Preclusive Effect:

(res judicata)

Res Judicata: any kind of preclusion, claim or issue

MSG: Some courts use the term res judicata to only apply to claim preclusion, but according to the book, use it in the broad sense that could apply to any type of preclusive effect

Collateral Estoppel: one type of issue preclusion

Direct Estoppel: another rarer type of issue preclusion (don’t worry about the distinction)

But since collateral estoppel does not exhaust the examples of issue preclusion, it is best to just use the term issue preclusion

* Use the terms claim preclusion and issue preclusion, and then when you want to talk about them together, just talk about preclusion (but if you must use Latin, say res judicata for preclusion in general)

Claim Preclusion: about causes of action you should have brought but did not.

For Claim Preclusion:

1. There must be a **final** judgment (even if it is on appeal)
2. Judgment must be **valid**.
3. Judgment must be on the **merits**.

Default judgments are final judgments.

* Would not be final if the action was still ongoing.
* But if the first action is still ongoing and P brought another cause of action that was about the same transaction, then D could get the second action dismissed without prejudice under the doctrine of prior action pending
  + 🡪 Then the 2nd cause of action could be brought with the 1st though an amendment of the complaint
* Difficult to challenge the validity original judgment (unless it was a default judgment)

“Scope of the Claim”: this is a general term for whatever is claim precluded

A) Federal Approach: the scope is the transaction

B) Older Approaches: narrower

**Williamson v. Columbia Gas & Electric**

1. Two lawsuits, ongoing at same time, both brought in federal court in DE:
   1. **1st suit:** Sherman Act violation action (D colluded with others in a conspiracy in restraint of trade)
   2. **2nd suit**: Clayton Act violation action (individual acting in restraint of trade – monopolist)
      1. 2nd action comes to a judgment first – dismissed because the SOL ran out under DE law
         1. (Federal statutes often don’t have SOL, so federal courts borrow relevant SOL in the state where the action is being heard – fairly common)
      2. Now we have a final valid judgment on the merits
      3. D invokes claim preclusion in 1st suit based on 2nd suit’s judgment
      4. Court rules that 1st suit (Sherman action) is precluded – not because it is a bad action/ does not have merit, but because the P engaged in duplicative litigation
         * 1. Does not matter that the precluding action was brought AFTER the precluded action.

**Policy**: Penalty for duplicative litigation 🡪 when one comes to a judgment, the other one is barred.

* + - 1. 1st action would not have been barred on SOL grounds.

*Why?*

* + - * 1. It was a claim of conspiracy, and so the conspiracy was ongoing and so it would have saved the action as far as SOL was concerned.
        2. But that does not matter – action is barred on claim preclusion grounds

1. *Why didn’t the D bring up “prior action pending” when the 2nd suit was filed?*
   1. The D could have brought up “prior action pending” for the 2nd lawsuit, and gotten it dismissed without prejudice and joined in the earlier action.
      1. D probably wanted it to come to a judgment so claim preclusion could be invoked in the first action.
   2. D kept both going on and sort of agreed to claim splitting 🡪 now generally thought to be waiver of claim preclusion rights (when you agree to claim splitting by not objecting)
2. *Is this fair to the P (when the D didn’t bring up prior action pending)?* 
   1. Majority view is now that if D didn’t mention claim-splitting and one suit comes to a judgment, claim preclusion should not be allowed to be invoked in the other suit.
      1. D is just as “guilty” as the P who brought the duplicative lawsuits.
3. Claim Preclusion is fluid – takes into consideration equitable considerations.

**Hypo**: P sues D in Pa. state court under NY negligence law for his damages in a NY accident.  
  
P’s action is dismissed by due to Pa.’s 1 year statute of limitations for negligence. *May P sue D in Del. state court for his damages concerning the same accident? (Del. has a 2 year statute of limitations for negligence.)*

*(Is he precluded from suing in another jurisdiction that has a longer SOL by virtue of the earlier dismissal? What type of preclusive effect does it have?)*

**Answer**: SOL is generally a jurisdictional claim.

“We in PA do not take cause of action that has been sitting around for more than a year.”

* SOL more similar to SMJ or PJ – dismissal simply bars the claim in THAT jurisdiction, but not necessarily from bringing it in another.
  + - * + Dismissal in PA has no preclusive effect in another jurisdiction (NOTE: only applies to SOL)
* If suing in state court under a CoA in another state, the forum’s SOL is usually used.
  + Ex) PA uses its SOL even though the accident occurred in NY.

**Apply to Williamson:**

* Williamson’s Clayton Act action was dismissed under Delaware’s SOL.
* *Could that Clayton Act action be brought in another jurisdiction that has a longer SOL?*

🡪 Clayton action could be brought again in another jurisdiction.

**BUT**

Sherman Action was barred in DE on claim preclusion grounds.

*Can THAT action be brought in PA where it has a longer SOL?*

***The question is: How much are you being punished for claim splitting?***

If you can’t bring the Sherman Act action anywhere, the consequences seem too draconian;

* Should be that if the claim is dismissed on SOL grounds in a forum, then just claim precluded IN that forum. But should be able to bring any cause of action concerning the transaction elsewhere where the SOL is longer.

\*\*\*Whenever action is being dismissed – ask the court to specify the preclusive effect

* When the Sherman action was dismissed, MSG would have asked the court to say what that effect is after the dismissal.
* Preclusive everywhere or JUST in DE?
* Ask them if it is without prejudice in other jurisdictions.
* **Scope of a claim**: what does it mean to say the CoA is precluded because it is part of a claim that previously came to judgment?

**Restatement of Judgments**: because claim and issue preclusion are common law made up by courts, it is nice to have a restatement about it.

**Rest. (2d) of Judgments**  
§ 24. Dimensions Of “Claim” For Purposes Of Merger Or Bar—General Rule Concerning “Splitting”  
(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.  
(2) What factual grouping constitutes a “transaction”, and what groupings constitute a “series”, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

* Transactional test: this is the federal approach (some states have narrower views)
* Claim (and Issue) Preclusion have been getting broader and broader

**Why in this modern world is Claim Preclusion growing broader?**

* Because we put SO much up front in that first lawsuit.
* Litigation is SO expensive, so you better bring everything you have regarding that transaction so we can get everything taken care of relating to the parties who are adversaries litigating against each other.
* They need to air EVERYTHING about that transaction due to **efficiency**.

**Inefficiency of claim preclusion: since you will lose a cause of action unless you use it,** you are going to USE it.

* You may not have used it otherwise.
* If you know you don’t have claim preclusion and can bring duplicative litigation, then you could figure out later if you even *wanted* to sue on another issue.
  + Claim preclusion could actually *INCREASE* the amount of litigation because P’s are going to bring all actions related to the transaction at issue in the lawsuit, *just in case.*
    - Same point is true of expanded issue preclusion - You are going to fight more about the litigation of a particular issue if you know that the determination of the issue is going to be binding on you in the future. 🡪 aggregate amount of litigation increases

One determination of transaction (between the parties) and then that’s it!

*But what if it’s wrong?* *What if there was an error in that first judgment, then that error is perpetuated because every COA is infected by that error?*

*-* If you had duplicative litigation, the error costs would be less.

Other ways to penalize besides preclusion: courts are emphasizing finality and efficiency WAY more over fairness to the parties.

* Classic malpractice action is that lawyer failed to bring a COA and now it is claim precluded
  + If you would have won, there are damages that are the but- for and proximate cause of the lawyer’s failure to satisfy the duty of care.

Practical Notion coming into play to determine the scope of a claim:

Some considerations: efficiency and overlap of evidence

Like the compulsory counter claim rule

But also need a more formalist view that puts people on notice that you have GOT to bring this COA; transactional standard is easier than to figure out than if there is evidentiary overlap between the two causes of action.

There are lots of other considerations that come into play.

Restatement (2d) Judgments

***What factual grouping constitutes a transaction:***

Ex) MSG buys something and pays with promissory notes, each for 1000 k. You sue on only one of those promissory notes.

*Would that preclude you from collecting on the other three promissory notes? NO, even though you could say that this was all the same transaction – why did MSG give you 4 separate promissory notes? – meant to be able to be redeemed separately*

🡪That is the practical and fact intensive stuff that comes into effect for claim preclusion.

* **Rule**: When in doubt include a cause of action, and if courts says that it doesn’t have to be brought, you have a **court’s determination** that you didn’t need to bring it, so 2nd court later won’t say “you should have brought that before”.

Transactional test for claim preclusion is the same as the test for the compulsory counterclaim rule

It would be odd if P did not have as much of an obligation to bring COA against the D as the D had to bring against the P

* claim preclusion cases help show the scope of the compulsory counterclaim rule.

Whenever you are suing, even in a counterclaim, crossclaim, etc. you are subject to the law of claim preclusion.

Ex) Janie impleads a joint tortfeasor, who does not have an obligation to join an action against P.

But if he does, claim preclusion applies – must bring all causes of action concerning the same transaction

Whenever a cause of action is brought in whatever form, once you have chosen to make an adversarial relationship, claim preclusion will attach.

**Williamson**: *did this involve the same claim?*

* One was Sherman Act and one was Clayton Act
* One alleged conspiracy and the other an individual actor

Evidence would be different to some extent

*enough to say different transactions and claim preclusion does not imply?*

In both he lost his business because defendant (whether in concert with others or not) took it over and ran it into the ground. *Not different enough to make them different claims.*

**Sherman Act**: P sues one D and loses and then tries to sue the other D.

Not claim precluded – otherwise would be like introducing compulsory joinder rule saying that basically the other co-conspirator MUST be made a party or else you lose your ability to sue him in the future.

* there is no rule that requires him to be joined, and so it is really a different transaction.
  + NJ used to have a rule that you had to bring ALL parties to the table or else suits against them are barred (unless you could not get jurisdiction over them)
* Simply because you have different people involved in the same transaction does not mean that any action you might bring against one of those people is part of the same claim.
  + Can sue one, then another, then another.
  + But if P sued one and lost and then sued another 🡪 still has another hurdle: Issue preclusion.
    - This would be non-mutual – we will discuss later

**Hypo:** P and D have 2-year oral lease under which P rents D an apartment.   
  
D is in the apartment for a while and does not pay.   
  
P sues under the lease.   
  
The court holds that the lease is invalid because of the statute of frauds.  
  
P sues again to get the fair value of the apartment during the time that D lived in it.   
  
*Barred by claim preclusion?*

**ANSWER:**

First cause of action is a contract action 🡪 failed because no contract.

Now P is asking for an equity action – *is he barred from claim preclusion?*

Under the federal approach – yes.

* At the time NY law allowed action at law and then an equity action.
* Only subsequently that NY adopted this more expansive view of claim.

**Smith v. Kirkpatrick (NY 1953)**

P’s landlord sets up a rendering plan next to P’s apartment building.    
  
The smell is so bad that P moves out of his apartment and sues for a declaratory judgment in New York state court that he does not have to pay the rent because of constructive eviction.   
  
P loses.   
  
P subsequently brings a simple nuisance action against D*.   
  
Barred by claim preclusion?*

**ANSWER:**

Barred by claim preclusion, at least concerning the same smells.

* All the other smells that happen during the lawsuit and into the beginning of the second one may be “new smells”
* Suits on old smells are barred from preclusion.

If in state court, and litigating and it comes to a judgment, then when preclusion is brought up in another court system must look to law of the first state on preclusion and the scope of a claim,

**Sutcliffe Storage, Warehouse Co v. US**.:

1. P files four actions in federal court in MA for $10K each; wanted to stay in federal court in MA. If for more than 10K would have to bring in Court of Claims in DC
   1. Gov’t makes motion to dismiss for claim splitting (or prior action pending)
   2. govt is nice to him – at the time, could have waited for one to come to a judgment and used claim preclusion on the rest

**Claim Splitting Defense:**

1. *Aren’t these actually different transactions?* 
   1. They concern different renewals of the lease
   2. BUT – action was not for not paying under lease but for using land outside the scope of the lease.
   3. And even if the actions were for different renewals of the lease, still the same transaction – must ask for the totality due under a running account

* If you had an account with a card company, leases that are continuing, you have to sue for ALL of a running account up to the time of filing or else you lose it.
* So even if this had been a suit for non-payment of a number of renewals of a lease, it would not matter b/c would all have to be brought or else all would be lost.

Hypo:

1. Imagine leasing property to someone on two sides of the state and the renter is not paying on either of them –
   1. Would you have to sue concerning both of those properties or one and then the other?
   2. Not necessarily
      1. Not true that you have to bring **all** claims of debt against a D that you have against them.
         1. It is narrower than that. *We are talking about running accounts.*
   3. Would matter if it was two properties were covered in the same lease?

**Commercial Box & Lumber Co. Uniroyal Inc.  
  
(5th Cir. 1980)**

1. 1st action about cost of extra performance for changing delivery location.
   1. P suing D for added costs having to ship – increased cost of performance and wanted compensation
2. 2nd action claims breach of contract for improper discounts – underpayment
   1. In the original contract, the D and P said that within 10 days of receiving the boxes, prompt payment meant less payment.
   2. P was suing on underpayment
3. Conclusion on Claim Preclusion: appeals court said that CP did not apply.
   1. *Does that make sense?*
      1. Some of underpayment occurred after the first lawsuit.
         1. Here claim preclusion does not apply.
      2. But what about underpayments for the very same deliveries they claimed were too costly to perform.
      3. This seems to be the same transaction
   2. Real reason claim preclusion did not apply
      1. Footnote 2: this sounds a lot like acquiescence in claim splitting.
      2. Footnote 2  
         Commercial Box filed suit only on the labor losses it incurred related to the change in destination. The owner and general manager of Commercial Box, Robert Torrans, stated in his deposition that the fact that the first suit was confined to the issue of increased labor and lumber costs was due to representations by Uniroyal that if claims were made solely on those issues, there would be more likelihood of payment. When Uniroyal did not pay, Torrans believed that the prior law suit had better chances of success if it was confined to those issues. In light of such alleged representations by Uniroyal and since Commercial Box was never required to include the present issue in its first complaint, we refuse to accept the district court's finding of a lack of diligence.
4. They were not different transaction or claims; same transaction and CP would normally bar this, but it is the D’s responsibly that we have duplicative litigation.

**Hypo:**

P sues D for breach of contract – the product sent to P was defective.

P asks for damages and gets a judgment.  
  
*May P sue later for the amount that D overcharged P for the product?*  
  
*May D sue P later for P’s failure to pay the full amount under the contract?*

**Answer:**

P is barred from bringing the second suit.

D is also barred by the compulsory counter claim rule.

* All suits on that cause of action have to be brought together. Same transaction.

**Hypo:**

P sues D (a municipality) for employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.

Judgment for P with injunctive relief, but no compensatory damages, since it was held they are not available under Title VII  
- Subsequently the Supreme Court decides that compensatory damages are available against municipalities under 42 USC 1983  
- P sues D under 1983 for compensatory damages for the past employment discrimination.   
- Claim precluded?

**Answer:**

Yes. Change in law, especially in interpretation that makes available a cause of action that was not available before, does not get you out of claim preclusion.

*What if you could escape based on changes on law? –*

-If you start allowing an exception to claim preclusion that opens up too wide a hole in the doctrine of claim preclusion –

S Ct bought this argument. P should have brought it up herself

Not only need to bring all causes of action concerning the transaction but all conceivable causes of action if the law changes because you will lose those ones too!

**Hypo:**

African-American students as a class bring suit against school board for racial discrimination.   
- The court holds that segregated schools are compatible with the 14th Amendment and enters judgment for the defendant.   
- Afterward in Brown v Board of Education, the United States Supreme Court in another action between different parties strikes down as unconstitutional segregated education.   
- The plaintiff class brings a new action.   
*- Claim precluded?*

Could wiggle out of – could say they were not members of the class before.

But even if the same transaction, there are exceptions to claim preclusion

* + - * + If public effects and substantial changes in the law.

Intolerable to have pockets of discrimination because of claim preclusion.

**Rest (2d) Judg 26(f) Exceptions to Splitting a Claim**  
It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

**Hypo**:

P sues D for mild asbestosis caused by asbestos exposure.

P receives damages.

Years later, he develops deadly mesothelioma, a cancer caused by asbestos.

P sues D for this harm.

Claim precluded?

SOL: could be that the statute of limitations clock starts with first harm as a result of the exposure. The first bit of harm was small and the cancer came later.

*What about claim preclusion?*

This is fair? : Small damages v Huge damages.

Law is unsettled here

Some courts hold that claim preclusion applies

especially if the state allows us to sue for the chance of harm that you get as a result of the asbestos. If you don’t bring that action, then you lose it.

But even some who do not allow actions for chance of harm hold claim precluded

Others make exception to claim preclusion