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# ALTERNATIVE GROUNDS IN COLLATERAL ESTOPPEL

## I. INTRODUCTION

The basic principles underlying *res judicata* and collateral estoppel are the policies of promoting finality and stability of judgments and ending vexatious and wasteful litigation. Prohibiting a losing party from relitigating a claim or issue gives all concerned parties a definitive judgment which is not subject to the vicissitudes of subsequent litigation, and avoids wasting the resources of the courts and of the parties on redundant litigation.<sup>1</sup> The doctrine of *res judicata* prohibits a party from relitigating the same claim in a subsequent suit on the same cause of action, while collateral estoppel, also called issue preclusion, prohibits a party from retrying a previously tried issue in a subsequent suit on a different cause of action.<sup>2</sup>

Originally the scope of *res judicata* and collateral estoppel was limited by the concept of mutuality: both the party asserting the estoppel and the party estopped had to have been parties or privies to the first action.<sup>3</sup> With the demise of the mutuality requirement in California<sup>4</sup> and in other states,<sup>5</sup> as well as in the federal court system,<sup>6</sup> strangers to the first action could invoke collateral estoppel against a party or privy to the first suit. While this practice was initially restricted to the "defensive" assertion of collateral estoppel where a defendant as-

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1. "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (footnote omitted).

The social policies which underlie the barring of subsequent litigation on a previously tried and finalized issue are based on considerations which seek the most reasonably efficient and economic use of judicial resources as well as the desire to promote peace and tranquility in the minds of those who might otherwise suffer due to the fear of constantly recurring litigation.

*De Weese v. Unick*, 102 Cal. App. 3d 100, 105, 162 Cal. Rptr. 259, 262 (1980). See, e.g., RESTATEMENT OF JUDGMENTS § 1 (1942).

2. *Parklane*, 439 U.S. at 326 n.5 and cases therein; *Sutphin v. Speik*, 15 Cal. 2d 195, 201-02, 99 P.2d 652, 655 (1940).

3. *Bernhard v. Bank of America, Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942).

4. *Id.* at 813.

5. See, e.g., cases collected in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 322 n.9, 326 n.14 (1971).

6. *Id.* at 324.

serts the prior action against a plaintiff who was a party to that action,<sup>7</sup> both California and the federal courts now allow the "offensive" use of collateral estoppel where a plaintiff asserts an estoppel against a defendant who was a party to the prior action.<sup>8</sup> These developments significantly increased the range of application of collateral estoppel and res judicata.<sup>9</sup>

The expanding scope of res judicata and collateral estoppel is limited, however, by considerations of fairness to the party estopped.<sup>10</sup> Thus, the estopped party must have been a party or privy to the first action.<sup>11</sup> Furthermore, courts will not generally grant estoppel to an issue which was unimportant or irrelevant to the prior action,<sup>12</sup> or which appeared in the context of a suit which was entirely different or of little importance,<sup>13</sup> because it would be unfair to hold a party to a determination on an issue which he had had little incentive to litigate vigorously. Similarly, estoppel is generally not given to an issue when the losing party lacked certain procedural opportunities, although this is not a per se rule.<sup>14</sup>

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7. *Parklane*, 439 U.S. at 331; *R.E. Spriggs Co. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 429-31, 156 Cal. Rptr. 738, 743-45 (1979), *cert. denied*, 444 U.S. 1076 (1980).

8. *See, e.g., Parklane*, 439 U.S. at 330-31; *Bernhard*, 19 Cal. 2d at 811, 122 P.2d at 894.

9. In *Spriggs*, for example, the court gave preclusive effect to two prior judgments in an action by a stranger to both of them. In the first and second actions, Coors had been adjudged liable for imposing a price fixing scheme on its distributors. 94 Cal. App. 3d at 427-28, 156 Cal. Rptr. at 742-43. In the third action, another distributor who had not been a party to either of the first two suits was able to preclude Coors from relitigating the finding that its distributor policies amounted to price fixing. *Id.* at 429-32, 156 Cal. Rptr. at 743-45.

10. The court in *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981), declared that "the traditional arguments concerning the unfairness of offensive collateral estoppel are bolstered when the estoppel used is an alternative ground." *Id.* at 1170; *see also id.* nn.8-9.

11. *See Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 894. The question of who is bound by a judgment has many facets. Generally, any person who had or later acquired an interest in the subject of the litigation, or who participated in or controlled the litigation, is bound by a judgment thereon. *See* CAL. CIV. PROC. CODE § 1908 (West 1980). The determination of "privity" is frequently little more than a conclusion that collateral estoppel will apply in a given case. *See Lynch v. Glass*, 44 Cal. App. 3d 943, 947, 119 Cal. Rptr. 139, 141 (1975).

12. *See Natural Soda Prods. Co. v. Los Angeles*, 109 Cal. App. 2d 440, 445, 240 P.2d 993 (1952); RESTATEMENT OF JUDGMENTS § 8 comment o (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

13. This was the problem that concerned Judge Learned Hand in the well known case of *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). Judge Hand observed that the scope of application of collateral estoppel must be limited or "[d]efeated in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train." *Id.* at 929. This is especially so now that strangers to the first action may assert collateral estoppel.

14. *See, e.g., Sanderson v. Niemann*, 17 Cal. 2d 563, 110 P.2d 1025 (1941) (no collateral estoppel effect given to unappealed small claims judgment). *But cf. Parkland*, 439 U.S. at 333-37 (lack of jury trial in first action not sufficient to defeat estoppel).

When the judgment in the first suit is based on alternative grounds, however, the policies underlying collateral estoppel and the requirement of fairness to the losing party come into conflict. This type of judgment occurs whenever more than one claim or defense is put at issue, and the trier of fact decides in favor of one party on more than one of the claims or defenses.<sup>15</sup> The Restatement (Second) of Judgments provides a good illustration of multiple grounds.<sup>16</sup> Suppose A sues B for an installment of interest on a promissory note executed by B. B sets up two defenses: (1) that he executed the note in reliance on A's fraud; and (2) that, in any event, A gave him a binding release from the obligation to pay interest. (The abbreviations "S-1" and "S-2" will be used throughout the Comment to refer to the first suit and the second suit, respectively.) The court in the first action (S-1), sitting without a jury, finds for B on both defenses, and gives judgment to B. If A then sues B for the principal of the note (S-2), the question arises whether B may preclude A from relitigating the issue of fraud which was decided adversely to A in the first action. The need for finality and conservation of the resources of the litigants and the courts suggests that A should not be allowed to relitigate the fraud issue, because there has already been a judgment on the merits on that issue. The requirement of fairness to the losing party in the first suit,<sup>17</sup> however, may suggest the opposite result.

First, neither of the grounds is, strictly speaking, necessary to the judgment, because the judgment could always be rested on the other ground.<sup>18</sup> A judgment based on alternative grounds, it is argued, thus carries with it the possibility of less careful decision of one or both grounds, because the decisionmaker is aware that the judgment can always be rested on the other ground.<sup>19</sup> There is also the possibility, although none of the commentators have seriously considered it, that neither alternative ground would be capable of supporting the judgment alone, because the decisionmaker felt that the cumulative impact of both grounds was sufficient to sustain the judgment.

The losing party in a judgment based on alternative grounds might also have been denied a procedural right in that he may not have had a meaningful opportunity to appeal an erroneous ground, because the

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15. See Scott, *Collateral Estoppel By Judgment*, 56 HARV. L. REV. 1, 10 (1942).

16. This example is taken directly from the RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i, illustrations 15 and 16 (1982).

17. See *supra* text accompanying notes 10-14.

18. See, e.g., RESTATEMENT OF JUDGMENTS § 68 comment n (1942).

19. See *Halpern v. Schwartz*, 426 F.2d 102, 105 (2d Cir. 1970); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

judgment would probably have been affirmed on the other ground.<sup>20</sup> This result would leave the appellant with an edited opinion, a lost case, and increased costs. Furthermore, the appellate court is likely to review a judgment based on alternative grounds less carefully than it would a judgment based on a single ground because it is aware of the other ground on which the judgment may be sustained.<sup>21</sup> The losing party thus has an unpleasant choice: he must either mount an appeal which will not change the result in the first action for the sole purpose of avoiding the collateral effects of the erroneous ground, or accept the preclusive effects of an erroneous ground.

This conflict has produced two opposite rules: the first rule (the old rule) was adopted by the Restatement of Judgments<sup>22</sup> and is the rule in the California courts;<sup>23</sup> the second rule (the new rule) has been propounded principally by the Restatement (Second) of Judgments,<sup>24</sup> based on *Halpern v. Schwartz*,<sup>25</sup> a 1970 New York case. The old rule gives preclusive effect to both alternative grounds for a judgment, while the new rule gives preclusive effect to neither.<sup>26</sup> The conflict between the two rules is limited, however, to true alternative grounds which have not been affirmed on appeal. If one or both of the alternative grounds has been affirmed on appeal, the new rule permits the estoppel.<sup>27</sup> In addition to the exception regarding a ground affirmed on ap-

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20. *Id.*

21. *Id.*

22. RESTATEMENT OF JUDGMENTS § 68 comment o (1942).

23. *Wall v. Donovan*, 113 Cal. App. 3d 122, 125-26, 169 Cal. Rptr. 644, 646, *appeal dismissed*, 451 U.S. 978 (1980).

24. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

25. 426 F.2d 102 (2d Cir. 1970).

26. The RESTATEMENT OF JUDGMENTS (1942) also allowed estoppel based on an alternative procedural ground. RESTATEMENT OF JUDGMENTS § 49 (1942). The RESTATEMENT (SECOND) has no comparable rule for procedural grounds because it denies estoppel to all alternative grounds. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

A resolution of this conflict that is both simple to apply and consistent with traditional collateral estoppel doctrine treats an alternative procedural ground in exactly the same way as grounds on the merits are treated: if the procedural ground is capable of supporting the judgment by itself, and is "on the merits" for purposes of res judicata, then it is the functional equivalent of an alternative ground on the merits. *See Kahn v. Kahn*, 68 Cal. App. 3d 372, 380-83, 137 Cal. Rptr. 332, 336-38 (1977) (determination of whether procedural ground is "on the merits" by reference to CAL. CIV. PROC. CODE §§ 581-83 (West 1976)).

27. *See* RESTATEMENT OF JUDGMENTS § 69 (1942) and RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment o (1982).

If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. In contrast to the case discussed in comment *i*, the losing party has

peal, the new rule excludes from its purview cases where there are alternative bases for a single determination which is essential to the judgment (as distinguished from cases where there are alternative grounds for the judgment).<sup>28</sup> Finally, both rules are inapplicable where both grounds are strictly necessary to the judgment, or where one

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here obtained an appellate decision on the issue, and thus the balance weighs in favor of preclusion.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment o (1982). *See Ezagui v. Dow Chemical Corp.*, 598 F.2d 727 (2d Cir. 1979) (alternative ground affirmed on appeal is a proper subject of offensive estoppel).

Where the appellate court relies only on one ground, that ground only is given preclusive effect. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment o (1982); RESTATEMENT OF JUDGMENTS § 68 comment o (1942). Unlike both Restatements, however, *McLaughlin* suggests that an affirmance on one ground or a general affirmance would give preclusive effect to both grounds, 40 Cal. App. 2d at 628-29, 105 P.2d at 612; the wording of the pertinent comments in both Restatements suggests that only an express affirmance is sufficient. If an unappealed alternative ground is to be given preclusive effect, it is hard to see why that effect should be dissipated by anything short of explicit rejection on appeal. *See infra* note 38.

28. The examples in the RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i, illustrations 15 and 16 (1982), provide good illustrations of this distinction. A sues B for an installment of interest on a note executed by B in favor of A. B defends by asserting that he executed the note in reliance on A's fraud; and that, in any case, A gave him a binding release from the obligation to pay interest. The judge, sitting without a jury, finds that A defrauded B and that A gave B a binding release from the obligation to pay interest. If A now sues on a subsequent installment of interest, the judgment in the first suit operates as a complete defense, since the judgment in the first suit necessarily decided the issue of whether B owed A any interest, even though that single determination rests on alternative bases. If, however, A sued B for the principal of the note, the new rule would require the issue of fraud to be relitigated if B chose to raise it, because the determination of fraud is but one of two alternative grounds. Under the old rule, the determination of fraud in the first action would preclude A from suing on the principal. *See* RESTATEMENT OF JUDGMENTS § 68 comment n (1942).

Another way of phrasing this distinction might be to say that under the new rule, B can use the judgment as a whole for an estoppel, since it constitutes the adjudication of a single issue—the non-existence of a duty to pay interest—but he cannot use any of the judgment's constituent, alternative parts as an estoppel. The use of the entire judgment to defeat the second identical claim closely resembles the operation of *res judicata* as a bar to a second suit on the same cause of action, as compared with the use of the fraud ground as collateral estoppel in a suit based on a different cause of action.

The court in *Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp.*, 515 F.2d 964 (3d Cir.), *cert. denied*, 423 U.S. 876 (1975), distinguished *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970), reasoning that in *Halpern* the plaintiff in S-2 was asserting only one of three independent grounds, *see infra* notes 66-81 and accompanying text, whereas:

By contrast, in the case here, all the grounds of the very core of the first decision, that is the invalidity of the . . . patent, are urged for collateral estoppel purposes . . . . No suggestion was made in *Blonder-Tongue* [402 U.S. 313 (1971)] that a holding of patent invalidity predicated on several grounds was entitled to less collateral estoppel weight than a patent held invalid for but one reason.

515 F.2d at 980 n.74.

ground is completely unnecessary to the judgment.<sup>29</sup>

This Comment will explore both the old rule that allows estoppel for alternative grounds and the new rule that denies it, and suggest that the old rule is the better of the two, not only in the context of California law but also in the body of collateral estoppel doctrine as a whole. The principal criticisms of the old rule are that it may lead to less careful decisions on the fact finding level and that it may deny a losing party a meaningful opportunity to appeal. As will be explained subsequently, the new rule eliminates these problems but substitutes more serious deficiencies. The new rule suffers from a rigidity which is unfair to parties who win the first action, inconsistent with the flexible ad hoc approach of the main body of collateral estoppel doctrine, and contrary to the policies which underlie collateral estoppel.

This Comment will trace first the development of the old rule in California and then the rise of the new rule and its subsequent virtual abandonment. The Comment will then address the major criticisms of the old rule—that it may lead to less careful decisions at the fact finding level and that it may deny losing parties a meaningful opportunity to appeal—and the even more serious problems created by the new rule.

## II. THE DEVELOPMENT OF THE TWO RULES FOR ALTERNATIVE GROUND COLLATERAL ESTOPPEL

### A. *Development of the Old Rule in California*

*Bank of America v. McLaughlin Land and Livestock Co.*<sup>30</sup> is generally considered to mark the origins of the old rule in California.<sup>31</sup> *McLaughlin* represented the culmination of eight years of litigation, during which plaintiff Bank of America made repeated attempts to re-

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29. These two categories of judgments superficially resemble true alternative grounds, but should be distinguished. For example, where A sues B for interest on a promissory note and B sets up defenses of fraud and a binding release from the obligation to pay interest, a judgment for A requires finding for A on both issues because both are strictly necessary to the judgment.

On the other hand, suppose the court had found for A on the fraud issue (finding that there was no fraud) but had found for B on the binding release issue, and therefore gave judgment to B. The finding of no fraud is not an alternative ground; i.e., the judgment for B could not rest on it. It is in fact unnecessary and immaterial to the judgment, and no estoppel will attach to it. See Scott, *supra* note 15, at 10; RESTATEMENT OF JUDGMENTS § 68 comment o, illustration 9 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h, illustration 13 (1982).

30. 40 Cal. App. 2d 620, 105 P.2d 607 (1940).

31. See *Wall v. Donovan*, 113 Cal. App. 3d 122, 126, 169 Cal. Rptr. 644, 646 (1980), *appeal dismissed*, 451 U.S. 978 (1981).

cover possession of a piece of property on which defendant McLaughlin had executed a note in favor of the bank.<sup>32</sup> After McLaughlin defaulted on the note, Bank of America commenced a series of unlawful detainer actions, to which McLaughlin responded with a number of adroit parries, including declaration of bankruptcy.<sup>33</sup> The bankruptcy action and the final unlawful detainer action shall be called S-1 (the first suit) and S-2 (the second suit), respectively, for the sake of simplicity.<sup>34</sup>

In S-1, the federal bankruptcy action, McLaughlin tendered two issues for decision: that McLaughlin was a "farmer" under the terms of the Bankruptcy Act;<sup>35</sup> and that it was the owner of the property in question.<sup>36</sup> The bankruptcy court decided both issues adversely to McLaughlin.<sup>37</sup> The latter appealed, and the judgment was affirmed solely on the ground that the company lacked the status of "farmer."<sup>38</sup>

In S-2, the final unlawful detainer action, Bank of America sought to assert as an estoppel the federal court determination that McLaughlin did not own the land.<sup>39</sup> McLaughlin argued that once the federal court had decided that McLaughlin was not a "farmer," it had no jurisdiction to proceed further because jurisdiction was based on that status.<sup>40</sup> Both the trial court and the court of appeal allowed the estoppel, however.<sup>41</sup> The court of appeal explained that the bankruptcy court properly considered both matters as jurisdictional questions,<sup>42</sup> and that the state courts were bound to give full faith and credit to that court's decision.<sup>43</sup> Because the denial of the relief sought in bankruptcy court could have rested on either the determination that the company was not a "farmer" or the determination that McLaughlin did not own the land, neither ground was strictly necessary to the decision. The Cali-

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32. 40 Cal. App. 2d at 623, 105 P.2d at 609-10.

33. *Id.* at 623-24, 105 P.2d at 609-10.

34. The issues decided in the other actions were not raised as possible subjects for estoppel.

35. *Id.* at 625, 105 P.2d at 610. McLaughlin had sought relief available only to farmers under the Bankruptcy Act. *Id.* at 625-26, 105 P.2d at 610-11.

36. *Id.*

37. *Id.*

38. *Id.* The court considered that this affirmance extended to both grounds, and this rule has continued to be followed. See *Markoff v. New York Life Ins. Co.*, 530 F.2d 841 (9th Cir. 1976) (construing Nevada law as following *McLaughlin* and giving collateral estoppel effect to an unaffirmed alternative ground).

39. 40 Cal. App. 2d at 625-26, 105 P.2d at 610-11.

40. *Id.* at 626, 105 P.2d at 611; see *supra* note 35.

41. *Id.* at 629-30, 105 P.2d at 613.

42. *Id.* at 626-27, 105 P.2d at 611.

43. *Id.*



fornia courts nonetheless gave preclusive effect to the second of the two alternative grounds. The California Court of Appeal observed that the two issues had been presented for determination by *McLaughlin*,<sup>44</sup> and articulated the rationale of the old rule: "If the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled, in the same degree as if it were the sole issue in the case."<sup>45</sup>

The *McLaughlin* position is in accord with the Restatement of Judgments (1942), the final draft of which was published two years after the decision in *McLaughlin*.<sup>46</sup> The Restatement view, set forth in section 68, comment n, is as follows: "Where the judgment is based upon matters litigated as alternative grounds, the judgment is determinative on both grounds, although either ground would have been sufficient to support the judgment."<sup>47</sup>

Although the *McLaughlin* court considered that estoppel would apply to an unappealed alternative ground,<sup>48</sup> the judgment in S-1 was affirmed on appeal on the sole ground that *McLaughlin* was not a farmer; the ownership of the land was not discussed.<sup>49</sup> The court held that the affirmance was sufficient to maintain the preclusive effect of the ground not discussed on appeal.<sup>50</sup>

The court of appeal in *Evans v. Horton*<sup>51</sup> further refined the *McLaughlin* rule by applying the rule to an unappealed alternative ground<sup>52</sup> and by suggesting that the rule would apply only to alterna-

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44. *Id.* at 627, 105 P.2d at 612 (citing *In re Weiss*, 10 F. Supp. 227, 229 (1935)), which held that a bankruptcy court may properly decide both of these issues as jurisdictional questions:

The parties agreed to argue only the jurisdictional question whether or not the debtor is a farmer within the meaning of section 75(r) of the Bankruptcy Act [citation omitted]; but as the other question, to-wit, whether or not the court has jurisdiction of the property sought to be reclaimed by the petitioner herein, is also jurisdictional and as the federal court must notice facts which point to lack of jurisdiction, both questions should be here passed upon.

10 F. Supp. at 229.

45. 40 Cal. App. 2d at 628, 105 P.2d at 612 (citing 34 Cal. Jur. 922). To return for a moment to A and B and their hypothetical suit, A (the Bank) was trying in S-2 to use a single ground in a subsequent suit on a different cause of action, which the old rule permits but the new rule does not. See *supra* text accompanying note 16.

46. RESTATEMENT OF JUDGMENTS § 68 comment n (1942).

47. *Id.*

48. See *supra* note 36 and accompanying text.

49. 40 Cal. App. 2d at 625, 105 P.2d at 611.

50. *Id.* at 628-29, 105 P.2d at 612. Both Restatements deny preclusive effect to a ground not considered on appeal. RESTATEMENT OF JUDGMENTS § 69 comment b (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment o (1982).

51. 115 Cal. App. 2d 281, 251 P.2d 1013 (1953).

52. *Id.* at 286, 251 P.2d at 1016.

tive grounds that were material to the decision in S-1.<sup>53</sup> In S-1, plaintiff Evans attempted to rescind an investment contract, claiming that he had been induced to enter the contract by Horton's fraudulent investment offer.<sup>54</sup> The trial court found for the defendant, concluding that Evans had not taken all necessary steps for rescission, and that there had been no fraud.<sup>55</sup>

In S-2, Evans sought damages for fraud, based on the same alleged fraudulent behavior by Horton.<sup>56</sup> The latter argued that the finding of no fraud in S-1 was *res judicata* and barred any further action for fraud, while Evans argued that the second finding of no fraud was mere surplusage, and not *res judicata*.<sup>57</sup> The trial court held that the action was barred,<sup>58</sup> and the court of appeal affirmed on this point,<sup>59</sup> reasoning that:

The question of fraud . . . was not immaterial to the decisions in the prior rescission suits, nor was it only incidentally cognizable nor only collaterally in question. It was tendered and accepted by the pleadings; it went to the merits of the suits; it was litigated; expressly decided; and is *res judicata*.<sup>60</sup>

California has consistently followed the old rule, from *McLaughlin* through *Evans* to the recent case of *Wall v. Donovan*,<sup>61</sup> which expressly reaffirmed both the Restatement of Judgments (1942) position and the rule in *McLaughlin* and *Evans*.<sup>62</sup>

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53. *Id.* at 286, 251 P.2d at 1016-17.

54. *Id.* at 283, 251 P.2d at 1014-15.

55. *Id.* at 285, 251 P.2d at 1016.

56. *Id.* at 283-84, 251 P.2d at 1015.

57. *Id.* at 285, 251 P.2d at 1015.

58. *Id.* at 284, 251 P.2d at 1015.

59. *Id.* at 286, 251 P.2d at 1016.

60. *Id.*

61. 113 Cal. App. 3d 122, 169 Cal. Rptr. 644 (1980), *appeal dismissed*, 451 U.S. 978 (1981).

62. The collateral estoppel issue in *Wall* arose in the context of a malpractice action against an attorney who had represented a husband in a divorce action. In the malpractice action, which may be labelled S-3, the husband alleged that the attorney had committed malpractice by failing to raise in S-1 (the original dissolution proceeding) the issue of the husband's domicile, which resulted in the characterization of the husband's military pension as community property, subject to division. *Id.* at 125, 169 Cal. Rptr. at 645-46. The attorney had withdrawn as attorney of record after the original dissolution proceeding, *id.* at 124, 169 Cal. Rptr. at 645, and six months later the husband filed a motion (in S-2) to set aside the division of property on the grounds that he had never been a resident of California, *id.* at 124-25, 169 Cal. Rptr. at 645.

The court in S-2 concluded that:

(1) the motion was not timely filed as nine months had elapsed after entry of the interlocutory decree; (2) even if the husband were entitled to relief, there was no reasonable likelihood that he could prevail as at all times relevant he had been

### B. *Development of the New Rule*

While the old rule was developing in California, dissatisfaction with some aspects of it was being voiced elsewhere. The critics of the old rule focused on two problems arising from its application. First, the existence of an alternative ground on which to rest the judgment raises the possibility that a decisionmaker may rule less carefully on one of the two alternative grounds.<sup>63</sup> The second major criticism of the old rule is that it deprives the losing party of a meaningful opportunity to appeal an erroneous decision on one ground, since the judgment will probably be affirmed on the other, and since the appellate review is likely to be influenced by the awareness of an alternative ground for the judgment.<sup>64</sup> These criticisms led to the development of the new rule, which denies preclusive effect to both alternative grounds for a judgment.<sup>65</sup>

The Second Circuit Court of Appeals raised both these criticisms of the old rule in *Halpern v. Schwartz*,<sup>66</sup> the 1970 case which marked the genesis of the new rule. The facts in *Halpern* were as follows: Joseph and Evelyn Halpern and their son, David, formed a construction corporation, of which Joseph owned most of the shares. The company borrowed a substantial amount of money from Chase Manhattan Bank, secured by all three in their individual capacities. The company encountered severe financial difficulties and Joseph and Evelyn at-

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domiciled in California, and his Air Force benefits were properly characterized and divided as community property or quasi-community property; (3) even if the husband was not domiciled in California, he was estopped from contesting the issue as he originally failed to raise the issue in his response requesting dissolution, and he also had invoked the jurisdiction of the California court in the dissolution proceedings.

*Id.* at 125, 169 Cal. Rptr. at 646.

The attorney defended the S-3 malpractice action by arguing in a motion for summary judgment that the husband was collaterally estopped by the determination of his domicile in S-2, while the husband argued that the alternative findings in S-2 were inconsistent and could not operate as estoppel. *Id.* at 125-26, 169 Cal. Rptr. at 646. The trial court in S-3 rejected the husband's argument and the court of appeal affirmed, citing the RESTATEMENT OF JUDGMENTS (1942) rule, as well as *McLaughlin* and *Evans*. 113 Cal. App. 3d at 126, 169 Cal. Rptr. at 646.

63. See *supra* text accompanying note 19.

64. See *supra* text accompanying notes 20-21.

65. See *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 845 (1952). The RESTATEMENT (SECOND) OF JUDGMENTS states the rule: "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

66. 426 F.2d 102 (2d Cir. 1970).

tempted to minimize David's liability for the \$100,000 remaining on the note by transferring to him a mortgage and bond with \$80,000.<sup>67</sup>

Chase responded by filing petitions of involuntary bankruptcy against Joseph and Evelyn, charging that they had fraudulently conveyed assets with intent to hinder creditors, and that they had preferred some creditors over others in the same class, both of which are acts of bankruptcy.<sup>68</sup> The trial court declared each spouse a bankrupt and found that:

the assignment to David of the mortgage and bond was an act of bankruptcy on three statutory grounds: (1) it was a removal of property with intent to hinder and delay creditors under section 3a(1) of the [Bankruptcy] Act; (2) it was a transfer of property under section 3a(1), fraudulent as to creditors as defined in section 67 of the Act, [citation omitted]; and (3) it was a preferential transfer of property under section 3a(2) as defined in section 60 of the Act [citation omitted].<sup>69</sup>

The judgment was affirmed without opinion.<sup>70</sup>

In S-2 the trustee in bankruptcy opposed Evelyn's discharge from bankruptcy on the ground that she had transferred the mortgage and bond with intent to hinder, delay, or defraud her creditors.<sup>71</sup> The bankruptcy referee granted the trustee's motion for summary judgment on the ground that Evelyn was precluded from relitigating the issue of intent which had been decided adversely to her in the second of the three findings in S-1;<sup>72</sup> the district court affirmed.<sup>73</sup> The court of appeals reversed the judgment, holding that on these facts no estoppel would be given to any of the three alternative grounds for the first judgment.<sup>74</sup>

The Second Circuit determined that the intent issue had not been conclusively established in S-1, the bankruptcy action, because either of the other two grounds could have supported the finding of an act of

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67. *Id.* at 103.

68. *Id.*

69. *Id.*

70. *Id.* David and Evelyn took up joint appeals, arguing that there had not been adequate proof of the assignment, but not disputing the characterization of the assignment. *Id.*

71. *Id.* at 103-04. The Bankruptcy Act, § 14c(4), 11 U.S.C. § 32(c)(4) (current version at 11 U.S.C. § 727(a)(2) (Supp. V 1981)), provided that: "The court shall grant the discharge unless satisfied that the bankrupt has . . . (4) . . . transferred, removed, destroyed, or concealed . . . any of his property, with the intention to hinder, delay, or defraud his creditors . . . ."

72. 476 F.2d at 104. See *supra* text accompanying note 69.

73. *Id.*

74. *Id.* at 108.

bankruptcy.<sup>75</sup> The court explained that the rationale for denying collateral estoppel effect to issues which are incidental, collateral, or immaterial to the prior judgment is based on the likelihood that the non-essential issue "may not have been afforded the careful deliberation and analysis normally applied to essential issues, since a different disposition of the inessential issue would not affect the judgment."<sup>76</sup> Furthermore, the losing party would probably be unable to appeal an inessential ground because the appeal would likely be dismissed as frivolous and because the losing party might be unable to foresee the context in which the issue would later become important.<sup>77</sup>

Applying this analysis in the alternative ground context presented by *Halpern*, the court reasoned that the judge in S-1 may have decided the intent issue with less care because the judgment could always be rested on the third ground, that the transfer was a preferential one.<sup>78</sup> The court also considered that there would not be "vigorous review" of an error asserted as to one ground, since the judgment would be affirmed on the other ground.<sup>79</sup>

The American Law Institute seized on the broader implications of the limited holding in *Halpern* to fashion Restatement (Second) of Judgments section 27, a rule applicable to *all* alternative ground cases. The resulting new rule states: "If a judgment of a court of first instance is based on determinations of two issues, either of which standing alone would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."<sup>80</sup> The Restatement (Sec-

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75. *Id.* at 104.

76. *Id.* at 105.

77. *Id.* at 105-06.

78. *Id.* at 105. See *supra* text accompanying note 69.

79. *Id.* This was not a case, however, where the losing party was dissuaded from appealing because of the probability of affirmance on another ground; in fact, Evelyn did appeal on the ground that there had been no assignment at all, but did not attack any of the three alternative grounds. *Id.* at 103. See *supra* note 70. But see *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1169 n.7 (5th Cir. 1981) (arguing that appeal in *Halpern* was without opinion, and therefore not dispositive, and that appeal of individual alternative grounds would have been meaningless). *Halpern* thus seems an odd vehicle for propounding a general rule based in part on the lack of opportunity to appeal.

The argument for the new rule, notwithstanding the appeal in *Halpern*, is that appeals of alternative grounds will not generally be undertaken, and if they are undertaken, will not be properly argued, since the winning party will simply emphasize the alternative grounds for affirmance. 426 F.2d at 105. This is especially so if the winning party is not likely to be a party to future litigation on the same issues, and therefore is unconcerned with preserving all of the alternative grounds for future collateral use. The problem of appeals is particularly troublesome in bankruptcy cases, the *Halpern* court noted, because a losing bankrupt will probably be financially handicapped in taking up an appeal. *Id.* at 106.

80. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i and reporter's note.

ond) permits estoppel as to a ground which has been specifically affirmed on appeal.<sup>81</sup>

The decision of the American Law Institute to base a broad rule on *Halpern*, however, was considerably undermined by two subsequent Second Circuit cases, *Williams v. Ward*,<sup>82</sup> and *Winters v. Lavine*.<sup>83</sup> In *Williams*, the Second Circuit reaffirmed the old rule as it had been formulated under New York law in *Kessler v. Armstrong Cork Co.*,<sup>84</sup> a 1907 case, and limited *Halpern* to its facts.<sup>85</sup>

In distinguishing *Halpern*, the *Williams* court emphasized that *Halpern*'s two criticisms of the Restatement (1942) position—that when both grounds were given collateral estoppel effect the first action was likely to be less carefully decided, and that the losing party lacked a meaningful opportunity to appeal—were not present in *Williams*.<sup>86</sup> First, the court was satisfied as to the carefulness of the prior decision by the fact that the trial judge had had the only substantive issue fully briefed and had discussed it at length to his opinion.<sup>87</sup> Second, the *Williams* plaintiff had filed two separate actions in two different federal courts;<sup>88</sup> therefore, the court reasoned, he could fully anticipate the

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81. *Id.* at comment o.

82. 556 F.2d 1143 (2d Cir.), cert. dismissed, 434 U.S. 944 (1977).

83. 574 F.2d 46 (2d Cir. 1978).

84. 158 F. 744 (2d Cir. 1907), cert. denied sub nom. *Sexton v. Armstrong Cork Co.*, 207 U.S. 597 (1908). The *Kessler* court had held that "[b]ecause either ground would have been sufficient without the other, we do not think that one must be held to be obiter dictum." *Id.* at 747.

The *Halpern* court considered that it was not bound by the *Kessler* decision because the *Kessler* court ultimately denied an estoppel because of lack of privity. 426 F.2d at 107 (citing 158 F. at 748-49).

85. 556 F.2d at 1154. The *Williams* court noted that the *Halpern* court had limited its opinion to "the facts before us." *Id.* at 1154 (citing *Halpern*, 426 F.2d at 105).

86. 556 F.2d at 1154.

87. *Id.*

88. In *Williams*, plaintiff filed two separate actions in two different federal courts, in response to denial of parole. *Id.* at 1152. The second action to be filed, a 42 U.S.C. § 1983 action to compel the Board to grant a new hearing, actually proceeded to judgment before the first. *Id.* at 1152-53. The court noted that the question of res judicata is decided by which action is brought to judgment first, not by which action is filed first. *Id.* at 1154 (citing RESTATEMENT OF JUDGMENTS § 43 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 41.1 (Tent. Draft No. 1, 1973)).

In the first action (S-1), plaintiff alleged that the Parole Board had "improperly based its denial of his parole on the seriousness of the crime to which he had pleaded guilty and had wrongly concluded that he had failed to participate sufficiently in the rehabilitative programs of the prison," 556 F.2d at 1152, and that the Board had improperly relied on a report filed by an unnamed prison official which alleged that plaintiff required psychiatric treatment before his release from prison. *Id.* Judgment was had for defendant state officials based on alternative grounds: (1) a procedural ground, that plaintiff had failed to exhaust

barring effect of an adverse decision in either one of them.<sup>89</sup>

The *Williams* court declined to rest its reversal of the S-2 trial court on collateral estoppel because of uncertainties about the alternative ground issue and about the identity of the issues in the two actions.<sup>90</sup> Nevertheless, the *Williams* decision indicated the Second Circuit's reservations about giving the new rule a broad application.

The *Williams* case was cited at length in *Winters v. Lavine*,<sup>91</sup> in which the Second Circuit retreated further from its *Halpern* position in that it actually followed the old rule; it rested its decision on preclusion of plaintiff's claim by an alternative ground of the prior judgment. Without directly overruling *Halpern*, the Second Circuit discredited both of the *Halpern* considerations outside the limited context from which they had been derived.

In *Winters*, plaintiff sought to have the state Medicaid program pay for "medical" treatment by Christian Science "practitioners" and "nurses."<sup>92</sup> She commenced an action (S-1) in New York state court for payment on the "nurse" claim.<sup>93</sup> In S-1, Winters claimed that the state Medicaid statute under which she had been denied benefits violated her first amendment right to free exercise of religion.<sup>94</sup> The court denied her relief on two grounds: (1) that a Christian Science nurse was not a registered nurse within the meaning of the New York Educational Laws; and (2) that plaintiff had not sufficiently demonstrated the nature of her illness or of her treatment.<sup>95</sup>

Winters then commenced an action (S-2) in federal district court pursuant to 42 U.S.C. section 1983, seeking to have social service officials enjoined from refusing to pay her the benefits she sought. Again, she asserted her constitutional right to free exercise of religion.<sup>96</sup> A three-judge district court considered her claim that the Medicaid statute, if interpreted so as to deny her benefits for the "nursing" care, was

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state remedies; and (2) a substantive ground, that the denial of parole was based on facially reasonable grounds. *Id.* at 1153.

89. *Id.* at 1154.

90. *Id.* at 1155.

91. 574 F.2d 46 (2d Cir. 1978).

92. *Id.* at 50.

93. *Id.* at 51. After Winters lost her case in administrative hearings on both the city and the state levels, she sought review in the New York State Supreme Court which granted respondent Commissioners' motion to transfer the case to the Appellate Division, which became, in effect, the trial court in S-1. *Id.*

94. *Id.*

95. *Id.* at 51, 60. Subsequent appeals to the New York Court of Appeals and the United States Supreme Court were summarily dismissed. *Id.* at 51-52.

96. *Id.* at 52-53. She also sought punitive damages in the amount of \$50,000. *Id.* at 53.

unconstitutional, and held that the claim was barred by res judicata because it had implicitly been decided in S-1. The court of appeals affirmed the judgment.<sup>97</sup> The Second Circuit reiterated the *Williams* admonition that *Halpern* was to be limited to the "narrow circumstances" of bankruptcy actions.<sup>98</sup> Furthermore, the court reasoned, the two criticisms raised by *Halpern* did not apply to the facts of *Winters*. The court held that *Halpern*'s "lack of meaningful opportunity to appeal" consideration was inapplicable because in *Winters*, as in *Williams*, plaintiff was pursuing two actions at once, and would thus be motivated to appeal an adverse ruling.<sup>99</sup> The Second Circuit also held that the prior case had been decided with sufficient care; therefore *Halpern*'s "carefulness of decision" consideration was inapplicable.<sup>100</sup>

In finding the *Halpern* considerations inapplicable to *Winters*, the Second Circuit also questioned their validity. First, although the court found that *Winters* could have appealed the constitutional issue,<sup>101</sup> it also asserted that the applicability of collateral estoppel does not depend on whether the losing party had a right to appeal.<sup>102</sup> The court did not address the effect of alternative grounds on the depth and carefulness of appellate review.<sup>103</sup>

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97. *Id.* at 68.

98. *Id.* at 67-68.

99. *Id.*

100. *Id.* at 68.

101. *Id.* at 62-63. *Winters* was not entitled to an appeal as of right to the New York Court of Appeals. She had attempted to appeal under N.Y. Crv. Proc. L.R. § 5601(b)(1) (McKinney 1978), which provides an appeal as of right for judgments directly involving federal or state constitutional questions. If the judgment in the lower court rested or may have rested on two grounds, one of which was not of constitutional dimension, the appeal will not lie. 574 F.2d at 61-62. In this case, the Appellate Division's finding that plaintiff had not alleged in sufficiently specific detail her illness and treatment precluded the invocation of § 5601(b)(1). *Winters* did have the opportunity, under N.Y. CIV. PROC. L.R. § 5602(a)(1)(i) (McKinney 1978), to obtain leave to appeal from the Appellate Division, but she failed to pursue this possibility, a failure which the Second Circuit considered estopped her from complaining of a lack of opportunity to appeal. 574 F.2d at 62.

102. 574 F.2d at 62. The court said that "the extent of preclusion produced by a prior judicial determination of material and essential issues is not affected by the fact that the losing party could not appeal . . ." *Id.* (citations omitted).

103. The court did note, however, that *Winters* could attack on appeal the Appellate Division's reliance on her failure to allege with specificity the nature of her illness and treatment, a ground on which the Department of Social Services hearing officer had not expressly relied. *Id.* at 62-63. The court noted that unlike regular appeals, appeals from administrative hearings may not be decided on grounds other than those expressly relied upon by the administrative hearing officer. *Id.* at 62-63 & n.16.

If *Winters* had appealed on this basis, she would have eliminated one of the alternative grounds at the outset, and might have brought the court's attention to bear on the first amendment issue, which was the crux of her claim.



Second, the court did not base its conclusion that the alternative grounds had been decided carefully on the indicia of careful decision which had been emphasized by the *Williams* court—full briefing and extensive discussion in the opinion. Those indicia were lacking in *Winters*. In fact the constitutional issue which was raised in S-2 was decided implicitly in the first action. The court reasoned that since *Winters* had raised the constitutional challenge in S-1, and since the court in that action decided that a Christian Science “nurse” was not within the scope of the Medicaid statute, the court must necessarily have concluded that the statutory exclusion of Christian Science nurses was not unconstitutional.<sup>104</sup> The court of appeals in S-2 thus made a *presumption* of careful decision.<sup>105</sup>

Thus, the *Winters* court adopted a substantially less restrictive requirement as to careful decision, and attempted to dispense with *Halpern*’s “lack of meaningful opportunity to appeal” argument entirely. The Second Circuit, then, despite having originated the *Halpern* rule, has limited *Halpern* to its facts and adopted relatively flexible requirements for the application of collateral estoppel to alternative grounds.<sup>106</sup>

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104. *Id.* at 60-61. In so holding, the court of appeals confused the factors involved in establishing carefulness of decision with those used to establish identity of issues. The necessity of ruling on the constitutional claim in the first action shows only that the constitutional claim in S-2 was identical to that in S-1. It does little to illuminate the second court as to the carefulness of the review in S-1.

See also *Garcia v. Garcia*, 148 Cal. App. 2d 147, 306 P.2d 80 (1957). The court in *Garcia* correctly employed these factors to determine the identity of issues between the two actions. *Id.* at 153-54.

105. The *Winters* court said “we choose to eschew any assumption that five distinguished jurists of the Appellate Division failed to accord to the two issues resolved by their decision ‘the careful deliberation and analysis normally applied to essential issues.’ ” 574 F.2d at 68.

106. The progress of the new rule has been uncertain. Some jurisdictions, such as California and New York, have continued to adhere to the old rule. Other jurisdictions initially adopted the new rule without reservation and later limited its scope, while still others have pursued seemingly inconsistent approaches.

In most jurisdictions, there exists a somewhat dusty collection of precedent following the old rule. See, e.g., *Kessler v. Armstrong Cork Co.*, 158 F. 744, 747 (2d Cir. 1907), *cert. denied sub nom.* *Sexton v. Armstrong Cork Co.*, 207 U.S. 597 (1908). Among the jurisdictions which have more recently reaffirmed the old rule are: California, *Wall v. Donovan*, 113 Cal. App. 3d 122, 169 Cal. Rptr. 644 (1980), *appeal dismissed*, 451 U.S. 978 (1981); New York, *Malloy v. Trombley*, 50 N.Y.2d 46, 50-53, 405 N.E.2d 213, 214-16, 427 N.Y.S.2d 969, 973 (1980); New Jersey, *Kelley v. Curtiss*, 16 N.J. 265, 272-73, 108 A.2d 431, 435-36 (1954); and Minnesota, *Goblirsch v. Western Land Roller Co.*, 310 Minn. 471, 478, 246 N.W.2d 687, 691 (1976). The most recent case in the Sixth Circuit is *Crawford v. Zeitler*, 326 F.2d 119, 121 (6th Cir. 1964) (dismissal on jurisdictional ground and on merits gave preclusive effect to decision on merits). Some jurisdictions, such as the Fifth Circuit, have adopted the new

### III. ANALYSIS OF THE NEW RULE'S TWO RATIONALES

#### A. *The Presumption of Careless Decision*

The premise underlying much of the new rule is the oft-quoted principle that estoppel will be given only to a determination that was

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rule. *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981) (unfair to apply offensive collateral estoppel to alternative ground).

Other jurisdictions, such as the Ninth Circuit, have not yet firmly adopted either rule. The Ninth Circuit has applied estoppel to alternative grounds specifically affirmed on appeal. *Westgate-California Corp. v. Smith*, 642 F.2d 1174, 1176 (9th Cir. 1980). In *Markoff v. New York Life Ins. Co.*, 530 F.2d 841 (9th Cir. 1976), *aff'g*, 369 F. Supp. 308 (D. Nev. 1973), the Ninth Circuit also affirmed, as a matter of Nevada law, the *McLaughlin* rule that an alternative ground which is not mentioned in the affirmance of the other ground is good estoppel. 530 F.2d at 842. Dicta in the district court opinion in *Markoff* strongly suggested adherence to the old rule as to unaffirmed grounds.

The cases . . . indicate that in California an exception is recognized such that where a finding is unnecessary and immaterial, the rule of collateral estoppel does not operate. [Citation omitted.] To extend this exception so as to remove collateral estoppel effect from every alternative holding not addressed by an appellate court would be to allow the exception to swallow the general rule. While the principle of *res judicata* "is not to be applied so rigidly as to defeat the ends of justice" [citation omitted], the ends of justice would not be served by permitting a relitigation of the disability issue presented in this case, an issue which was actively contested previously. Neither policy nor reason supports the application of an exception to the general rule in the instant case.

369 F. Supp. at 314 n.6.

In contrast, the district court in *Church of Scientology of California v. Linberg*, 529 F. Supp. 945 (C.D. Cal. 1981), adopted the new rule and refused to grant collateral estoppel effect to an alternative finding of reasonable search when the prior judgment also rested on lack of standing to challenge the search and the narrow scope of the exclusionary rule for flagrant searches. *Id.* at 963-66. *Church of Scientology* was an appropriate case in which to deny estoppel, because in addition to the alternative ground problem, neither the issue nor the level of proof in S-1 were the same as those in S-2. *Id.* at 965-66 & n.19. The Ninth Circuit has yet to respond to a case in which an unappealed alternative ground has strong indicia of careful decision and motivation to appeal. For such a case, *see infra Malloy v. Trombley*, notes 132-42 and accompanying text.

Finally, even those jurisdictions which had developed the new rule have had second thoughts. The Second Circuit, whose *Halpern* decision was the basis for the RESTATEMENT (SECOND)'s broad formulation, has limited that case to its facts. *Winters v. Lavine*, 574 F.2d at 67. The District of Columbia Circuit, which had initially come out strongly in favor of *Halpern* and the RESTATEMENT (SECOND) OF JUDGMENTS, has hinted that it will treat the new rule simply as an exception to the old. In *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501 (D.C. Cir. 1973), the court of appeals held that no estoppel would be given an alternative ground for dismissal based on a curable procedural defect. *Id.* at 508-09. Recently, however, the court has indicated that a rigid rule might be inappropriate. In *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983), the District of Columbia Circuit gave estoppel effect to one of two alternative grounds explicitly affirmed on appeal. *Id.* at 1193-94, 1194 nn.9-10. The court declined to address the more general issue of unappealed alternative grounds, but recognized the existence of the competing considerations of conclusiveness and fairness, and insisted that *Stebbins* was "an exception from the general rule of binding effect for alternate holdings." *Id.* at 1194 n.10.

essential to the judgment.<sup>107</sup> California and most other jurisdictions have adopted this requirement.<sup>108</sup> Both Restatements are in accord with this view.<sup>109</sup> The basis for this rule is that the parties and the trier of fact presumably did not devote their full attention and energy to litigating and deciding an issue which had little or no relevance to the case at hand.<sup>110</sup> The proponents of the new rule, however, have distorted this requirement by applying it literally to alternative grounds.

### 1. The "essential to the verdict" requirement

When viewed in the context of alternative grounds, the "essential to the verdict" requirement has produced some confusion. Some courts have taken the position that the force of estoppel is contained in the judgment itself, and therefore a matter must be an essential element of that judgment to have preclusive effect.<sup>111</sup> It seems clear from the commentary on the requirement, however, that the term "essential to the verdict" is simply a shorthand way of describing the degree of effort exerted by the parties in litigating a matter and the degree of care which the trier of fact is presumed to have exercised in deciding it.<sup>112</sup> The confusion arises because of the unusual character of alternative grounds, each of which may be considered essential or inessential to the verdict.

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107. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

108. *Bleek v. State Bd. of Optometry*, 18 Cal. App. 3d 415, 430, 95 Cal. Rptr. 860, 870 (1971); *see, e.g.*, *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1384 (9th Cir. 1977).

109. RESTATEMENT OF JUDGMENTS § 68 comment o (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

110. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 comments i, j (1982).

111. Hence the characterization of inessential grounds as dictum—a relevant comment on the law but not considered part of the judgment for purposes of collateral estoppel or stare decisis. *See* RESTATEMENT OF JUDGMENTS § 68 comment o (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

112. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment j (1982). The American Law Institute declined to follow the distinction between "mediate" and "ultimate" facts in determining whether an issue is essential to the judgment. Rather, said the Institute:

[t]he appropriate question . . . is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 28—for example, that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment j (1982).

It is difficult to reconcile this common-sense approach based on the importance of the issue and the foreseeability of its re-appearance in a later action with the mechanical approach toward alternative grounds adopted in comment i. *See supra* note 61.

Strictly speaking, neither of two alternative grounds is essential to a judgment because in the absence of one ground the judgment could be sustained on the other. Yet the new rule's characterization of both grounds as inessential leads to the illogical conclusion that the judgment rests solely on inessential grounds. If it is assumed that only one of the grounds is essential, it is necessary to determine which one is the "real" basis of the judgment. Possibly the first ground should be considered the more essential of the two. Such a rule, however, would be of doubtful use if the trial judge's opinion devoted only a paragraph to the first ground, but a page to the second. If one arbitrarily gave estoppel effect only to the first ground, then trial judges would be forced to consider the mere ordering of their findings as a critical factor in future litigation.<sup>113</sup>

This search for the one essential ground is not only artificial; it is illusory. If it could readily be discerned which ground was essential and which not, then there would no longer be a judgment based on alternative grounds, which by definition must be capable of resting on either ground. The struggle to define the term "essential to the judgment" in this context, then, is of little analytical use. Clearly, both grounds must be good estoppel, or both must be open to relitigation.<sup>114</sup> Thus, statements that alternative grounds are to be considered "necessary" for purposes of collateral estoppel are merely indicative of the conclusion that estoppel should apply, and usually do not contain any discussion of the logical necessity of an alternative ground.<sup>115</sup>

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113. In some cases the trial judge may specify which of the alternative grounds is the "real" one. This argument was raised in *Malloy v. Trombley*, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980), where the trial judge in the first action found that the defendant was not liable for negligence, and then made the finding that the plaintiff was in any case barred from recovery by his own contributory negligence. *Id.* at 40, 405 N.E.2d at 214, 427 N.Y.S.2d at 971. (For a discussion of *Malloy*, see *infra* notes 131-41 and accompanying text.) Judge Gabrielli, dissenting in *Malloy*, emphasized that the trial judge had admitted that the second finding was not strictly necessary to the judgment, *id.* at 55-56, 405 N.E.2d at 218, 427 N.Y.S.2d at 975 (Gabrielli, J., dissenting), and argued that this was not a case of true alternative grounds, *id.* What the trial judge actually said was that the finding of contributory negligence was not necessary to the judgment, *id.* at 56, 405 N.E.2d at 218, 427 N.Y.S.2d at 975, but this is always true of alternative grounds, in the strict sense. If the essence of the necessary to the judgment requirement is indeed the avoidance of the collateral effects of carelessly worded dicta, it is difficult to see the purpose that is served by disregarding the carefully made findings of a trial judge.

114. Most commentators, whether espousing the new rule or the old, agree with this proposition. See, e.g., RESTATEMENT OF JUDGMENTS § 68 comment n (1942); Comment, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 845 (1952).

115. See, e.g., *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978): "an alternative ground on which a decision is based should be regarded as 'necessary' for purposes of determining whether the plaintiff is precluded by the principles of *res judicata* or collateral estoppel from

In *Evans v. Horton*,<sup>116</sup> the California Court of Appeal suggested a more meaningful basis for distinguishing between essential and inessential grounds, focusing on the materiality of the ground. This view rejects the abstract inquiry into "necessity" in favor of distinguishing between issues which were material to the judgment and those which were extraneous.<sup>117</sup>

This is a sound distinction.<sup>118</sup> When the parties energetically litigate several claims, submit them to the trier of fact for determination, and that determination is carefully made, there seems little point in giving the losing party a second opportunity to litigate any of the claims. The thoroughness and care with which the alternative grounds are decided will vary, and the court in S-2 should be allowed to examine the record of the entire proceedings in the first action for evidence of the care of the decisionmaker, just as courts may review the record of the prior action to establish which issues were decided in that

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relitigating in a subsequent lawsuit any of those alternative grounds." The *Winters* court gave no explanation of its reasoning on this point other than the somewhat circular argument that because the RESTATEMENT OF JUDGMENTS stated in § 68 comment n, that both grounds were to be given preclusive effect, both grounds were therefore to be considered "necessary." 574 F.2d at 66-67.

116. 115 Cal. App. 2d 281, 251 P.2d 1013 (1953).

117. The court pointed out:

[T]here is a difference between a finding or adjudication which is immaterial and one which is material, though perhaps unnecessary in view of other findings. The mere fact that the court goes further than is absolutely necessary to sustain its judgment in determining material issues presented to it does not prevent such issues from becoming res judicata.

*Id.* at 286, 251 P.2d at 1016 (citing 2 FREEMAN ON JUDGMENTS 1478, § 698 (1925)).

This practical approach to collateral estoppel is endorsed in other contexts, such as determining which issues were decided in S-1. In *United States v. Abatti*, 463 F. Supp. 596 (S.D. Cal. 1978), Abatti was charged with filing fraudulent tax returns. He moved for dismissal on the grounds that the tax court in a prior proceeding had found that he had not understated his income for the years in question. *Id.* at 598. Although the judgment in the prior tax court proceeding did not clearly state why Abatti had been found not liable, the district court adopted a "practical," rather than a "hypertechnical" approach, in determining what issues were necessarily resolved by the prior proceedings." *Id.* at 600. The court found that the only fair construction of the prior judgment was that Abatti had not underreported his income. *Id.* See also *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The *Ashe* case is summarized in *Abatti*, 463 F. Supp. at 600 n.1.

118. Cases like *Malloy v. Trombley*, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980), see *infra* notes 132-42 and accompanying text, in which the trial court devoted five days to deciding a common traffic accident, illustrate the absurdity of characterizing alternative grounds as having merely the character of obiter dicta. The court in *Wall v. Donovan*, 113 Cal. App. 3d 122, 169 Cal. Rptr. 644 (1980), *appeal dismissed*, 451 U.S. 978 (1981), observed that "where both parties have energetically litigated the issue of domicile, it was necessary for the trial court to rule upon the matter," *id.* at 126, 169 Cal. Rptr. at 646, and held that this alternative ruling was binding in the subsequent action, *id.* at 125-26, 169 Cal. Rptr. at 646.

action.<sup>119</sup> If the reason for requiring that an issue be necessary to the judgment before it will be given preclusive effect is to ensure that the issue will be carefully decided, then a moving party should be allowed to show, if he can, that the issue was carefully decided.

## 2. The new rule's irrebuttable presumption of careless decision

The essential criticism of the new rule, however, is not that it introduces confusion about what is "necessary to the judgment," but that it creates in effect an irrebuttable presumption that the grounds appearing on the face of a valid judgment were less than carefully decided because neither was strictly necessary to the result. This presumption undermines the validity and finality of a judgment, even one which was thoroughly litigated and carefully decided. The old rule is based on the assumption that every alternative ground case was carefully decided; the judgment is still subject, however, to the safeguards contained in the body of traditional collateral estoppel law.<sup>120</sup>

By contrast, the new rule conclusively presumes that a valid judgment on alternative grounds is not in fact final, and may be relitigated as to its constituent parts. Although some alternative ground cases may be decided with less than the requisite degree of care, basing a presumption upon an occasional occurrence is unnecessary because of the presence of other safeguards,<sup>121</sup> and suggests a certain distrust of the judiciary and the judicial process by which the alternative ground judgment was obtained.<sup>122</sup>

The new rule's presumption of careless decision is contrary to the general rule that a judgment, after the appeals period has elapsed, is valid until overruled.<sup>123</sup> The presumption also contradicts California

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119. See, e.g., RESTATEMENT OF JUDGMENTS § 68 comment k (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment f (1982); *Garcia v. Garcia*, 148 Cal. App. 2d 147, 153, 306 P.2d 80, 84 (1957) (permissible to refer to both the face of the record and to extrinsic evidence to establish which issues determined by the prior action).

120. See *supra* text accompanying notes 10-14.

121. *Id.*

122. Consider the remarks of Professor Currie in Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). Professor Currie, an authority on collateral estoppel, had initially proposed that nonmutual estoppel be limited to defensive use because he doubted whether courts could or would properly determine whether the losing party in S-1 had had a full and fair opportunity to litigate. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). In the 1965 article, Professor Currie admitted that the need for his "rule of thumb" had been obviated by the careful, particularized determinations that both California and federal courts had made in offensive collateral estoppel cases decided after Currie's 1957 article.

123. See CAL. CIV. PROC. CODE § 456 (West 1973) (not necessary to plead finality of judgment because it is rebuttably presumed).

statutes and cases which support the premise that the propriety and validity of a judgment are the rule, not the exception.

California Code of Civil Procedure section 1911 states: "That only is deemed to have been adjudged in a former judgment which appears upon its facts to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."<sup>124</sup> The decisions demonstrate, moreover, that if the party asserting the estoppel meets the three *Bernhard* requirements<sup>125</sup> and does not run afoul of other safeguards against unfairness to the estopped party, such as lack of incentive or opportunity to litigate vigorously, the estoppel will be granted.<sup>126</sup>

California courts will grant an estoppel when the matter is expressly concluded by the judgment<sup>127</sup> or when the matter was necessarily decided in the course of reaching the judgment, even though it does not appear on the face of the judgment.<sup>128</sup> It would be anomalous to

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124. CAL. CIV. PROC. CODE § 1911 (West 1955).

The legislature phrased the statute in necessary condition form ("That only"), rather than in sufficient condition form (e.g., "An issue is deemed adjudged if . . ."), which might suggest that satisfying the condition (by demonstrating that both grounds are on the face of the judgment) does not necessarily guarantee an estoppel. It is difficult to avoid the conclusion that the legislature intended that matters expressly set forth on the face of the judgment be concluded by it. There do not seem to be any other requirements which must be met to determine that an issue was adjudged in the prior action.

125. The *Bernhard* requirements are: (1) the issue decided in the prior adjudication must be identical with the one presented in the action in question; (2) there must have been a final judgment on the merits in the first action; and (3) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication. *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

126. See *supra* notes 10-14 and accompanying text.

127. *Garcia v. Garcia*, 148 Cal. App. 2d 147, 153, 306 P.2d 80 (1957), *supra* note 119; CAL. CIV. PROC. CODE § 1911 (West 1955).

128. *Garcia v. Garcia*, 148 Cal. App. 2d 147, 153, 306 P.2d 80, 84 (1957), *supra* note 119; CAL. CIV. PROC. CODE § 1911 (West 1955). This is the "black box" question which first appeared in *Russell v. Place*, 94 U.S. 606 (1876). This problem occurs whenever an issue not expressly mentioned in the judgment is proposed as an estoppel. Sometimes the matter is resolved simply by reference to the record, other than the face of the judgment, but sometimes the record is inadequate, and the court in the subsequent action must determine which issues *may* have been decided in the first action, and which issues *must* have been decided.

For example, in *Dobbins v. Title Guar. & Trust Co.*, 22 Cal. 2d 64, 136 P.2d 572 (1943), the probate court in S-1 apportioned compensation for extraordinary services by executors by awarding the entire amount to one executor of a will and none to the other. In S-2, the executor who received nothing sued the other for one half the compensation, relying on an agreement to split the fees which the two had made prior to the probate action. The trial court held for the plaintiff, but the California Supreme Court reversed, saying that the probate court, in issuing the final order settling in the estate and all accounts, must necessarily have decided the issue of apportionment adversely to plaintiff. "It also must be true that, as a necessary incident of the adjudication upon that issue, apportionment, the rights of the

suggest that estoppel may be given to matters which are not on the face of a judgment, while no estoppel will be given to an otherwise identical matter which appears as an express alternative ground. The new rule's answer is that in the former case the issue was "necessary" while in the latter case it was not; but this is simply shorthand for other factors, such as the care with which the decision was made.<sup>129</sup>

The irrebuttable presumption created by the new rule does not seem to serve any purpose other than simplicity of application. As the Restatement frankly observes:

There may be causes where, despite these considerations [of lack of appeal and possibility of less careful decision], the balance tips in favor of preclusion because of the fullness with which the issue was litigated and decided in the first action. But since the question of preclusion will almost always be a close one if each case is to rest on its own particular facts, it is in the interest of predictability and simplicity for the result of non-preclusion to be uniform.<sup>130</sup>

"Simplicity" may be taken to mean simplicity of application for the court, or simplicity of prediction for the parties. The former interpretation suggests that law is too complex for judges to apply, which is an inappropriate conclusion. Judges are routinely entrusted with decisions on equally difficult prerequisites to collateral estoppel, such as whether the losing party in S-1 had an incentive to litigate vigorously.<sup>131</sup>

If the Restatement (Second) is referring to simplicity of prediction by the parties, then it is equally unpersuasive. It could as readily be argued that because the other requirements of collateral estoppel are often difficult to apply, it would be simpler and more predictable never to grant collateral estoppel; yet all the parties to a single ground judgment, and strangers to that suit who wish to use it for estoppel, are

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parties under the agreement to share the compensation must be deemed to have been determined adversely to plaintiff." *Id.* at 70, 136 P.2d at 575.

See also *Kingsbury v. Tevco, Inc.*, 79 Cal. App. 3d 314, 317-18, 144 Cal. Rptr. 773, 775 (1978) (prior judgment on boundary line carried implicit finding that survey was not negligently or fraudulently made). Cf. *Mattson v. City of Costa Mesa*, 106 Cal. App. 3d 441, 445-46, 164 Cal. Rptr. 913, 915-16 (1980) (no estoppel to federal judgment when issue might have been but was not necessarily litigated and no indication from record whether it was in fact litigated).

129. See *supra* notes 111-19 and accompanying text.

130. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

131. See, e.g., *People v. Gephart*, 93 Cal. App. 3d 989, 997, 156 Cal. Rptr. 489, 494 (1979) (courts entrusted with balancing the need to limit litigation against the right to have fair adversary proceeding in first action).



routinely faced with some uncertainty about whether the application of estoppel will be considered fair. Moreover, in some alternative ground suits, the carefulness of the decision and the resulting fairness of estoppel are easily determined.

The contrast between the utility of the old rule and the unfairness and waste of resources caused by the new rule's presumption of careless decision is easily demonstrated in a case such as *Malloy v. Trombley*, a 1980 New York decision.<sup>132</sup> In *Malloy*, plaintiff Malloy struck Trombley's car, which had been parked on the side of the road, and which may have been blocking a portion of the road. Both motorists filed claims against the state, alleging that a police car, which had been parked next to Trombley's vehicle, had been responsible for the accident.<sup>133</sup> In S-1, the New York Court of Claims found that: (1) each claimant had failed to prove negligence against the state; and (2) each claimant was guilty of contributory negligence.<sup>134</sup> No appeal was taken.<sup>135</sup>

In S-2, Malloy sued Trombley.<sup>136</sup> After the resolution of S-1, Trombley moved for summary judgment on the ground that the finding of contributory negligence against Malloy in S-1 estopped Malloy from relitigating that issue.<sup>137</sup> The motion was denied by the New York Supreme Court, but granted on appeal to the Appellate Division.<sup>138</sup>

The court of appeals affirmed.<sup>139</sup> While declining to fashion a broad rule,<sup>140</sup> the court held that estoppel was proper in this case because the trial judge in S-1 had devoted considerable time (five days) to the resolution of what was, in the words of Judge Fuchsberg, "a garden variety collision between two motor vehicles in circumstances that left little room for factual dispute."<sup>141</sup> The court said:

[W]e hold in this instance that the rule of issue preclusion is

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132. 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980).

133. *Id.* at 48-49, 405 N.E.2d at 214, 427 N.Y.S.2d at 970.

134. *Id.*, 405 N.E.2d at 214, 427 N.Y.S.2d at 970-71. As the accident had occurred prior to the enactment of New York's comparative negligence law, the latter ground alone would have barred recovery. *Id.* at n.1.

135. *Id.* at 49, 405 N.E.2d at 214, 427 N.Y.S.2d at 971.

136. *Id.* at 48-49, 405 N.E.2d at 214, 427 N.Y.S.2d at 970. This action had been pending during the trial of S-1. *Id.*

137. *Id.* at 49, 405 N.E.2d at 214, 427 N.Y.S.2d at 971.

138. *Id.*

139. *Id.*

140. *Id.* at 52, 405 N.E.2d at 216, 427 N.Y.S.2d at 973. This recognition of the case by case nature of collateral estoppel is apparent even in *Halpern*. 426 F.2d at 105. See *supra* note 135. See also *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).

141. *Id.* at 53, 405 N.E.2d at 217, 427 N.Y.S.2d at 973-74 (Fuchsberg, J., concurring).

applicable notwithstanding that in a precise sense the issue precluded was the subject of only an alternative determination by the trial court. The issue was fully litigated, and the party precluded had full opportunity to be heard and was in no way, motivationally or procedurally, restricted or inhibited in the presentation of his position. Additionally, and critically in our view, the decision of the trial court gives significant internal evidence of the thorough and careful deliberation by that court, both in its consideration of the proof introduced and of the applicable law, and the determination made, though recognized to be an alternative, served a substantial operational purpose in the judicial process, thus negating any conclusion that the trial court's resolution was casual or of any lesser quality than had the outcome of the trial depended solely on this issue.<sup>142</sup>

The new rule would conclusively presume that at least one of the two grounds for the decision (lack of negligence on the part of the police officer, and contributory negligence on the part of each driver) was less than carefully decided. Therefore, the new rule would have permitted Trombley, after a five-day trial, to relitigate the issue of his negligence. Moreover, the crowded dockets of many courts might discourage judges from devoting five days to a simple traffic accident, resulting in the anomaly that the second action, devoted to one ground, would be less carefully decided than the first action, which decided two grounds.

The new rule is simply too rigid to accommodate a case like *Malloy*; it would be as absurd as it would be unjust to require the parties to relitigate in this context. Only an ad hoc approach can accommodate the cases which demand estoppel, such as *Malloy*, the cases which just as clearly compel a denial of estoppel, and those cases on the spectrum in between. It is precisely because collateral estoppel is predicated on the identity of issues in two particular, separate cases that an ad hoc approach is the only satisfactory one; the facts are unique in every set of cases to which an estoppel might apply.

### *B. The "Lack of Meaningful Appeal" Argument*

The proponents of the new rule contend that the application of the old rule denies the losing party in S-1 a meaningful opportunity to appeal. The criticism is three-pronged. The first criticism is that the old

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142. *Id.* at 52, 405 N.E.2d at 216, 427 N.Y.S.2d at 973-74 (footnote omitted).

rule's allowance of estoppel on either ground of an alternative judgment results in a less careful review of the issues on appeal.<sup>143</sup> The second and third criticisms of the old rule focus on the problem of the losing party's ability and motive to edit the judgment—to take a cautionary appeal merely to avoid the collateral effects of the erroneously decided ground, even though the appeal will not result in a reversal of the first judgment, because the first judgment is capable of resting on the other ground.<sup>144</sup> The argument for the new rule is that it avoids imposing burdensome appeals on a losing litigant, and avoids the possibility that an appellate court will dismiss the appeal as frivolous.

The appeal issue can be addressed more fairly by distinguishing between the *right* to appeal and the incentive and ability to do so. Some courts have suggested that the assertion of collateral estoppel is not in any way dependent on a party's right to appeal.<sup>145</sup> It is true that an appeal is not required for a judgment to be asserted as *res judicata*,<sup>146</sup> it is also true that an erroneous judgment is good estoppel.<sup>147</sup>

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143. See *Halpern*, 426 F.2d at 105. The *Halpern* court stated:

An appeal from the prior judgment by the losing litigant, asserting error in the determination of an issue not central to the judgment, probably would be deemed frivolous by the appellate court, which would affirm without considering the merits of the claim of alleged error . . . . [E]ven if the losing litigant were to take an appeal, the winning litigant might not diligently oppose the claim of error on the merits, since he could demur, in effect, and rely solely on the argument that the claimed error was not essential to the judgment.

*Id.*

144. The *Halpern* court observed: "The losing litigant would have little motivation to appeal from an alleged erroneous finding in connection with one of several independent alternative grounds, since even if his claim of error were sustained, the judgment would be affirmed on one of the other grounds." *Id.* at 105-06. The losing party would be editing the erroneous ground out of the judgment in order to avoid its collateral effect; he could expect no reversal of the judgment rendered in S-1, because it would rest on the alternative ground.

145. *Winters v. Lavine*, 574 F.2d 46, 62 (2d Cir. 1978) and cases cited therein.

146. "An action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." CAL. CIV. PROC. CODE § 1049 (West 1980). Small claims judgments are an exception. See *Perez v. City of San Bruno*, 27 Cal. 3d 875, 616 P.2d 1287, 168 Cal. Rptr. 114 (1980) (appeal of small claims action required before estoppel will attach).

The rule in federal courts is that judgments are final until reversed; hence a judgment is final when rendered, and may constitute the basis for an estoppel even while an appeal is pending. See *Performance Plus Fund, Ltd. v. Winfield & Co., Inc.*, 443 F. Supp. 1188 (N.D. Cal. 1977).

It has been suggested that the reason for the difference between the two jurisdictions is that California appellate courts are allowed to make new findings of fact while federal courts are not. See *Performance Plus*, 443 F. Supp. at 1190 (citing *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 719 (E.D. Wash., D. Nev. 1962), *aff'd sub nom.* *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964)). See also CAL. CIV. PROC. CODE § 909 (West Supp. 1983).

147. See, e.g., *Pacific Mut. Life Ins. Co. v. McConnell*, 44 Cal. 2d 715, 285 P.2d 636

These rules do not suggest, however, that an estoppel should be granted where the losing litigant had no right to appeal. Such a proposition seems to be a casual and unnecessary dismissal of an important element of the judicial process, and both Restatements agree that no estoppel should be granted where the losing party had no right to appeal.<sup>148</sup> A better approach is to start with the assumption that a losing party has a right to appeal, and then to examine both his motivation for appealing and the quality of the appellate review.

1. The old rule does not reduce the likelihood of careful appellate review

The suggestion raised by the new rule that appellate review of judgments based on alternative grounds is somehow suspect<sup>149</sup> once again indicates an unwillingness to trust the judiciary to carry out its function.<sup>150</sup> Less careful appellate review could arise from two sources: lack of contested review; and the presence of an alternative ground on appeal.

First, if the lack of a contested review does reduce the likelihood of careful appellate review under the old rule, this would actually operate to the advantage of the party appealing one erroneous ground. If the opposing party simply emphasizes the ground that is not error, and if the appellate court affirms on that ground, the losing party in S-1 has attained his objective of removing the preclusive effect of the erroneous ground. If neither ground is error, then of course the losing party should neither appeal nor deny the preclusive effect of either ground.

Second, in California the existence of an alternative ground at the trial level need not reduce the likelihood of thorough appellate review. Although there are no reported cases on this precise issue, California Code of Civil Procedure section 663<sup>151</sup> provides a mechanism which could probably be utilized to deal with the erroneous ground indepen-

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(1955): "It is the general rule that a final judgment or order is *res judicata* even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties." *Id.* at 725. *See also* *Columbus Line, Inc. v. Gray Line Sightseeing Cos. Associated, Inc.*, 120 Cal. App. 3d 622, 174 Cal. Rptr. 527 (1980).

148. *See also* RESTATEMENT OF JUDGMENTS § 69 (1942) (no estoppel where party against whom estoppel is sought lacked opportunity to appeal); RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982).

149. *See supra* note 143 and accompanying text.

150. *See supra* note 121.

151. CAL. CIV. PROC. CODE § 663 (West Supp. 1983) provides:

A judgment or decree, when based upon a decision made by the court, or the special verdict of a jury, may upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either

dently of the other ground. This section allows any aggrieved party to move that the judgment be set aside and a different judgment entered.<sup>152</sup>

In California, the appeal process in cases of alternative grounds should operate in the following way: If the losing party believes that both of the grounds are correctly decided, he need do nothing, and both grounds will carry preclusive effect in subsequent lawsuits, provided that the other requirements for estoppel have been met. If the losing party considers that both grounds are error, he should appeal, and if he is correct the judgment will be reversed. In both cases the losing party has had the opportunity for a meaningful appeal, and failure to take an appeal should estop him from denying the validity of either ground.

If the losing party thinks that only one ground is error, he should move, pursuant to section 663, to vacate the judgment and enter a new judgment based on only the correctly decided ground. If granted, the section 663 motion accomplishes the result of removing the erroneous ground at little cost. Because the ruling has no effect on the judgment in the first action, which continues to rest on the alternative ground, the winning plaintiff in the first action would have little motive to appeal the grant of a section 663 motion. If, however, he anticipates a second suit, he might appeal the grant of the motion in order to retain the preclusive effect of the alternative ground that had been removed from the judgment. If the plaintiff can foresee the second suit, it is likely that the defendant can also foresee it, so the appeal of the alternative ground will be vigorously contested.

Should the trial judge deny the section 663 motion, the losing party can appeal the denial.<sup>153</sup> Because the appeal of a section 663 motion in this context involves only one of two alternative grounds, it should provide an opportunity for careful appellate review. Moreover, if the trial judge denies the section 663 motion on the ground that the

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of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict.

152. *Id.* The requirement that the alleged error affect "the substantial rights of such [moving] party" should be met in cases of alternative grounds occurring in California, since California current follows the old rule and allows an estoppel as to both grounds. *Wall v. Donovan*, 113 Cal. App. 3d at 126; *see supra* notes 61-62 and accompanying text.

153. CAL. CIV. PROC. CODE § 663a (West 1976).

error does not affect the substantial rights of the losing party,<sup>154</sup> and if the appellate court affirms on this basis, the losing party may have won the collateral estoppel issue, because the affirmed ruling declares in effect that the issue is not important; this presents a strong suggestion that the issue was not important in the context of the first action. Under traditional collateral estoppel doctrine, an unimportant issue may not be the subject of an estoppel.<sup>155</sup> If the denial of the motion is reversed, the party seeking to avoid the estoppel will have accomplished his purpose.

The existence of the section 663 mechanism substantially reduces the likelihood that a judgment based on alternative grounds will not be carefully reviewed. If the trial court grants the motion, and if the plaintiff does not appeal this ruling, the losing party has obtained his desired result in a comparatively short time and at relatively little expense. If appealed by either side, the motion narrows the focus of appellate review to the single disputed ground.

2. Appeal for the purpose of editing the judgment: the use of the foreseeability of the second suit to avoid burdensome appeals

Even if a losing party is given an adequate appellate review, he must still decide whether to take up an appeal merely to avoid the collateral consequences of the erroneous ground. If only one ground for judgment is error, the losing party is in effect simply editing the judgment; the elimination of one ground has no effect on the result, but is required in order to avoid future consequences. The proponents of the new rule argue that time and expense of editing the judgment may constitute a serious hardship to the losing party.<sup>156</sup> While the imagery of eliminating burdensome appeals is superficially attractive, the Restatement (Second)'s position is ultimately an unsatisfactory solution to an illusory problem.

The contours of this problem have been obscured because the pro-

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154. See *supra* note 152.

155. See *Natural Soda Prods. Co. v. Los Angeles*, 109 Cal. App. 2d 440, 446, 240 P.2d 993, 996 (1952).

156. The RESTATEMENT (SECOND) states:

[T]he losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the application of the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts . . . .

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1982).

ponents of the new rule have focused on the burdens of *appeal*, but have said nothing about subjecting the losing party in S-1 to the burdens of *relitigation*. This is because the losing party *wants* to undertake the burden of relitigating an issue he had lost in the first action;<sup>157</sup> otherwise there would never be any dispute about alternative grounds. Relitigation—with all that it entails—is likely to be an expensive proposition, probably at least as expensive as appeal. The cost of undertaking an appeal, then, cannot be the determining factor. Judicial economy cannot be the issue either, because an appeal usually involves less use of judicial time than trial litigation, and avoids bottlenecking the judicial process at the trial level.<sup>158</sup> The new rule's analysis is accurate only in that it exposes the risk that a losing party might appeal an erroneous ground to avoid its collateral consequences when no one is interested in asserting the matter as an estoppel. Only in this case can the appeal truly be said to be wasteful. The problem, therefore, is to ensure that a party against whom an estoppel is asserted has had an opportunity to appeal without requiring every party who loses on alternative grounds to undertake cautionary appeals.

The solution is to be found in the concept of foreseeability, which is already an element of collateral estoppel analysis.<sup>159</sup> If it is clear that

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157. In this context, the new rule may actually discourage parties from appealing an erroneous ground for the purpose of avoiding future collateral consequences. By not appealing, the losing party can insure that he is allowed to relitigate every issue, whereas an appeal would narrow the range of questions which remain open.

158. The *Malloy* court considered that:

As to the suggestion that to require Malloy to have appealed would be to waste judicial time, it appears that an appeal would be less time consuming and at a less beleaguered level of our court system than would be true in consequence of the new trial which the dissenters would grant.

50 N.Y.2d at 51-52, 405 N.E.2d at 216, 427 N.Y.S.2d at 972.

159. See RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(b) & comment i (1982).

[P]reclusion should not operate to foreclose redetermination of an issue if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing party's failure to litigate the issue fully. Such instances are rare, but they may arise, for example, between institutional litigants as a result of a change in the governing law. Thus, a determination in an action between the taxing authorities and a corporate taxpayer that a transfer of property has not occurred may become relevant to a wholly different question of tax liability under an amendment to the tax law passed after the initial judgment was rendered.

RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment i (1982).

The Restatement correctly states the rule, but the example is inapplicable because it applies to changes in law rather than to unexpected contexts. A better rationale is to be found in *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944). Judge Learned Hand argued that facts established in the first action should be applied only to "ultimate" facts in the second action in order to restrict the scope of collateral estoppel to reasonably foreseeable actions. Judge Hand felt it a "pertinent inquiry, whether the conclu-

a second action is foreseeable, it is reasonable to require the losing party to remedy an erroneous ground by appealing the ground in the first action rather than by relitigating it in the second. Failure to appeal or affirmance on appeal would give that ground preclusive effect.<sup>160</sup> If the second action were unforeseen and unforeseeable, it is unreasonable to expect the losing party to appeal an erroneous ruling and unfair to estop him from relitigating it.

The task of deciding whether a losing party actually did foresee or reasonably should have foreseen the likelihood of a second action<sup>161</sup> is not as formidable as it might seem at first glance. In fact, the pattern of cases involving alternative grounds suggests that the assertion of collateral estoppel usually occurs in the context of a series of actions on similar or identical claims or transactions. For example, in *Bank of America v. McLaughlin Land and Livestock Co.*,<sup>162</sup> both parties had been litigating over title to a property for some eight years.<sup>163</sup> In *Malloy v. Trombley*,<sup>164</sup> both parties were pursuing the second action simultaneously with the first.<sup>165</sup> In *Winters v. Lavine*,<sup>166</sup> the plaintiff had initiated a long series of actions and could plainly foresee the preclu-

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siveness, even as to facts 'ultimate' in the second suit, of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried." Otherwise, "[d]efeats in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train." *Id.* at 929. See also Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 842-43 (1952).

160. See *Frank v. Frank*, 275 Cal. App. 2d 717, 80 Cal. Rptr. 141 (1969). The court held:

If there is jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court. He has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as new trial or appeal . . . . In brief, there are adequate methods of direct attack on such judgments, and there is almost a presumption of negligence on the part of the aggrieved party who fails to seek these normal remedies and later raises the objection by collateral attack.

*Id.* at 722, 80 Cal. Rptr. at 144 (citing 1 WITKIN, CALIFORNIA PROCEDURE 411-12 (1954)). The court went on to hold that the prior judgment, though contrary to statute, was a good estoppel and not open to collateral attack. 275 Cal. App. 2d at 722-23, 80 Cal. Rptr. at 145.

161. Usually the test will focus on foreseeability, but occasionally there will be a question of fact whether the losing party *actually* foresaw the second action. For example, if the losing party took action such as shifting assets, leaving the jurisdiction, or retaining counsel, it might be inferred that he anticipated the second action. Also, an offer to settle might be relevant to show awareness of the existence of a claim; this use is implicitly permitted by California Evidence Code § 1152, which prohibits the use of settlement offers to show liability or the value of a claim, but which does not prohibit other uses. *Accord* FED. R. EVID. 408 (1976).

162. 40 Cal. App. 2d 620, 623-24, 105 P.2d 607, 609-10 (1940).

163. See *supra* text accompanying notes 30-42.

164. 50 N.Y.2d 46, 48-49, 405 N.E.2d 213, 214, 427 N.Y.S.2d 969, 970-71 (1980).

165. See *supra* note 136.

166. 574 F.2d 46, 52-53 (2d Cir. 1978).



sive consequences of failure in the earlier actions.<sup>167</sup> Even in *Halpern*,<sup>168</sup> the second action by the bank hardly seems unforeseeable, in view of the obvious effect that the Halperns' preference of their son would have on the bank's ability to recover on the loan.<sup>169</sup> Thus, while the spectre of a losing party trapped by the unexpected appearance of the former alternative ground is forbidding in the abstract, the reality may well be that such occurrences are rare or even nonexistent.<sup>170</sup> Moreover, in many of these series of closely related suits, especially the simultaneous ones, such as *Malloy*, the time for appeal will not have expired by the time that the alternative ground in S-1 becomes important in S-2.<sup>171</sup> The losing party could therefore appeal the first judgment when the second suit is brought.

The issue of foreseeability is affected by the relationship between the party bringing the action and the party asserting the estoppel. For example, compare an estoppel asserted defensively against a losing plaintiff in S-1 with an estoppel asserted offensively against a losing defendant in S-1.<sup>172</sup> In the first case, a plaintiff brings an action, loses, and then seeks to bring a new action in order to relitigate an issue that he has lost. Of all the concerned parties, he should best be able to foresee the second action because he initiated it. There is little logic in denying an estoppel against such a party.

The situation is quite different for a losing defendant in S-1, against whom a stranger to the first action is seeking to assert an alternative ground in an offensive estoppel. The losing defendant initiated neither action, and is much less able to control or predict the initiation of the second suit. This is not to say that a defendant in such a position will never foresee the second suit;<sup>173</sup> but rather that, other things being equal, a losing plaintiff who initiates a second action is much more

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167. See *supra* note 95 and accompanying text.

168. 426 F.2d 102, 103 (2d Cir. 1970).

169. See *supra* text accompanying notes 67-68.

170. There do not appear to be any cases where the assertion of estoppel on an alternative ground came as a complete surprise to the party against whom the estoppel was sought. There is always the possibility that these cases have been disposed of on the ground that the second action is not foreseeable or is not sufficiently related, especially if separated by a long period of time.

171. In California, the maximum time for appeals is 180 days after entry of judgment. Cal. Rules of Court, App. R. 2(a) (West 1980).

172. See *supra* notes 7-8 and accompanying text.

173. For example, the defendant in a tort action such as a railway accident can easily foresee quite a number of suits. The existence of a pool of potential plaintiffs was the subject of Professor Currie's well known discussion of the multiple plaintiff anomaly. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

likely to foresee the collateral effects of the first judgment on a second action which he himself initiates. Thus, the identity of the party initiating the second action should be considered as a factor in assessing the overall foreseeability of the second suit.<sup>174</sup>

There are, of course, other factors which the second trial court should consider in deciding whether the second action was foreseeable. These include the closeness of the relationship between the transactions which give rise to the two lawsuits. Obviously, an issue that reappears in an entirely new and unexpected context will not be a sound basis for an estoppel. Sometimes, however, the same transaction gave rise to both suits; the plaintiff in the second action is merely seeking to avoid the barring effects of *res judicata* by raising essentially the same claim disguised as a different cause of action.<sup>175</sup> In this situation estoppel should be permitted.

Another factor is the temporal relationship between the two ac-

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174. One of the few cases that explicitly discusses this aspect is *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981). In *Hicks*, former employees of Quaker sued for retirement benefits after Quaker sold its plant to another company, but did not include retirement benefits in the conveyance. In S-1, one former employee sued Quaker and the transferee company for the benefits. The trial court found against Quaker, but dismissed as against the other company. *Id.* at 1161. The trial court based its judgment on the alternative grounds of contract and detrimental reliance. *Id.* at 1161-62. Quaker did not appeal.

In S-2, other employees sued Quaker for benefits and sought to assert the contract ground of the S-1 judgment as offensive collateral estoppel. *Id.* at 1162-63. The trial court in S-2 granted the estoppel, but the court of appeals reversed. The court of appeals adopted the new rule, but limited its holding to the facts. The court emphasized the impact that offensive estoppel had on considerations of fairness:

When collateral estoppel is used offensively the problems with the "alternative ground" rule [old rule] are heightened and the arguments against the rule become even more persuasive. In such a case, the losing party must guard against not only a subsequent use of the alternative ground by the plaintiff he has just faced, but he must take into account any possible future plaintiffs who might use the ground against him some day. A losing party would thus be well advised to appeal any judgment based on alternative grounds as a matter of course—for even if he were sure that the particular plaintiff he has just faced will never trouble him again, he could not be sure that some other plaintiff would not emerge later to use the results of the litigation against him.

*Id.* at 1170.

Although the court's reasoning has much to commend it, its conclusion is hardly compelled by the facts of the case. When Quaker first confronted litigation by former employees who had reached retirement age, it could easily see that all other former employees would attempt to collect the benefits when they reached the appropriate age. Subsequent litigation was not a bare possibility; it was a virtual certainty. This case is simply another example of the dangers of discussing the abstract phantom of unforeseen future litigants without reference to the facts of the case, which show that the losing party certainly should and probably did foresee the subsequent action. See *supra* notes 161-71 and accompanying text.

175. See, e.g., *Evans v. Horton*, 115 Cal. App. 2d 281, 284-85, 251 P.2d 1013, 1015-16 (1953); *supra* text accompanying notes 55-56.

tions. In some cases, the two actions actually overlap in time so that a litigant hardly need be clairvoyant to anticipate the preclusive effect of the first judgment to be handed down.<sup>176</sup> At the other end of the spectrum, a case which reappears in a different type of action some years later is a much less appropriate subject for estoppel.

Obviously, these factors are the same as those used to decide whether to grant an estoppel in conventional collateral estoppel cases.<sup>177</sup> Because the factors are the same, there is little reason to require a flexible rule for most collateral estoppel cases, and a rigid one for collateral estoppel cases that involve alternative grounds. The new rule does not save any judicial effort because the court must undertake the foreseeability analysis in any collateral estoppel case. Moreover, the new rule can produce anomalous results: an action may be foreseeable for purposes of conventional estoppel, but is conclusively presumed to be unforeseeable for purposes of alternative ground estoppel. The better solution to the appeal problem is simply to require an appeal when the second action is foreseeable, and not to grant an estoppel when the second action is not foreseeable. All of the cases discussed herein are readily susceptible to this sort of analysis, and even the more difficult cases in the middle of the spectrum are manageable because the other traditional collateral estoppel factors, such as lack of procedural opportunities, still apply. This procedure requires a losing litigant to consider seriously the necessity of appeal but does not require the automatic undertaking of an appeal; thus, a workable balance is achieved between the need for conclusiveness of litigation and the requirement of fairness to the losing party.

### 3. The problem of frivolous appeals

The third problem in appealing an alternative ground is that the appellate court may consider the appeal frivolous. Of all the arguments advanced by the proponents of the new rule, this is the only one that merits serious consideration.

When the second action has been initiated before the expiration of the appeal period for the first action, the disposition of an appeal of the first action would clearly control the disposition of the identical issue in the second action; therefore, appeal could not be said to be frivolous. Thus, in cases such as *Malloy*<sup>178</sup> or *Williams*,<sup>179</sup> which involve concur-

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176. See, e.g., *Malloy v. Trombley*, 50 N.Y.2d 46, 48-49, 405 N.E.2d 213, 214, 427 N.Y.S.2d 969, 970-71 (1980).

177. See *supra* notes 12-13.

178. 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980).

rent proceedings,<sup>180</sup> the argument for estoppel is very strong.

When the appeal period has expired, an argument can be made that the foreseeability analysis should still apply. If the second action is foreseeable, then the appellate court would have a proper basis for reviewing a single alternative ground. Both the federal and the California appellate courts possess the power to review matters which will not change the result below. In patent cases, for example, the United States Supreme Court has entertained appeals for the sole purpose of avoiding the collateral effects of erroneous or unnecessary grounds.<sup>181</sup> Similarly, the California appellate courts have repeatedly exercised jurisdiction over matters which will not change the result but which are important for other reasons.<sup>182</sup>

Finally, even if relitigation is required, the relitigation should be subject to the same standards which apply to appellate review. The court in S-2 could decide matters of law anew,<sup>183</sup> but matters of fact should be subject to the "clearly erroneous" standard of appellate re-

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179. 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977).

180. 50 N.Y.2d at 49, 405 N.E.2d at 214, 427 N.Y.S.2d at 971 (*Malloy*); 556 F.2d at 1154 (*Williams*).

181. *See, e.g.*, *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). In upholding the right of the winner in a patent case to edit out of the judgment an unnecessary ground, the Court said:

[T]hough the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, . . . to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree.

*Id.* at 242.

This argument is at its strongest in the context of a purely unnecessary ground. Thus, to the extent that proponents of the new rule argue that an alternative ground is not "necessary," they must accept that an appeal may be undertaken for the purpose of eliminating the ground from the judgment.

182. *See, e.g.*, *Vazquez v. Superior Court*, 4 Cal. 3d 800, 821 n.18, 484 P.2d 964, 978 n.18, 94 Cal. Rptr. 796, 810 n.18 (1971) (matter decided for guidance of trial court in further litigation, though not strictly reviewable); *Marin v. Superior Court*, 53 Cal. 2d 633, 640, 349 P.2d 526, 531, 2 Cal. Rptr. 758, 763 (1960) (discussion of alternative issue unnecessary but undertaken because of importance of question).

Also, one basis for entering a different judgment pursuant to California Code of Civil Procedure § 663 is that the legal basis for the decision be incorrect and that the error "materially [affects] the substantial rights of the party." *See supra* notes 151-54 and accompanying text. A party who foresees a second suit could make a strong argument that his rights will be materially affected by an erroneous alternative ground. *Id.* Of course, a party who wants to relitigate would also want to avoid making this argument, but that does not mean that he should be able to do so. It is the losing party's obligation to seek review or be bound by the result.

183. *See Lucas v. Monterey County*, 65 Cal. App. 3d 947, 951-52, 135 Cal. Rptr. 707, 709-10 (1977) (*de novo* review for matter of law).

view.<sup>184</sup> If the goal is to provide a meaningful opportunity to appeal, the solution should be to assure such an opportunity or its equivalent, rather than to give a losing party a windfall benefit by permitting him to relitigate questions which would not be subject to change or modification on appeal.

### C. Policy Considerations

#### 1. The plaintiff's dilemma under the new rule

The new rule proposes to ease the supposed burdens of the losing party by creating substantially heavier burdens on the winning party's side of the scale. In so doing, the new rule ignores a fundamental difference in the irrevocability of the effects on the two different parties. A plaintiff who gives up an alternative ground has probably lost it forever under either rule,<sup>185</sup> whereas a losing defendant still has an opportunity, under the old rule, to argue in S-2 that the estoppel should not apply because the first decision was not carefully decided. Moreover, the party operating under the new rule must usually make his election at the beginning of the first action, whereas the party operating under the old rule may wait until the end of the first action before deciding whether to appeal any of the grounds for judgment.

When the plaintiff in S-1 seeks to advance two alternative grounds to support his case, the new rule may place him in an awkward dilemma: he must either abandon one of his alternative grounds for judgment or accept the lack of preclusive effect of both grounds. Where the plaintiff in S-1 knows or suspects that a second suit involves an issue identical to one in S-1, he may be presented with a Hobson's choice.

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184. See *Nigro v. West Foods of California*, 218 Cal. App. 2d 567, 571-72, 32 Cal. Rptr. 692, 695 (1963) (scope of appellate review on factual matters is to determine if there is any substantial evidence, contradicted or not, supportive of factfinder's conclusion). See also *Sanborn v. Pacific Mut. Life Ins. Co.*, 42 Cal. App. 2d 99, 105, 108 P.2d 458, 461 (1940) (appeal is not a trial de novo but rather is to correct errors committed in trial court). But see CAL. CIV. PROC. CODE § 909 (West Supp. 1983) (allowing the appellate court to make additional or different findings of fact on appeal if action below was tried without a jury).

The distinction between appealing an alternative ground and relitigating it is thus substantial. An appeal will usually change the result only if there has been an error in law or if the facts are not sufficient to sustain the finding of fact. In contrast, every question of fact is open in relitigation.

185. Under the doctrine of res judicata, a judgment acts as a merger of, or a bar against, a second suit on the same cause of action. *Todhunter v. Smith*, 219 Cal. 690, 695, 28 P.2d 916, 918 (1934). The doctrine of collateral estoppel precludes the relitigation of a decided issue, notwithstanding the fact that not all arguments which could have been advanced to support that particular issue were actually raised. *Pacific Mut. Life Ins. Co. v. McConnell*, 44 Cal. 2d 715, 724-25, 285 P.2d 636, 641 (1955), cert. denied, 350 U.S. 984 (1956).

Failure to assert one of two grounds for judgment could have serious negative consequences. First, by relinquishing part of his arsenal, the plaintiff may reduce his chances of winning S-1. Moreover, if the plaintiff decides to withdraw one of his grounds for judgment, *res judicata* may preclude him from litigating that ground in a separate action.<sup>186</sup> Alternative grounds, by definition, are almost inevitably bound up in the same transaction, or involve the same basic claim. Once a claim has been adjudicated, all arguments which might have been, but were not, advanced in support of the claim are lost, regardless of whether the plaintiff wins or loses.<sup>187</sup> Thus the decision to refrain from asserting one of the alternative grounds may be irrevocable.

The plaintiff's alternative to sacrificing a ground is to forego the preclusive effect of the alternative grounds, which may require relitigation of one of them. The effort and expense of relitigation make this option equally undesirable. Even if the ground foregone was a simple issue, relitigating takes time and money, and requires the re-introduction of evidence and witnesses whose availability and reliability may have diminished in the interim. If the issue is more complex, relitigation could be an extremely heavy burden.

The new rule's flat ban on estoppel is particularly inappropriate in the more complicated cases, since the more complicated and expensive cases are often decided with more care. Conversely, of course, they are more likely to be appealed, an event which would take the issue out of the scope of the new rule. Nonetheless, the power to appeal, and thereby legitimize the alternative grounds in the context of the new rule, usually lies with the losing party. Thus, the plaintiff who wins on two alternative grounds, each of which took considerable effort to establish, is at the mercy of the losing defendant, who may choose not to appeal, leaving open the opportunity to relitigate one of the grounds in the future.

The plaintiff in S-1 may choose to abandon one of his grounds after it becomes clear that he will win on the other, thus avoiding the Hobson's choice required by the new rule. Yet this may be only half a victory, because it might be the abandoned ground which is the subject of S-2. Thus the plaintiff must anticipate not only the possibility of S-2, but also the particular claim on which it is based.

As difficult as these decisions may be for the plaintiff who can anticipate a second suit, they are still more onerous for the plaintiff who

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186. *See supra* note 185.

187. *Id.*

cannot. Where the second action is unexpected, the plaintiff cannot have made a knowing choice to keep or abandon an alternative theory of recovery in the first suit.<sup>188</sup> To the extent that the second action was also unforeseeable by the losing defendant, however, it should not be the subject of an estoppel.<sup>189</sup>

The effect is similar on a defendant who wins in S-1, who must choose whether to advance one defense or two. The decision is likely to be forced on many defendants because, like the hare in the fable, they are running for their lives, while the plaintiff, like the wolf, may be running only for his supper. It seems fair to conclude that most defendants in an action of any serious magnitude would be unwilling to abandon an alternative defense unless a second action were pending or very likely to be initiated.<sup>190</sup>

The new rule's solicitude for the losing litigant, combined with its rigid formula, thus imposes heavy burdens on winning litigants even when the application of collateral estoppel would not be unfair to the losing litigant. Courts should be allowed to make the initial determination of whether unfairness to the losing party would result from the

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188. The court in *Halpern* focused on the plight of a bankrupt litigant forced to take up an appeal to ward off possible future collateral consequences of the judgment. 426 F.2d at 106. Yet the plight of the plaintiff who has exhausted his resources in winning the first action, and who is now forced to relitigate one of the very issues he won, is never mentioned. While the losing litigant may have a less expensive remedy than an appeal (see discussion of CAL. CIV. PROC. CODE § 663 motions, *supra* text accompanying notes 156-57), the winning litigant has no alternative to relitigation under the new rule.

189. See *supra* notes 12-13 and accompanying text.

190. To return to the hypothetical in which A sues B for an installment of interest on a promissory note (see *supra* text accompanying note 16), B must make the decision to advance both grounds of fraud and a binding release from the obligation to pay interest. If B chooses to advance both defenses, he will have to relitigate the fraud claim if A later sues him on the principal. If B can anticipate a second action, which seems likely in this case, then he may choose to advance only the binding release from the obligation to pay interest. If he loses on this claim, however, he will have to pay interest on a note which he might successfully have challenged on the grounds of fraud.

Under California law, moreover, B is precluded from relitigating the obligation to pay interest, even though he might have advanced the fraud defense successfully. See *supra* note 185. B is not, however, precluded from relitigating the fraud issue with respect to the principal of the note, an issue which was not determined in the first action. See *Henn v. Henn*, 26 Cal. 3d 323, 330-31, 605 P.2d 10, 13, 161 Cal. Rptr. 502, 505-06 (1980).

Under both the old and the new rules, the obligation to pay future installments of interest would be conclusively established by collateral estoppel, despite the existence of several bases for that decision and despite the fact that some arguments were not advanced. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i, illustration 16 (1982).

Under the new rule, A can relitigate the fraud issue as to the principal. The result is of course *contra* under the old rule, according to which the issue of fraud, once decided, operates as an estoppel in the second suit on a different cause of action.

application of collateral estoppel, in order to avoid the unnecessary unfairness which the new rule imposes on the winning party.

## 2. Judicial economy

Considerations of judicial economy, which form a major policy basis for precluding relitigation,<sup>191</sup> apply regardless of whether the party asserting the estoppel was a party to the first action. Thus, while it may be less "unfair" to require a stranger to the first action to relitigate an issue, the resulting drain on judicial resources is the same. Although the consideration of judicial economy has not been considered sufficient justification for an estoppel, it is certainly worthy of consideration.<sup>192</sup> Other parties whose cases are delayed while decided issues are retried clearly suffer in this situation. In the current environment of fiscal conservatism, the practical constraints on hiring additional judges and support staff, in conjunction with a caseload that already strains the existing system, require that serious thought be given to a policy which produces no benefits, save the dubious one of allowing a party who has had one full and fair opportunity to litigate an opportunity to relitigate that issue.

## IV. CONCLUSION

*Halpern's* concerns about careful decision and the meaningful opportunity to appeal both seem capable of resolution through traditional case-by-case collateral estoppel analysis. Although the new rule highlights some important considerations, its solutions to these problems impose a rigidity and unfairness which is inappropriate for such a flexible and equitable doctrine. The traditional ad hoc approach to collateral estoppel, which made no exception for cases involving alternative grounds, has been and continues to be the rule in most jurisdictions.<sup>193</sup> Nonetheless, the somewhat halting progress of the new rule has served to emphasize certain effects of the old rule which call for more careful

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191. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 328 & n.10 (1979); *De Weese v. Unick*, 102 Cal. App. 3d 100, 105, 162 Cal. Rptr. 259, 262 (1980).

192. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971):

Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.

*Id.* at 328 (footnote omitted).

193. See *supra* note 107.



scrutiny.<sup>194</sup>

The unifying principles which run through these decisions are the considerations of fairness to the losing party—including the carefulness of decision and the availability of appellate review—and the policies which underly collateral estoppel—including fairness to the winning party and considerations of judicial economy. While only a few of these decisions can be reconciled with the new rule, most of them can be reconciled with the old rule.<sup>195</sup> In short, the courts which denied estoppel to an alternative ground could have reached exactly the same result under the old rule, without attempting to impose a broad and inflexible rule on cases in which estoppel is clearly appropriate.

*Adam Siegler*

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194. *Id.*

195. The *Halpern* court might have decided that the burdens of appeal were simply too heavy for the bankrupted litigants in that case, without undertaking to question the applicability of estoppel to all alternative grounds; the Second Circuit chose to view *Halpern* as an exception. See *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978). See also *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 n.10 (D.C. Cir. 1983) (considering the new rule in *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501, 508 (D.C. Cir. 1973), as an exception to, rather than a replacement of, the old rule).