of his evidence a right to relief based upon the facts and the law.[27] The fourth type of dismissal resulting in res judicata consequences was a "*sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court."[28] Second, the holding made it clear that a dismissal for failure to file an affidavit of good cause was a dismissal within the broadened "lack of jurisdiction" exception and should not preclude a subsequent suit.[29] Although the examples set forth by the court are useful, they are more helpful for identifying what is *not* a dismissal for lack of jurisdiction than for understanding what *is* such a jurisdictional dismissal.

The *Costello* Court's general standard fails to resolve the uncertainty over the scope of the "dismissal for lack of jurisdiction" exception. The Court stated that the exception "encompass[es] those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim."[30] This formulation, however, does not articulate a methodology for determining when the court can be said to have gone forward to determine the merits of the

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25 *Id.* at 285.

26 In rejecting the government's narrow reading of "jurisdiction" the Court noted that "[a]mong the terms of art in the law, 'jurisdiction' can hardly be said to have a fixed content." *Id.* at 287.

27 *Id.* at 286.

28 *Id.* at 286-87 (emphasis in original).

29 *Id.* at 285.

30 *Id.*

substantive claim. The Court attempted to clarify this by stating that the instances in which res judicata will apply to involuntary dismissals "primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them."[31] Under the Court's analysis a dismissal for failure to file an affidavit of good cause did not "[call] for the application of the policy making dismissals operative as adjudications on the merits"[32] because a defendant is not forced to prepare a defense when the dismissal is based on that ground.[33]

The *Costello* Court, in the passages quoted above, demonstrated awareness and concern for the defendant's interest in avoiding duplicative preparations to meet the merits of the plaintiff's claim. Its "initial bar" analysis, however, fails to protect that interest adequately. The Court's assertion that an "initial bar" situation, as when the plaintiff fails to file an affidavit, does not put the defendant "to the necessity of preparing a defense"[34] is not always true. In the initial action, Costello not only prepared to meet the merits, he actually went to trial and won a dismissal against the government by proving that the government's evidence was tainted with wiretapping.[35] The government then subjected the defendant to two tiers of appeals in the Second Circuit and the Supreme Court. Only in the Supreme Court did the unsatisfied "initial bar" become salient.[36]

From a defendant's perspective, the inconvenience involved in a situation like the *Costello* case[37] equals, if not exceeds, that in other types of dismissals which the Court classified as not of the "initial bar" type. For example, a dismissal for want of prosecution may entail little inconvenience or necessity of preparation for a defendant.[38] Nevertheless, the *Costello* Court presented a dismissal for

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31 *Id.* at 286.

32 *Id.* at 287.

33 *Id.*

34 *Id.*

35 United States v. Costello, 145 F. Supp. 892, 895 (S.D.N.Y. 1956).

36 The court of appeals reversed the district court on the grounds that the government should have been allowed a fair opportunity to demonstrate that it had sufficient untainted evidence against the defendant. 247 F.2d 384, 387 (2d Cir. 1957). The government's failure to file the affidavit of good cause with the complaint was not considered in the lower courts. Costello v. United States, 365 U.S. 265, 268 (1961).

37 *See* Brief for Petitioner at 48-49, Costello v. United States, 365 U.S. 265 (1961) (arguing that dismissal should bar second suit because of inconvenience to defendant).

38 9 C. WRIGHT & A. MILLER, *supra* note 8, § 2370 ("[a]n action may be dismissed for want of prosecution even though defendant has not been prejudiced by the delay.") (footnote omitted). Other policy reasons may support this result, but the Court's distinction between dismissals for want of prosecution and "initial bar" dismissals on the basis of inconvenience to the defendant is highly questionable.

want of prosecution as an example of a dismissal that should have preclusive effect.[39] Thus, the *Costello* Court's distinction between "initial bar" type dismissals receiving no res judicata effect and dismissals which will be given res judicata effect because the defendant bore the cost of preparing to meet the claim on the merits is not always accurate.

The *Costello* Court's expansion of the "dismissal for lack of jurisdiction"[40] category is not consistently justifiable on the basis of protecting the plaintiff's interest in having "at least one decision on a *right* between the parties."[41] A variety of types of dismissals which have res judicata consequences are likely to terminate litigation prior to any determination of the substantive rights of the parties.[42] The only real distinction between these dismissals and "initial bar" type dismissals is that in the former case courts are willing to entertain a presumption that the plaintiff's claim is unmeritorious.[43] Realistically, a plaintiff who fails to satisfy a precondition to suit, such as filing an affidavit, is no more likely to have a meritorious claim than a plaintiff whose suit is dismissed because the statute of limitations has run or because the plaintiff failed to press forward with the litigation. In each of these situations, dismissal is a consequence of plaintiff error or lack of diligence. Thus, protecting the plaintiff's interest in adjudicating substantive rights does not consistently support the Court's decision to exempt "initial bar" type dismissals from res judicata because the existence of an "initial bar" is not indicative of the merits of the plaintiff's claim.

In sum, the *Costello* Court's mechanical distinction between dismissals in which plaintiff's failure to satisfy a precondition to suit constitutes an "initial bar" and other types of dismissals fails to accord reasonable protection to the parties' interests. The distinction ignores the defendant's interest in avoiding duplicative preparations to meet the merits. Moreover, withholding res judicata effect whenever there is an "initial bar" places an unwarranted presumption of

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39 *Costello*, 365 U.S. at 286.

40 FED. R. CIV. P. 41(b).

41 *Costello*, 365 U.S. at 285 (quoting Haldeman v. United States, 91 U.S. 584, 585 (1875)) (emphasis in original).

42 *See supra* note 1. *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, §§ 4439 (in most federal and state courts, dismissals for insufficient pleading now preclude a second action on an improved complaint), 4440 (dismissals for failure to prosecute prior action, failure to comply with discovery orders, or failure to post required security have all been treated as res judicata in subsequent suits), 4441 (dismissal on grounds of statute of limitations bars a second suit on same claim in same court system).

43 *See, e.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 353-54 (1909) (holding that court may strike answer and enter default judgment against defendant who suppresses or fails to produce evidence; court's authority derives from presumption, raised as a result of defendant's actions, of want of foundation of defendant's asserted defense).

meritoriousness on the plaintiff's claim. This presumption is inconsistent with other types of dismissals to which the courts are willing to afford res judicata consequences despite no real adjudication of any substantive rights.

C. Lower Court Treatment of the New "Jurisdictional" Exception to Res Judicata

Since *Costello* lower courts have identified several types of dismissals that fall within the broadened "jurisdictional" exception to res judicata. Primarily they involve prematurity of suit[44] or failure to satisfy a precondition to suit. Examples of dismissals based on a failed precondition that do not have preclusive effect include failure to post a bond,[45] failure to attempt conciliation,[46] failure of an agency to comply with its own notice and investigation requirements,[47] and failure to name the correct defendant.[48] The modern view is that a dismissal based upon insufficient pleading will preclude a subsequent suit,[49] but under some circumstances courts categorize dismissals based upon insufficient pleadings as "jurisdictional" and do not give them preclusive effect.[50] One court described the expanded category of dismissals for lack of jurisdiction as "technical preconditions to access to the court, not elements of the substantive claim, and . . . typically curable."[51]

II
JUDICIAL EFFORTS TO SERVE FAIRNESS TO THE DEFENDANT AND JUDICIAL ECONOMY WITHOUT EXPLICIT RECOGNITION OF AN EXCEPTION TO THE RULE

Courts have ameliorated the unfairness to the defendant and harm to judicial economy that can result from strict application of the *Costello* "jurisdictional" test. The courts have done this, how-

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44 *See, e.g.*, Durham v. Mason & Dixon Lines, Inc., 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969) (dismissal based upon failure to exhaust grievance procedure under collective bargaining contract is jurisdictional and not on merits).

45 *See, e.g.*, Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968).

46 *See, e.g.*, E.E.O.C. v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980).

47 *See, e.g.*, Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980); *see also infra* notes 70-93 and accompanying text.

48 *See, e.g.*, Johnson v. Boyd-Richardson Co., 650 F.2d 147 (8th Cir. 1981).

49 *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 4439.

50 *See* Carter v. Telectron, Inc., 554 F.2d 1369 (5th Cir. 1977), *cert. denied*, 439 U.S. 1074 (1979) (dismissal based upon failure to state cause of action under 42 U.S.C. §§ 1981, 1983, or 1985 jurisdictional and will not bar subsequent suit).

51 Mashpee Tribe v. Watt, 542 F. Supp. 797, 800-01 (D. Mass), *aff'd per curiam*, 707 F.2d 23 (1st Cir. 1982), *cert. denied*, 104 S. Ct. 555 (1983).

ever, without explicitly recognizing an exception to the test. Courts presented with dismissals that qualify as "jurisdictional" under *Costello* have sometimes barred a subsequent suit, emphasizing the ensuing unfairness to the defendant and harm to judicial economy if another lawsuit were allowed. These courts were unwilling to create an explicit exception to the rule that "jurisdictional" dismissals do not preclude a subsequent suit; hence, they did not directly challenge the broadened definition of dismissals for lack of jurisdiction. Nevertheless, the results and nuances of the opinions indicate that concerns of fairness to the defendant and judicial economy influenced the courts.

Browning Debenture Holders' Committee v. DASA Corp.[52] is a good example of a court's willingness to avoid further burden to the defendant even though an unsatisfied precondition prompted the dismissal of the prior action. The case also illustrates how a dismissal based upon an unsatisfied precondition might occur after substantial inconvenience to the defendant and burden on the courts. In *DASA Corp.* the plaintiffs alleged that the defendants had failed to fulfill certain duties owed to the debenture holders.[53] After filing suit, the plaintiffs' attorney engaged in a series of bad faith procedural harassments that turned the case into "a morass of unnecessary paperwork and superfluous courtroom appearances for the other litigants."[54] The court dismissed each of the plaintiffs' frivolous allegations one by one over a period of three years.[55]

The plaintiff's claim against the Bank of New York (hereinafter "the Bank") is of primary concern. After the trial judge denied the plaintiffs' motion for summary judgment for lack of legal support, the court granted the Bank's motion to require the plaintiffs to post bond.[56] On the eve of trial, the court dismissed the claims against the Bank on the merits, with prejudice and costs, upon learning that the plaintiffs did not intend to post the bond.[57] On appeal the Second Circuit heard arguments on the requirement of a bond and the findings regarding the lack of merit of the claims against the Bank.[58] The appellate court affirmed on both grounds. Then, six years after the original filing, the plaintiffs advised the Bank that they intended

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52 454 F. Supp. 88 (S.D.N.Y. 1978).

53 *Id.* at 92.

54 *Id. See also* Browning Debenture Holders' Comm. v. DASA Corp., 431 F. Supp. 959 (S.D.N.Y. 1976) (earlier opinion in protracted *DASA Corp.* litigation tracing plaintiff's procedural obstructionist tactics).

55 431 F. Supp. at 961-62.

56 *DASA Corp.*, 454 F. Supp. at 96.

57 *Id.*

58 560 F.2d 1078, 1083 (2d Cir. 1977). The Second Circuit remanded the case for reconsideration of the assessment of attorneys' fees. *Id.* at 1089.

to file suit in state court.[59] The Bank sued in federal district court to enjoin the plaintiffs from bringing the new lawsuit.[60] The plaintiffs argued against an injunction, claiming that the lawsuit in state court involved " 'heretofore unpleaded and undecided state law claims for breach of fiduciary duties owed by [the Bank]' "[61] and that the dismissal of the claims against the Bank for failure to post a security for costs bond was not " 'on the merits' for *res judicata* purposes" and, therefore, could not preclude a subsequent suit.[62]

The *DASA Corp.* court's opinion granting an injunction against further litigation in state court strongly affirmed the defendant's interest in not being subjected to duplicative, harassing lawsuits, regardless of the basis for the dismissal of the prior action. First, the court found that the "unpleaded and undecided" state law claims were really not new at all but were "what this action against the Bank has primarily been about."[63] Second, the court held that the equitable power of the court to enjoin repetitious litigation could be exercised regardless of whether there had been a judgment on the merits or not.[64] Finally, the court refused to be constrained by *Saylor v. Lindsley,*[65] a Second Circuit decision holding that a dismissal "with prejudice" of a stockholder's derivative suit would not bar a subsequent suit when the dismissal was for failure to post a bond. One of the *DASA Corp.* court's reasons for distinguishing *Saylor* was that in *Saylor* the defendant had not been put to the inconvenience of preparing to meet the merits.[66] The great inconvenience suffered by the defendant in the *DASA Corp.* litigation, however, convinced the court that res judicata principles could bar state court action.[67]

The *DASA Corp.* court granted injunctive relief based on concern for fairness to the defendant even though the dismissal for failure to post a bond is of the "initial bar to reaching the merits" type and is, therefore, within the *Costello* definition of a "jurisdictional"

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59 454 F. Supp. at 92.

60 *Id.*

61 *Id.* at 97 (quoting Appellant's Memorandum in Opposition to Motion by the Bank of New York for a Permanent Injunction at 4).

62 *Id.* at 98 (quoting letter from Bradley R. Brewer to Edward Keane, Feb. 17, 1978).

63 *Id.* at 97.

64 *Id.* at 98.

65 391 F.2d 965 (2d Cir. 1968).

66 *DASA Corp.*, 454 F. Supp. at 98 ("The primary circumstance that the court in *Saylor* found dispositive was that defendants there had never been put to the inconvenience of preparing to meet the merits, and thus would suffer no duplication of effort in being required to defend against the second action.").

67 *Id.* at 98-99. The *DASA Corp.* court also noted that because plaintiffs were free to invoke pendent jurisdiction over the state claims, res judicata could bind the plaintiffs on issues that could have been, but were not actually raised. *Id.* at 99.

dismissal. *Saylor* seems to support this conclusion.[68] The *DASA Corp.* court, however, granted extraordinary relief to avoid this result because allowing another suit would be unfair to the defendant.[69]

A comparison of two Fifth Circuit decisions, *Jones v. Bell Helicopter Co.*[70] and *Truvillion v. King's Daughters Hospital,*[71] demonstrates that court's attempts to protect judicial economy and the defendant's interest in avoiding duplicative preparations to meet the merits. This comparison has three important aspects. First, despite substantial factual similarities between the cases, the court applied res judicata in *Jones* and not in *Truvillion.* Second, one distinction between the cases noted by the *Jones* court was that inconvenience to the defendant and a substantial burden on the courts were present in *Jones* and not in *Truvillion.* Finally, the *Jones* court served fairness to the defendant and judicial economy by its application of res judicata even though the real plaintiff in *Jones* was not blameworthy. These factors suggest that the court was sensitive to the judicial economy and fairness considerations and that it, consequently, avoided the need to allow a subsequent suit by declining to categorize the dismissal involved there as one based upon an unsatisfied precondition.

The factual similarities between *Jones* and *Truvillion* make it difficult to reconcile the divergent outcomes in the two cases. In both, the Equal Employment Opportunity Commission (EEOC) brought employment discrimination suits after charges were filed with the Commission by the real party in interest.[72] In both *Jones* and *Truvillion,* the EEOC's suit was dismissed prior to trial and the real party in interest brought a subsequent action on the same claim after receiving a right to sue letter.[73] The district courts dismissed the subsequent suits by the real parties in interest on res judicata grounds.[74] Both cases were appealed to the Fifth Circuit and decided within two weeks of each other in opinions by Judge Wisdom.

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68 *Saylor,* 391 F.2d at 969 ("In view of the fact that the plaintiff was never permitted to approach the point where the court could even consider its own power to go 'forward to determine the merits of his substantive claim,' it would be wrong to say that the dismissal . . . was *res judicata* . . . .").

69 *DASA Corp.,* 454 F. Supp. at 99.

70 614 F.2d 1389 (5th Cir. 1980).

71 614 F.2d 520 (5th Cir. 1980).

72 Jones alleged that the employer denied him an interview and a job because he was black. *Jones,* 614 F.2d at 1389. Truvillion alleged that she had been denied employment because of her race and that King's Daughters Hospital engaged in various other discriminatory practices. *Truvillion,* 614 F.2d at 522.

73 *Jones,* 614 F.2d at 1390; *Truvillion,* 614 F.2d at 523.

74 *Jones,* 614 F.2d at 1390; *Truvillion,* 614 F.2d at 523. The district court's dismissal in *Truvillion* was also based upon holdings that the EEOC's filing of the first suit cut off Truvillion's private right of action under the statute, and that the EEOC could not issue

To understand why the Fifth Circuit affirmed the district court's dismissal on res judicata grounds in *Jones* and reversed it in *Truvillion* two potential distinctions must be explored. The first is the nature of the dismissal of the prior actions instigated by the EEOC. The second distinction is the inconvenience to the defendant in each case. Despite a lack of clarity in the *Jones* opinion in this regard, only the second ground for distinguishing the cases justifies the different outcomes.

The district court's summary judgment dismissal of the EEOC's action in *Truvillion* was based on what the Fifth Circuit characterized as the EEOC's failure to meet procedural prerequisites to suit.[75] First, the EEOC had failed to comply with its own regulations requiring written notice to the defendant that conciliation efforts had failed and would not be resumed except upon request.[76] Second, the EEOC had not made a "good faith investigation" to determine whether the real party in interest was qualified for the job sought.[77] Such an investigation was "[a]n essential element," and "failure to meet this condition mandated dismissal of the complaint."[78] The Fifth Circuit characterized the first ground for dismissal as "based upon the failure of the E.E.O.C. to comply with its own regulation."[79] The second ground for dismissal, the court stated, "like the first, is concerned with the failure of the E.E.O.C. to meet a condition precedent to suit."[80] As a consequence of these characterizations, Judge Wisdom concluded that the dismissal of the EEOC's action would not raise a res judicata bar to a subsequent suit.[81]

The district court dismissed the EEOC's suit in *Jones* because of the EEOC's failure to comply with the Administrative Procedure Act[82] (APA) requirement of diligent prosecution.[83] The district court found that the case satisfied the three elements necessary for dismissal under the APA: (1) there was a delay in action on the part of the agency, (2) the delay was unreasonable, and (3) the delay resulted in prejudice to the defendant.[84]

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a valid right to sue letter after having brought the prior action. 614 F.2d at 523. The Fifth Circuit in *Truvillion* rejected each of these alternative holdings. 614 F.2d at 523-28.

75 *Truvillion,* 614 F.2d at 524.

76 *Id.* at 522.

77 *Id.*

78 *Id.* at 525.

79 *Id.* at 524.

80 *Id.* at 525.

81 *Id.*

82 5 U.S.C. §§ 551-59, 701-09 (1982).

83 614 F.2d at 1390.

84 *See* E.E.O.C. v. Bell Helicopter Co., 426 F. Supp. 785, 792-93 (N.D. Tex. 1976). The dismissal was not based upon the equitable doctrine of laches. This ground for decision was explicitly rejected by the district court.

The *Jones* court held that a dismissal on these grounds would bar a subsequent suit.[85] The court reached this result by concluding that the dismissal for failure to comply with the requirements of the APA operated as an adjudication on the merits.[86] The court offered scant support for its conclusion. The court first quoted the last portion of rule 41(b)[87] and summarily stated that "[u]nder Rule 41(b) . . . the district court's dismissal operated as an adjudication on the merits of Jones' claim."[88] The court then referred to *Truvillion* as "a different case" because it fell within the *Costello* expanded category of "jurisdictional" dismissals; however, the court failed to explain why *Jones* was not such a "jurisdictional" dismissal other than to say that "[h]ere the E.E.O.C.'s suit on Jone's [sic] behalf was dismissed because the agency's dilatory neglect, in violation of the Administrative Procedure Act, prejudiced the defendant."[89]

If the *Jones* court reached its conclusion that res judicata should apply to the dismissal for failure to comply with the APA solely on the basis of the nature of that dismissal, the conclusion is questionable in light of *Truvillion*. Whether a dismissal is for failure to comply with the EEOC's own procedural regulations or those regulations imposed by the APA does not affect whether the EEOC's failure to comply with those regulations stands as an "initial bar to the Court's reaching the merits."[90] Both dismissals seem to be within the *Costello* expansion of "jurisdictional" dismissals because both involve the agency's failure to comply with procedural preconditions to suit. Arguably, the APA requirements in *Jones* are more like a statute of limitations or a statutory laches and are, therefore, more "substantive" than the agency regulations involved in *Truvillion*,[91] but any differences between the dismissals are insufficient to justify the divergent outcomes. Furthermore, the *Jones* court's failure to raise this issue or provide any reasoned analysis

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> [T]he doctrine of laches has no practical application in cases brought by the EEOC to correct employment discimination; the doctrine is entirely overlapped by statutes of limitation and by the Administrative Procedure Act . . . . The APA allows much the same relief as does the doctrine of laches, but it is statutory, and does not require considerations of public policy or bad faith. Its availability and application is, therefore, even broader than that of laches, and there is no real need for the more narrowly applicable remedy.

Id. at 790 (citation omitted). Thus, the district court's dismissal must have been solely on the ground of failure to comply with the APA.

85 *Jones*, 614 F.2d at 1390.

86 *Id.*

87 The court cited the portion of rule 41(b) that describes when an involuntary dismissal is to have preclusive effect. *Id.*

88 *Id.*

89 *Id.*

90 *Costello*, 365 U.S. at 287.

91 *Jones* did not involve the equitable doctrine of laches. *See supra* note 84.

along these lines suggests that the court did not intend to base its decision upon distinguishing the district court's dismissal in *Jones* from that in *Truvillion*.

The factors in *Jones* that were absent in *Truvillion* and appear to have influenced the different results in the two cases are the substantial burden to the courts and prejudice to the defendant resulting from the EEOC's failure to comply with the APA in *Jones*. These factors led the *Jones* court to bar a subsequent suit regardless of whether the dismissal might technically have been "jurisdictional." The court cited the district court's conclusion with respect to the delay and prejudice to the defendant:

> The delay involved in this case, 5-7 years, is by far the longest delay involved in any case to which this Court has been referred. The only apparent explanation for this delay is administrative lethargy and inertia; the EEOC has not proffered any other explanation.
>
> . . . .
>
> The Court finds that Defendant Bell has demonstrated that . . . prejudice to the defendant occasioned by the delay . . . is also present.[92]

If judicial economy and prejudice to the defendant were the bases for barring the subsequent suit in *Jones,* the court should have been able to articulate those reasons for its result instead of summarily announcing that the *Costello* res judicata rule was inapplicable.

The *Jones* court applied res judicata to the dismissal despite the fact that the real plaintiff was relatively blameless. The EEOC, and not the real plaintiff, was responsible for the prejudicial delay to the defendant. Hence, *Jones* might be read as barring a subsequent suit on the basis of judicial economy and fairness to the defendant even when the plaintiff is not at fault. The *Jones* court, however, was reluctant to find Jones entirely blameless. The court stated that "Jones himself was not without fault, for he showed a singular lack of interest in pressing his claim, but he did not deserve to be penalized by the E.E.O.C.'s failure to provide decent governmental process."[93] Even with this qualification, *Jones* still indicates that substantial plaintiff blameworthiness is not always essential for application of res judicata if barring a subsequent suit would further the twin interests of judicial economy and fairness to the defendant.

The Fifth Circuit's decision in *Weissinger v. United States*[94] is an earlier example where that court was influenced by concerns of fair-

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92 *Jones,* 614 F.2d at 1390 n.1 (quoting E.E.O.C. v. Bell Helicopter Co., 426 F. Supp. 785, 793 (N.D. Tex. 1976)).

93 *Id.* at 1391.

94 423 F.2d 795 (5th Cir. 1970) (en banc).

ness to the defendant and judicial economy but remained unwilling to create an explicit exception to the rule that a dismissal for failure to satisfy a precondition to suit will not bar a second action. As in *DASA Corp.*[95] and *Jones,*[96] the court in *Weissinger* managed to achieve the desired result. The *Weissinger* court, however, accomplished this by limiting the application of *Costello* to dismissals that do not specify whether they are with or without prejudice.[97] This restrictive reading of *Costello* left the court free to conclude that:

> [A] dismissal specified to be with prejudice, entered after full trial on all issues and with complete findings and conclusions, may [not] be treated as a mere warm-up for another trial if the unsuccessful party decides, without an appeal, that he would like to go around the track again.[98]

Thus, the court was able to bar further litigation despite the fact that the prior dismissal was on the basis of plaintiff's failure to satisfy a precondition to suit.

In *Weissinger*[99] the Small Business Administration (SBA) mailed written demands to Weissinger for payment due pursuant to the terms of the guaranty instruments, but the post office returned the demands because Weissinger had moved and left no forwarding address.[100] The government's suit on the guaranties was ultimately dismissed "with prejudice" because the government failed to demand payment, after what later was described as a "full-blown trial" with "filing of briefs" and "lengthy and detailed findings of fact and conclusions of law on numerous issues."[101] The SBA subsequently filed a written demand and brought a new action. The district court denied Weissinger's res judicata defense and granted summary judgment for the government. On appeal a Fifth Circuit panel af-

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95 *See supra* notes 52-69 and accompanying text.

96 *See supra* notes 70-93 and accompanying text.

97 *Weissinger,* 423 F.2d at 799 ("Cases such as Costello v. United States are concerned with non-specifying orders, and, for such orders of uncertain meaning, seek to determine the scope of the 'lack of jurisdiction' exception . . . ." (citation omitted)).

98 *Id.* at 800.

99 For a discussion of *Weissinger,* see Comment, *supra* note 9; Note, *Rule 41(b), Federal Rules of Civil Procedure—Is a Specifying Dismissal Order Unimpeachable?* Weissinger v. United States, 31 MD. L. REV. 85 (1971) [hereinafter cited as Note, *Rule 41(b)*]; Note, *Federal Procedure—Rule 41(B)—A Dismissal with Prejudice is Res Judicata of the Cause of Action and Operates as an Adjudication of the Merits Regardless of Whether the Merits Have Been Reached*—Weissinger v. United States, 49 TEX. L. REV. 372 (1971).

100 423 F.2d 782, 787 (5th Cir. 1968), *vacated,* 423 F.2d 795 (1970) (en banc).

101 *Weissinger,* 423 F.2d at 796-97. Defendant Weissinger moved for involuntary dismissal at the close of the government's evidence. The trial judge denied the motion, and defendant presented her evidence. At the close of defendant's evidence, the trial judge granted defendant's motion for involuntary dismissal despite finding for the government on all issues other than the demand for payment. *Id.* at 796-97 & n.1.

firmed the trial court over Judge Godbold's dissent.[102] Two years later the Fifth Circuit, sitting en banc, reversed the panel majority in a nine to four decision, with Judge Godbold writing for the majority.[103]

Several factors suggest that interests of judicial economy and fairness to the defendant persuaded the *Weissinger* en banc majority to bar a second suit. First, the court's narrow reading of *Costello* was unprecedented[104] and unlikely. Nothing in *Costello* indicates that the exceptions to rule 41(b) are overridden by a "with prejudice" designation, and rule 41(b) itself does not limit its exceptions to dismissals not "with prejudice."[105] Second, the repeated references to the fact that there had been a "full blown trial . . . [with] lengthy and careful findings of fact and conclusions of law"[106] were not necessary to the court's holding that res judicata applies whenever a dismissal specifies that it is "with prejudice." The stress placed on the extensive litigation that had already occurred suggests that the court was influenced by judicial economy[107] and fairness to the defendant and may indicate that the court contemplated limiting the application of its exception to situations in which a dismissal was "with prejudice" after a full blown trial. That the en banc dissenters thought it necessary to attempt to refute the role of "any possible harassment of the defendant occasioned by the filing of the suit before making demand for payment,"[108] further supports this conclusion.

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102 423 F.2d 782 (5th Cir. 1968), *vacated,* 423 F.2d 795 (1970) (en banc).

103 *Weissinger,* 423 F.2d at 796.

104 *See* Note, *Rule 41(b), supra* note 99, at 92-93 (indicating that court's conclusion that "with prejudice" dismissals preempt the exceptions to rule 41(b) was without prior authority).

105 Wright and Miller present three objections to the court's interpretation. First, the court's reading of rule 41(b) is strained because the "unless otherwise specifies" language does not control the exceptions. Second, the court's reading of *Costello* is unduly narrow given the lack of any evidence that the *Costello* Court would have reasoned or concluded differently if the dismissal were "with prejudice." Third, it would be reversible error for the court to specify that a dismissal based upon lack of jurisdiction or one of the other exceptions is with prejudice because in most cases the court would lack authority to decide the merits. 9 C. WRIGHT & A. MILLER, *supra* note 8, § 2373, at 241-42. *But see* Note, *Rule 41(b), supra* note 99, at 95 (arguing that *Weissinger* decision is "a wise manifestation of the rule that a man is entitled to only one day in court" and may, therefore, reduce caseloads).

106 *Weissinger,* 423 F.2d at 798. *See also id.* at 796, 800.

107 *Id.* at 798 (noting that if court allowed another suit, elaborate consideration and disposition of all legal and factual issues would have been an "exercise in sheer futility").

108 *Id.* at 802. The dissenters attacked both the ripeness and the fairness premise of the question of "harassment to the defendant." First, the dissent argued that the question was not presented below or passed on by the district court, and, therefore, the plaintiff's intent to harass the defendant is unclear from the record. *Id.* Second, the dissenters attacked the premise that unfairness to the defendant existed in the case. The

Judge Godbold's dissent from the panel decision elaborated upon the fairness and judicial economy themes that appeared in abbreviated form in his en banc opinion. Three factors emerged as important to Judge Godbold's finding that a second suit should be barred. First, the defendant had already experienced substantial inconvenience.[109] Second, a subsequent suit in these situations would impose a burden upon the courts.[110] Third, the fact that the government was aware of the precondition to suit and had the power to satisfy it weighed in favor of a res judicata bar.[111]

Despite the strong evidence that concerns of judicial economy and fairness to the defendant dictated the decision, the *Weissinger* court, like the courts in *DASA Corp.*[112] and *Jones,*[113] chose to protect these interests without acknowledging them.[114] The courts in each case implicitly concluded that considerations of fairness to the defendant and judicial economy justified disregarding the normal rule that a dismissal for failure to satisfy a precondition to suit would not bar a subsequent suit. Such obfuscation lessens the predictability of the res judicata rules and harms confidence in the judiciary. The courts should recognize, therefore, that in some situations considerations of fairness to the defendant and judicial economy demand an explicit exception to the general rule of no preclusion in unsatisfied precondition cases.[115]

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dissent noted that the defendant could have raised the precondition defense long before the trial and thereby avoided the need to prepare for trial in the first action. *Id.*

109 Judge Godbold pointed out that "[a]ppellant had to prepare to meet all issues including demand, went to trial on all issues after strenuous insistence on a continuance, adjudicated every issue, and lost every issue except one." *Id.* at 790.

110 Judge Godbold noted that:

> If the government's position is correct . . . [it] would be free to tie up courts and litigants at will, never bound by the adverse result, until such time as it gets around to giving the demand agreed upon and required by law. This is, of course, absurd. The cut-off has to come somewhere, and it comes after the first adjudication, for the government as for any other litigant.

Id. at 790.

111 Judge Godbold concluded that when the precondition is beyond plaintiff's control "[i]t is fair to plaintiff and neither unfair nor oppressive to other litigants and the courts to give him an opportunity to pursue his cause to judgment after it is within his power to make the cause viable." *Id.* at 789. He reserved as unnecessary to decide the closer case arising when a plaintiff has the power to satisfy a precondition but the failure to satisfy the precondition does not appear until trial. *Id.*

112 *See supra* notes 52-69 and accompanying text.

113 *See supra* note 70-93 and accompanying text.

114 *See* Comment, *supra* note 9, at 430 (court based conclusion that second action was barred upon judge's "with prejudice" specification; full litigation factor was merely added to bolster decision).

115 Wright and Miller agree in the context of the *Weissinger* facts: "[a] good argument can be made that after a full trial and decision of the merits of the case a plaintiff should not be allowed to start over by removing an obstacle to suit that it was within its power to remove at any time." 9 C. WRIGHT & A. MILLER, *supra* note 8, § 2373, at 240

In addition, the *Weissinger* decision illustrates that the stated rationale may create bad law or at least highly questionable precedent.[116] Judicial recognition of a defendant fairness exception to the *Costello* rule that dismissals based upon unsatisfied preconditions do not preclude further litigation would more effectively balance the interests of plaintiff, defendant, and judicial efficiency in unsatisfied precondition cases. The following section discusses an attempt to create such an exception.

III
EXPLICIT RECOGNITION OF A FAIRNESS TO DEFENDANT EXCEPTION

A. The "Manifestly Unfair" Exception

Tentative Draft No. 1 of the *Restatement (Second) of Judgments* § 48.1(2) (hereinafter *Restatement Draft*)[117] articulated a defendant fairness exception to the *Costello* rule that a dismissal based upon prematurity or failure to satisfy a precondition to suit does not bar a subsequent suit. The Restatement Draft provided that:

> [a] valid and final personal judgment for the defendant which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, *unless* a second action is precluded by operation of the substantive law, or the *circumstances are such that it would be manifestly unfair to subject the defendant to such an action.*[118]

This new "manifestly unfair" exception to the *Restatement of Judgments*[119] was inspired by the facts of the *Weissinger* case.[120] The *Restatement Draft* reporters did not accept the *Weissinger* holding that a dismissal "with prejudice" will bar a subsequent suit in all cases. Rather, the reporters found that the *Weissinger* facts presented a situ-

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(footnote omitted). Wright, Miller, and Cooper also agree with preclusion where "the plaintiff has forced substantial burdens on adversary and court alike by failure to satisfy a precondition that easily could have been satisfied before bringing the first action . . . ." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 4437, at 351 (footnote omitted). For a discussion of a case involving such facts, see *infra* notes 124-34 and accompanying text.

116 *See supra* notes 104-05 and accompanying text.

117 RESTATEMENT (SECOND) OF JUDGMENTS § 48.1(2) (Tent. Draft No. 1) (1973) [hereinafter cited as RESTATEMENT DRAFT].

118 *Id.* (emphasis added).

119 *See* Discussion of Restatement of the Law, Second, Judgments, Tentative Draft No. 1, 50 A.L.I. Proc. 307 (1974) [hereinafter cited as 1973 ALI PROCEEDINGS] (indicating that "manifestly unfair to the defendant" provision is new and did not appear in FIRST RESTATEMENT).

120 The *Weissinger* case was the basis for illustration 9 to § 48.1(2) and was the "primary support" for the defendant fairness exception. *See id.*

ation in which fundamental fairness alone should bar the plaintiff's subsequent suit.[121]

The *Restatement Draft*'s exception based on fairness to the defendant was a significant development because it explicitly acknowledged that judicial economy and fairness to the defendant are viable considerations in the res judicata decision. Comment n to the *Restatement Draft* explained the possible applications of the "manifestly unfair" exception:

> [i]n some instances, it would be plainly unfair to subject the defendant to a second action on the same claim because, for example, all issues in the case were fully litigated in the first proceeding and the precondition the plaintiff did not satisfy could readily have been satisfied in that proceeding, thus avoiding the burden of additional litigation.[122]

This comment indicates that the "manifestly unfair" exception would fit the facts of *DASA Corp.*, *Jones*, and *Weissinger* and would be a superior rationale for their holdings. This exception might also have produced a different result in *Costello*.[123]

B. Judicial Application of the "Manifestly Unfair" Exception

Stebbins v. Nationwide Mutual Insurance Co.[124] presented the Fourth Circuit with an ideal case in which to apply the *Restatement Draft*'s "manifestly unfair" exception. In a prior proceeding, Stebbins sued a prospective employer under title VII, alleging discrimination in hiring and retaliation.[125] The Fourth Circuit affirmed the

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121 *See id.* Professor Shapiro argues that irrespective of whether the *Weissinger* case is correct, illustration 9 to § 48.1(2), which is derived from the case, "is a sound case and the result is a sound one, and it supports the flexibility that is built into Section 48.1, subsection (2)." Illustration 9 reads as follows:

> A sues B on B's promise of guaranty of a certain debt. After pretrial discovery, and trial of all the issues, the action is dismissed on the ground that A had not made a demand for payment as required by law—a demand that could have been made at any time prior to dismissal. The action is dismissed "with prejudice to any action on the same claim." The judgment is a bar to a second action by A on B's promise of a guaranty brought after a demand is made.

RESTATEMENT DRAFT, *supra* note 117, at 55.

The result in illustration 9 was based upon the fact that "plaintiff has failed to satisfy some condition that he could readily have satisfied at an earlier stage," and "it simply is not fair to subject the defendant to another lawsuit." 1973 ALI PROCEEDINGS, *supra* note 119, at 307 (remarks by Professor Shapiro).

122 RESTATEMENT DRAFT, *supra* note 117, comment n, at 54-55.

123 See *supra* notes 34-39 and accompanying text for a discussion of the substantial unfairness to the defendant in *Costello*.

124 528 F.2d 934, *cert. denied*, 424 U.S. 946 (1976).

125 Stebbins alleged that Nationwide had denied him employment on account of his race in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000e-2. *Id.* at 935. He further alleged that Nationwide violated 42 U.S.C. § 2000e-3 by refusing him consideration for employment because he brought an earlier title VII action against Nationwide. *Id.*

district court's dismissal of Stebbins's claim because Stebbins had failed to file suit within the statutorily prescribed time period after receiving the EEOC's right to sue letter.[126] The EEOC then issued Stebbins a new suit letter, and Stebbins again filed a complaint against the same employer alleging the same wrongdoing.[127]

The district court dismissed the suit on res judicata grounds; Stebbins appealed to the Fourth Circuit.[128] The appellate court emphasized that the dismissal in the first suit was based upon a precondition to the suit and was, therefore, not on the merits.[129] Nevertheless, the court affirmed the application of res judicata to the dismissal, explaining that the "manifestly unfair" exception mandated this result:

> [T]he unfairness that would result to Nationwide from a new trial is substantial and manifest. Nationwide not only prepared to litigate the merits of the first suit, but actually participated in a hearing on the merits . . . . [I]t was a full-blown trial . . . . [T]he issues were fully litigated . . . . [T]he fact that the first action was not decided on the merits is due solely to Stebbins' intentional disregard of the statutory precondition.[130]

Thus, the *Stebbins* court invoked the "manifestly unfair" to the defendant exception in order to foster fairness to the defendant and judicial economy when the dismissal of the prior action was based upon failure to satisfy a precondition to suit.[131]

The *Stebbins* facts strongly supported application of the fairness to the defendant exception. First, Stebbins not only failed to satisfy the precondition in the first suit, he intentionally disregarded the statutory precondition.[132] Second, the inconvenience to the defendant was substantial; the defendant not only had to prepare to meet the merits in the first suit, but the case actually went to trial

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126 The appellate court in the first suit declined to rely upon the district court's rationale because the lower court addressed the merits of Stebbins's claim. *See Stebbins*, 528 F.2d at 937.

127 *Id.* at 936.

128 *Id.* at 935.

129 The court stated: "[h]aving held that Stebbins' action was properly dismissed not because he had no enforceable claim on the merits but rather because he had failed to comply with statutory preconditions to the bringing of his action, we cannot now say that the matter was adjudicated against him on the merits." *Id.* at 937.

130 *Id.* at 937-38.

131 The court relied upon the *Restatement Draft* for its holding. After citing the *Draft*, the court noted: "[w]e believe that this section, which has been approved in principle by the membership of American Law Institute, correctly states the rule that should be applied in this case." *Id.* at 937.

132 *Id.* at 937-38. The appellate court in the first *Stebbins* suit observed that Stebbins was a "uniquely sophisticated litigant in Title VII matters," and he made "the intentional choice of disregarding the statutory provisions." Stebbins v. Nationwide Mutual Ins. Co., 469 F.2d 268, 270 (4th Cir. 1972), *cert. denied*, 410 U.S. 939 (1973).

where the defendant prevailed on the merits.[133] Third, judicial efficiency favored application of the "manifestly unfair" exception because the litigation had already consumed a large quantity of judicial resources. Fourth, the district court's dismissal on the merits left little concern that applying the "manifestly unfair" exception would bar any meritorious claim. Finally, only the plaintiff had the power to satisfy the precondition.[134] Because of these factors, the court correctly applied the "manifestly unfair" exception in *Stebbins*. The court, however, failed to offer future courts applying this balancing test any guidelines as to which of the factors present in the *Stebbins* facts were essential to its application of the "manifestly unfair" exception.

C. The 1973 ALI Annual Meeting and the Demise of the "Manifestly Unfair" to the Defendant Exception

At the Fiftieth Annual Meeting of the American Law Institute (ALI) in 1973,[135] two main objections to the "manifestly unfair" exception in the *Restatement Draft* surfaced and ultimately resulted in the deletion of that exception from the *Restatement (Second) of Judgments* § 20(2) (hereinafter *Restatement Final Draft*).[136] The first objection concerned the uncertainty over the parameters of the "manifestly unfair" standard. The drafters feared that a defendant might deliberately wait until after trial to press for dismissal on the basis of an unsatisfied precondition in order to argue that a second suit would be "manifestly unfair" to the defendant.[137] More a criticism of the exception's phrasing than an attack upon its conceptual basis, this concern would be valid only if the courts did not consider the defendant's fault for allowing the litigation to proceed.[138] It is

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133 The district court in the first suit found for Stebbins on the retaliation claim but awarded only nominal damages. 528 F.2d at 936. The discrimination claim was dismissed because Stebbins had been found totally unqualified for the employment position he was seeking. *Id.* The Fourth Circuit affirmed solely on the basis of the unsatisfied precondition. *Id.* *See supra* note 129 and accompanying text.

134 The precondition was a statutorily prescribed time limit within which suit must be brought after receipt of a right to sue letter. *Stebbins,* 528 F.2d at 936.

135 1973 ALI PROCEEDINGS, *supra* note 119.

136 RESTATEMENT (SECOND) OF JUDGMENTS § 20(2) (1982). The only substantive change tbat § 20 makes to RESTATEMENT DRAFT § 48.1 is the omission of the "manifestly unfair" exception. The final draft, however, provides that "[i]n some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action." *Id.* comment n, at 177.

137 1973 ALI PROCEEDINGS, *supra* note 119, at 312-13.

138 *Id.* at 312. Professor Shapiro indicated that these details would be "far too complex to spell out in a single page" and that the possible disagreement over the specific details of the narrow problem might not justify the risks involved in any rule change. *Id.* at 313.

arguable that allowing another suit in such situations is not "manifestly unfair" to the defendant.

The second objection was that the "manifestly unfair" exception is unnecessary. It was suggested that when a case progresses through trial before an unsatisfied precondition is raised, the defendant should be viewed as having the choice of waiving the precondition and receiving the res judicata effects of the full trial or insisting upon the precondition and waiving the res judicata effects of the full trial.[139] This waiver view is flawed, however, because it adversely affects judicial economy and fairness to the defendant. Judicial economy is sacrificed if the defendant insists upon the precondition because the entire proceeding must be repeated after the plaintiff satisfies the precondition. Moreover, the defendant's waiver of the precondition may still sacrifice judicial economy because many of the preconditions are litigation avoidance devices that might have precluded need for any court proceeding.[140] When the plaintiff alone can satisfy the precondition, and the defendant has not intentionally chosen to forego his right to satisfaction of the precondition, then the waiver method results in a windfall to the plaintiff: the plaintiff avoids the costs of compliance and successfully deprives the defendant of whatever benefits the precondition offered. If the defendant waives the res judicata consequences of the litigation, the plaintiff may also benefit because the process must start anew and the incentives for the defendant to settle are increased. A defendant fairness exception barring a subsequent suit in appropriate cases of unsatisfied preconditions would create an incentive for plaintiffs to comply with preconditions and would thereby serve both judicial economy and fairness to the defendant.

D. Summary

The explicit recognition in the *Restatement Draft* of a defendant fairness exception to the rule that dismissals based upon prematurity or an unsatisfied precondition will not bar a subsequent suit, and its omission from the *Restatement Final Draft*, render the status of the exception uncertain. The *Stebbins* application of a fairness to the

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139 *Id.* at 313-14.

140 For example, *Weissinger* involved a precondition required primarily as a protection of defendants' rights and as a litigation avoidance device. As Judge Godbold noted,

> The purpose of notice of default is to alert the guarantor that he is relied upon for payment, to notify him of the amount of the debt, to give him an opportunity to persuade the debtor to pay and to obtain security from the debtor if possible before the debtor's financial situation deteriorates further, and to give him an opportunity to pay without suit if he desires.

Weissinger, 423 F.2d at 788 (Godbold, J., dissenting).

defendant exception was a positive development,[141] but the broad "manifestly unfair" terminology was too vague to form a workable standard. It simply relegated the entire matter to judicial discretion. Despite the removal of the "manifestly unfair" exception from the *Restatement Final Draft, Stebbins* remains good law.[142] The challenge now is to formulate a workable defendant fairness exception for unsatisfied precondition situations that avoids the pitfalls of the "manifestly unfair" formulation.

IV
A Possible Solution

The trial court is the best forum for administering a defendant fairness exception to the rule that dismissals based upon prematurity or failure to satisfy a precondition to suit do not preclude a subsequent suit. The trial judge is most familiar with the facts of the case and the attendant fairness and judicial efficiency considerations. Consequently, no siguificant additional investment of judicial resources would be necessary to administer the following suggested standards.

When confronting a situation in which the plaintiff's case must be dismissed on grounds of prematurity or failure to meet a precondition to suit, a trial court should have the option of making the dismissal "with prejudice" upon a showing of the unfairness to the defendant that would result from allowing another lawsuit. The defendant, in moving for involuntary dismissal, should have to request the "with prejudice" designation and should bear the burden of proving a three-pronged test. First, the defendant must have undergone substantial preparation to meet the merits. Second, the plaintiff must have been able to avoid the need for such preparation by exercising reasonable measures. Third, the defendant must not have intentionally waived the maturity or precondition required. Only upon finding that the defendant has met his burden of proof on all three elements should the "with prejudice" request be granted.

The first requirement, a showing of "substantial preparation," demands less than a "full blown trial" as occurred in cases like *Stebbins, Weissinger,* and *Jones*. Certainly cases which actually proceed to

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141 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, at § 4437. *See supra* notes 132-34 and accompanying text.

142 Wright, Miller, and Cooper agree, noting that "[a]t least in such circumstances as [the *Stebbins* case], in which the plaintiff has forced substantial burdens on adversary and court alike by failure to satisfy a precondition that easily could have been satisfied before bringing the first action, preclusion seems fully appropriate." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 4437, at 351 (footnote omitted).

trial with all issues adjudicated prior to dismissal pose the clearest example of "substantial preparation." Limiting the exception to only such situations, however, would unnecessarily restrict its application. When the equities strongly favor a dismissal "with prejudice," a trial judge should not be prevented from taking this action solely because the motion to dismiss was made prior to a "full blown trial." Conversely, if there was only minimal preparation required of the defendant and a relatively small investment of judicial resources, a "with prejudice" specification would be inappropriate.

The second requirement of the three-pronged test is a showing that the exercise of reasonable measures by the plaintiff could have averted substantial preparation by the defendant. The "reasonable measures" standard applies to both the party alleging injury and his representative. For the plaintiff, reasonable measures would include careful attorney selection and attention to the attorney or agency's efforts to prosecute.[143] For the representing attorney or agency, reasonable measures would include both steps to satisfy all preconditions and to become informed of the need to satisfy any prerequisites to suit. When the plaintiff cannot satisfy the precondition, or the plaintiff is not unreasonable in failing to learn of the existence of the precondition, this requirement would not be satisfied.

The final standard measures the defendant's blameworthiness. The defendant must not have "intentionally waived" the maturity or precondition. This standard would permit the plaintiff to introduce evidence that the defendant had early knowledge of the unsatisfied precondition and chose not to insist upon the precondition at that time. Evidence of an express or implied agreement between the parties that the defendant would not insist upon the precondition would be particularly relevant. The essence of the "intentionally waived" standard is the apparent exercise of a choice not to insist

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143 The view that a client should not be penalized for the incompetence of his attorney was rejected by the Supreme Court.

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) (upholding sua sponte dismissal by district court based on fact that plaintiff's attorney had not diligently prosecuted case and had failed to attend pretrial conference). A contrary view would destroy the efficacy of the exception because nearly every plaintiff could claim that his attorney was at fault for not satisfying the precondition.

upon the precondition. In such situations, it is not unfair to subject the defendant to further litigation because the defendant chose to allow the suit to proceed, thereby necessitating substantial preparation.[144] Delineating between mere knowledge of the statutory requirements and a deliberate choice not to insist upon the precondition will be a difficult, but not impossible, determination for the trial judge based on the facts of each case.

An appellate court reviewing a dismissal specified "with prejudice" on grounds of fairness to the defendant and judicial economy should uphold the dismissal and its res judicata consequences unless clearly erroneous because a trial judge is in a better position to determine if the defendant has met his burden of proof on all three elements.[145] Moreover, extensive review of this determination undermines the goal of judicial efficiency which the defendant fairness exception advances.

A more difficult application of the proposed test arises when an unsatisfied precondition does not become evident until the case is at the appellate level.[146] In such circumstances the appellate court should consider remanding the case to the trial court for a ruling as to whether the dismissal should be "with prejudice." This determination will be more accurately and efficiently made at the trial level because that court is likely to be more familiar with the facts of the case that bear on the three-pronged test previously outlined.[147]

In a limited number of cases, however, the appellate court may find that a remand would be unjust or unnecessary.[148] In these situations the appellate court's dismissal on the basis of the unsatisfied precondition would not preclude a subsequent suit, and the defendant would be foreclosed from raising a defendant fairness based res judicata defense in a second action.[149]

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144 *See supra* note 138 and accompanying text.

145 *See* FED. R. CIV. P. 52(a).

146 *Costello* and *Stebbins* are examples of such cases.

147 The recent amendments to rule 16 of the Federal Rules of Civil Procedure expressly authorize active case management by trial judges. This management should foster greater familiarity with the fairness considerations that must be weighed in deciding to dismiss with or without prejudice and should, therefore, not only make the determination more efficient, but also more accurate.

148 For example, if the defendant failed to notice the unsatisfied precondition throughout the litigation and failed to argue that fairness and judicial economy required affording preclusive effect to the dismissal, the appellate court might find it unnecessary to remand the case. Similarly, if it is clear that the suit involved little inconvenience to the defendant or that the defendant waived the precondition and that relatively little use of judicial resources was involved, the appellate court might refuse to remand.

149 This treatment is not unfair to the defendant; ample opportunity exists for raising this objection in the prior suit. In addition, it would be a substantial burden on the trial court in the second suit to become familiar with the background of the prior suit and to apply the test.

The proposed test would have allowed the trial courts in *DASA Corp., Jones,* and *Weissinger* to entertain a request for a "with prejudice" specification on the basis of fairness to the defendant and judicial economy. Each of these cases presents a situation in which it is likely that all three parts of the suggested test would be met. In *Costelio* and *Stebbins,* however, the unsatisfied preconditions did not become apparent until the case reached the appellate level. In such situations the appellate court should remand to the district court where the defendant could argue that the dismissal should bar a subsequent suit on the basis of fairness to the defendant and judicial economy. The trial court, already familiar with the factual setting of the case, should then determine on the basis of the defendant's evidence whether the three requirements are met. Had the courts in *Costello* followed this procedure, they probably would have reached a different result hecause the strong evidence of unfairness to the defendant would have resulted in a dismissal "with prejudice," thereby barring subsequent proceedings.[150] Such a result would conserve judicial resources and would be consistent with the Supreme Court's recent decisions encouraging more rigorous application of res judicata.[151] The outcome in *Stebbins* derived from applying the "manifestly unfair" exception would remain unchanged.[152]

In sum, the proposed test would provide an explicit and workable means by which courts could serve judicial economy and fairness to the defendant without the necessity of finding an alternative holding to justify the decision. This result is desirable because it provides greater uniformity and predictability in the application of res judicata.

The proposed test would allow courts more effectively to promote the interests of fairness to plaintiff, fairness to defendant, and judicial economy. The test is fair to the plaintiff because only the plaintiff's failure to take "reasonable measures" to avoid the defendant's need for preparation will foreclose a decision on the substantive rights. In addition, the plaintiff benefits from the allocation of the burden of proof because the defendant must establish all three requirements. The proposed exception preserves the defendant's interest in not being forced to undergo repeated preparations to

150 *See supra* notes 34-39 and accompanying text.

151 *See, e.g.,* Parklane Hosiery v. Shore, 439 U.S. 322, 332-33 (1979) (offensive use of collateral estoppel permitted against prior losing party); Montana v. United States, 440 U.S. 147, 154-55 (1979) (controlling nonparty in prior adjudication subsequently estopped from relitigating same issues in second suit); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 350 (1971) (rejecting mutuality requirement); *see also* Vestal & Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic,* 47 Mo. L. Rev. 1, 2-4 (1982) (tracing recent expansion of res judicata).

152 *See supra* notes 117-34 and accompanying text.

meet the merits of the plaintiff's case. Finally, by providing a mechanism for the courts to prevent relitigation of a claim that has already exhausted substantial judicial resources, the exception fosters judicial economy. The fact that most determinations will be made by the trial courts in the context of a motion for involuntary dismissal means that application of the test will consume little additional time. When the unsatisfied precondition does not become evident until appeal, remanding the case to the trial court will best accommodate all the interests involved for the preceding reasons. Even though the proposed exception may not apply to a large number of cases, its use in appropriate cases will allow courts more effectively to accommodate litigants' interests and allocate judicial resources.

CONCLUSION

The doctrine of res judicata in the involuntary dismissal context has evolved in response to realizations that the old rules did not balance fairly the competing interests involved. The *Costello* Court found that a literal reading of rule 41(b) with its four narrow exceptions was unfair to the plaintiff when the dismissal resulted from an unsatisfied precondition. The *Costello* rule, however, was too inflexible, tipping the scales in the plaintiff's favor whenever the dismissal could be deemed to fall within the expanded "jurisdictional" exception. Courts avoided this result by barring a subsequent suit when judicial economy and fairness to the defendant required it, yet they did so without creating an explicit exception to the rules. The reporters to the *Restatement Draft* attempted to provide a mechanism for protecting fairness to the defendant and judicial economy in unsatisfied precondition cases. This mechanism, although deleted from the final *Restatement,* was adopted by the Fourth Circuit in the *Stebbins* case. Despite the recognition of the need for a means to protect judicial economy and fairness to the defendant in unsatisfied precondition cases, no such mechanism has gained acceptance. This Note's proposal would provide a workable means of meeting this need. It would allow courts to apply res judicata more appropriately without having to create an alternative holding to achieve a desired result.

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