1-1-2017

Delusive Exactness in California: Redefining the Claim

Kami LaBerge
Loyola Law School, Los Angeles

DELUSIVE EXACTNESS IN CALIFORNIA: REDEFINING THE CLAIM

*Kami LaBerge**

My view of primary right may differ from yours, and we have no common ground, only the statement of our opposing views.[1]

* J.D., 2017, Loyola Law School, Los Angeles; M.S. Library Science, University of North Carolina at Chapel Hill, 2012; B.A. Art History, University of North Carolina at Chapel Hill, 2010. Many thanks to Professor Simona Grossi, whose continuous love and support made this Article possible. Thank you to Jason de Jesus, who provided thoughtful comments throughout the writing process. And, of course, thank you to the editors and staff of the *Loyola of Los Angeles Law Review*.

1. Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 827 (1924).

TABLE OF CONTENTS

I. INTRODUCTION 367
II. DEFINING THE CLAIM 369
A. California and the Primary Right 369
B. The Restatement and the Same Transaction or Occurrence 371
III. A DOCTRINE IN CHAOS 372
A. The California Supreme Court on Primary Rights 373
1. Primary Rights Until 2010 373
2. *Boeken v. Philip Morris USA, Inc.* 374
B. Defining the Primary Right Since *Boeken* 375
1. California Courts 375
a. *Villacres v. ABM Industries, Inc.* 375
b. *Fujifilm Corp. v. Yang* 378
c. *DKN Holdings LLC v. Faerber* 379
2. Federal Courts 380
a. *Wolin v. City of Los Angeles* 381
b. *Inoue v. Bank of America, N.A.* 382
IV. CALIFORNIA SHOULD ADOPT THE SAME TRANSACTION OR OCCURRENCE APPROACH TO PRECLUSION 383
A. Abandoning the Primary Right: Two Approaches 383
1. Through the Courts 384
2. Through the Legislature 384
B. The Legislature Is the Better Avenue: Proposed Revisions to the California Civil Procedure Code 386
1. Replacing "Cause of Action" with "Claim" 387
2. Enacting a Res Judicata Statute 387
V. CONCLUSION 389

I. INTRODUCTION

When does a legal dispute between two parties end? The doctrine of *res judicata*, under which courts give certain conclusive effect to a prior judgment involving the same controversy as subsequent litigation, answers that question.[2] *Res judicata* comprises two distinct forms.[3] In its first form—claim preclusion[4]—it bars parties from relitigating a *claim* already litigated, or that might have been litigated, in a prior proceeding.[5] In its second form—issue preclusion—it bars parties from relitigating *issues* that were litigated in a prior proceeding.[6] This Article focuses on California's application of *res judicata*'s first form—claim preclusion.[7]

Under general claim preclusion principles, a prior proceeding bars present litigation when: (1) the claim raised in the present litigation is identical to a claim litigated in the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties are the same or in privity with the parties to the prior proceeding.[8] Thus, whether a prior action bars a second depends largely on how a court defines a "claim" and how broadly or narrowly it construes that definition. In California, that definition is grounded in the nineteenth-century primary rights theory, under which a claim is an invasion of a "primary right."[9] Although California courts have characterized a primary right as "simply the plaintiff's right to be free

2. People v. Barragan, 83 P.3d 480, 492 (Cal. 2004).

3. Todhunter v. Smith, 28 P.2d 916, 918 (Cal. 1934).

4. "While the United States Supreme Court uses the term 'res judicata' to refer collectively to claim preclusion and issue preclusion, the California Supreme Court generally uses the term 'res judicata' to refer to claim preclusion, and the term 'collateral estoppel' to refer to issue preclusion." Renowitzky v. Shellpoint Mortg. Serving, No. 3:15-CV-01016-LB, 2015 WL 4881435, at *4 (N.D. Cal. Aug. 14, 2015). For purposes of clarity, this Article uses the term "claim preclusion."

5. Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 302 (Cal. 2002). The claim preclusion doctrine is said to act as "bar" and "merger" to subsequent litigations; claims which were actually adjudicated in a prior proceeding are barred, and claims which might have been litigated are merged into the prior judgment. *See* Arlo E. Smith, Comment, *Res Judicata in California*, 40 CAL. L. REV. 412, 419 (1952).

6. *Barragan*, 83 P.3d at 492.

7. For an informative overview of both claim and issue preclusion, *see* ALLAN IDES & CHRISTOPHER N. MAY, *The Binding Effect of a Final Judgment*, *in* CIVIL PROCEDURE 1219–20 (4th ed. 2012).

8. *Mycogen Corp.*, 51 P.3d at 302.

9. Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 571 (1998).

from the particular injury suffered,"[10] application of the doctrine has been anything but simple. After all,

> [w]hat is "one existing, primary right"? We might start with the right to life, liberty, and the pursuit of happiness as a broad definition and narrow it down almost to the vanishing point, and unless it was known what purpose we intended to subserve by our definition we could hardly be criticized.[11]

Two policy considerations underlie the claim preclusion doctrine:[12] first, the consideration of fairness—that a party should not be vexed by a matter already litigated; and second, the consideration of efficiency—that it is in the public interest to preserve the court's limited resources.[13] Thus, claim preclusion is intended to be a predictable doctrine—a promoter of reliance and repose.[14] But rather than serving this purpose, California's primary rights approach is ambiguous to both litigants and the courts, resulting in an inconsistent and chaotic doctrine. This "[u]ncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort."[15]

California is the only state that has not yet discarded the primary rights approach.[16] In contrast, most jurisdictions define a "claim" by the transaction, or series of connected transactions, out of which an

10. Crowley v. Katleman, 881 P.2d 1083, 1090 (Cal. 1994), *as modified* (Nov. 30, 1994).

11. Clark, *supra* note 1, at 819.

12. *See* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955) (Hand, J.) (Claim preclusion "must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.").

13. Wulfjen v. Dolton, 151 P.2d 846, 848 (Cal. 1944) (Claim preclusion serves two purposes: "(1) [t]hat the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action.").

14. Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 302 (Cal. 2002) ("A predictable doctrine of res judicata benefits both the parties and the courts because it seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.").

15. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4407 (2d ed. 2015).

16. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," so long as those rules comport with constitutional due process. Richards v. Jefferson Cnty., 517 U.S. 793, 797 (1996). For a list of the claim preclusion approaches applied by each state, see Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1270 (2014).

action arose.[17] Under this transactional approach, claim preclusion applies when a suit involves the same "group of operative facts" as prior litigation.[18] Although California's pleading and joinder rules have embraced a transactional approach, its claim preclusion doctrine has yet to pierce the modern litigation world.[19] As a progressive state in many other areas of law, it is time for California to release its grasp on the outdated primary rights approach and adopt a transactional model.[20]

Part II of this Article provides a brief historical background of the primary rights approach to claim preclusion, then explains the same-transaction-or-occurrence approach applied by federal courts. Part III considers early criticisms of primary rights, then examines the difficulties California and federal courts have had in applying the primary rights doctrine and defining the scope of a "primary right." Part IV recommends that California adopt the same-transaction-or-occurrence approach, then discusses the judicial and legislative avenues through which California could make that transition. It further recommends that the California legislature enact a *res judicata* statute barring subsequent actions arising out of the same transaction or occurrence. Part V concludes that the time is ripe for California to take action to redefine its claim for purposes of preclusion.

II. DEFINING THE CLAIM

A. California and the Primary Right

As a preliminary matter, California does not use the term "claim" in the preclusion context.[21] Rather, it uses the phrase "cause of action,"

17. *See* Trammell, *supra* note 16, at 1270; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.").

18. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 477 (2d ed. 1947) (defining a claim as "a group of operative facts giving rise to one or more rights of action").

19. California's claim preclusion doctrine is grounded in pre-1972 rules of pleading that severely limited the causes of action that could be pleaded in a single litigation unit. *See* discussion *infra* Section II.A.

20. Walter W. Heiser and Robin James encouraged California to abandon this approach in 1998 and 1989, respectively. Heiser, *supra* note 9; Robin James, Comment, *Res Judicata: Should California Abandon Primary Rights*, 23 LOY. L.A. L. REV. 351 (1989). California's continued use of this approach since then has only served to further muddle its claim preclusion law. *See* discussion *infra* Section III.B, III.C.

21. Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975).

which it defines as the violation of a primary right, rather than the legal theory asserted.[22] Yet California also uses "cause of action" "indiscriminately . . . to mean counts which state [according to different legal theories] the same cause of action . . . ."[23] Because the meaning of "cause of action" is context-dependent, it "remains elusive and subject to dispute and misconception."[24] To avoid that misconception, this Article uses the term "claim" in its discussion of *res judicata*.[25]

In California, courts have consistently applied the primary rights approach to define a "claim" for purposes of preclusion.[26] That approach developed from nineteenth century rules of pleading, when legal and equitable remedies were administered by different courts.[27] And in courts of law, strict procedural requirements often prevented parties from asserting different legal theories arising from the same offending conduct.[28] This limitation appears in an early California joinder statute, the California Practice Act of 1851.[29] That Act divided claims that could be joined in a single action into seven categories, each based on a separate right.[30] Plaintiffs could not join claims falling into different categories in the same complaint; for example, a plaintiff

---

22. *Id.*

23. Boeken v. Philip Morris, Inc., 230 P.3d 342, 348 (Cal. 2010) (citing Eichler Homes of San Mateo, Inc. v. Superior Court, 361 P.2d 914, 916 (Cal. 1961)).

24. 4 WITKIN, CALIFORNIA PROCEDURE § 35 (5th ed. 2008).

25. *See also* discussion *infra* Section IV.B.3.a.

26. *Boeken*, 230 P.3d at 348.

27. James, *supra* note 20, at 356.

28. *Id.*

29. 1851 CAL. STAT. 51, 59–60, ch. 5, § 64 (codified as amended at CAL. CIV. PROC. CODE § 427 (repealed 1971)).

30. *Id.* The 1851 Act provides:

> The plaintiff may unite several causes of action in the same complaint, when they all arise out of:
>
> 1. Contracts, express or implied; or,
>
> 2. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; or,
>
> 3. Claims to recover specific personal property, with or without damages, for the withholding thereof; or,
>
> 4. Claims against a trustee, by virtue of contract, or by operation of law; or,
>
> 5. Injuries to character; or,
>
> 6. Injuries to person; or,
>
> 7. Injuries to property.
>
> But the causes of action so united shall all belong to only one of these classes, and shall affect all parties to the action, and not require different places of trial, and shall be separately stated.

Id.

was required to plead injuries to his person and injuries to his property in separate actions.[31]

In the latter half of the nineteenth century, Professor John Norton Pomeroy of Hastings College of Law pioneered the primary rights approach; he was influenced in part by the California Practice Act of 1851.[32] According to Pomeroy, a "claim" comprised three requirements: (1) a plaintiff's primary right; (2) the defendant's corresponding duty; and (3) a wrong done by the defendant constituting a breach of that duty.[33] Thus, Pomeroy fixated on whether a prior proceeding was based on the same injury to the same right as the present litigation.[34] Although Pomeroy categorized primary rights and duties as those involving persons and those involving things, he emphasized that "[t]hese rights and duties are, of course, *innumerable* in their variety, nature, and extent."[35]

The merger of courts of law and equity allowed for broader joinder.[36] In 1971, California abolished the joinder categories, repealing Section 427 in favor of a broad joinder rule allowing a plaintiff to unite all claims he has against any defendant.[37] Nevertheless, California courts continue to administer Pomeroy's three prongs to determine whether two actions involve the same claim.[38]

B. The Restatement and the Same Transaction or Occurrence

In response to the adoption of the Federal Rules of Civil Procedure in 1938, which allowed for liberal joinder of claims, federal

31. *Id.* In 1907, California amended this statute to include an eighth category: "Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section." Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 2–3 (1970). As Friedenthal explained, the eighth category was of little use to litigants because the paragraph following the listing of categories, which required united claims to belong only to one class, precluded joining claims arising out of the same transaction if any claim fell within one of the other seven categories. *Id.* at 3.

32. JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS § 453 (1876) [hereinafter Pomeroy Remedies]; JOHN NORTON POMEROY, EQUITY JURISPRUDENCE §§ 89–95 (1881) [hereinafter Pomeroy Equity]. For a more comprehensive discussion of Pomeroy's scholarship, *see* Heiser, *supra* note 9, at 571–72 n.37.

33. Heiser, *supra* note 9, at 571–72 n.37.

34. Slater v. Blackwood, 543 P.2d 593, 595 (Cal. 1975).

35. Pomeroy Equity, *supra* note 32, §§ 91–92 (emphasis added).

36. James, *supra* note 20, at 384.

37. *Id. See* CAL. CIV. PROC. CODE § 427.10(a) (West 2015).

38. *See* Boeken v. Philip Morris USA, Inc., 230 P.3d 342, 348 (Cal. 2010).

courts began to acknowledge the necessary evolution of the definition of a claim.[39] Pleadings focused not on framing a single legal issue, but on *facts* supporting relief under multiple legal theories.[40] Thus, courts began to concentrate on those facts to define a claim brought under modern pleading standards.[41]

Acknowledging modern joinder rules, in 1982, the RESTATEMENT (SECOND) OF JUDGMENTS ("Restatement") recommended a "transactional" approach, defining a claim by "the transaction, or series of connected transactions, out of which the action arose."[42] Under the Restatement, courts assess the transaction "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[43]

Over the following decades, many federal courts embraced the Restatement's guidance, and by 2011, the United States Supreme Court had acknowledged that "[t]he now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring claims arising from the same transaction."[44]

III. A DOCTRINE IN CHAOS

"[E]ven in the 19th century it was not uncommon to identify a claim for preclusion purposes based on facts rather than relief."[45]

---

39. *See, e.g.*, Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469 (3d Cir. 1950) ("[T]he meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier.").

40. *Id.*

41. *See, e.g.*, Herendeen v. Champion Int'l Corp., 525 F.2d 130, 133 (2d Cir. 1975) (finding "essential facts" in the prior and subsequent actions relevant to determining whether the claims are the same); Moreno v. Marbil Prods., Inc., 296 F.2d 543, 544 (2d Cir. 1961) (stating that claim preclusion applies when "the essential facts in the [prior] action and in the present action are the same.").

42. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 17, § 24.

43. *Id.* For an example of a court's consideration of the factors enumerated in the *Restatement*, see Porn v. Nat'l Grange Mut. Ins. Co., 93 F.3d 31 (1st Cir. 1996).

44. United States v. Tohono O'Odham Nation, 563 U.S. 307, 316 (2011). This contrasts with the Court's early twentieth-century decisions embracing the primary rights approach. *See, e.g.*, Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927) ("A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.").

45. *Tohono O'Odham Nation*, 563 U.S. at 316; *see also* J. WELLS, RES ADJUDICATA AND STARE DECISIS § 241 (1878) ("The true distinction between demands or rights of action which are

Professor Charles Clark, providing some of the earliest criticisms of the primary rights approach, stated that "[w]e think that in speaking of 'one existing, primary right' we have discovered a mathematically exact test which will dispense with brains upon the part of the judge."[46] But he explained that the approach did anything but dispense with judges' gray matter.[47] Rather, it did not allow for practical application because it carried no real meaning; the primary rights approach was, in a word, elusive.[48] And it continues to elude courts applying California preclusion law.

A. The California Supreme Court on Primary Rights

1. Primary Rights Until 2010

At the turn of the twentieth century, the California Supreme Court, citing Pomeroy's scholarship, adopted the three-prong approach to define a claim: a plaintiff's primary right, the defendant's corresponding duty, and the defendant's breach of that duty.[49] By the late 1970s, California had revised its joinder statutes, and many other jurisdictions had adopted the transactional approach.[50] Yet the California Supreme Court continued to embrace primary rights.[51] Its 1979 decision in *Agarwal v. Johnson*[52] emphasized "that the same facts are involved in both suits is not conclusive."[53] But that case departed from Pomeroy's three-prong approach, instead stating that, in determining whether two claims are the same, "the significant factor is the harm suffered," upsetting lower courts' understanding of a claim.[54]

Since *Agarwal*, the California Supreme Court has not consistently considered the harm suffered in applying its rule of claim preclusion.

---

single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.").

46. Clark, *supra* note 1, at 831.

47. *Id.* at 826.

48. *Id. See also* Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 361 (1934) (explaining that "Pomeroy's primary right" theory "acquires specific content only if identified with rights enforced in the old forms of action," and that there is no "compelling reason for such a reversion so foreign to modern procedural ideas.").

49. McKee v. Dodd, 93 P. 854, 855 (Cal. 1908).

50. *See supra* note 41.

51. *See* Agarwal v. Johnson, 603 P.2d 58 (Cal. 1979).

52. *Id.*

53. *Id.* at 72.

54. *Id.* For a factual summary of *Agarwal*, *see* Heiser, *supra* note 9, at 580–83.

In two subsequent decisions in 1994 and 2002, it reverted back to Pomeroy's three-prong approach with no mention of *Agarwal* or the harm suffered by the plaintiffs.[55]

2. *Boeken v. Philip Morris USA, Inc.*

The California Supreme Court did not provide additional guidance on defining the primary right until 2010, when it decided *Boeken v. Philip Morris USA, Inc.*[56] There, Boeken's husband, a long-time cigarette smoker, was diagnosed with lung cancer.[57] Before his death, Boeken filed a common law loss of consortium action against a cigarette manufacturer in California state court.[58] She later dismissed that action with prejudice.[59]

After her husband died from the effects of lung cancer, Boeken brought another action against the same manufacturer, this time for wrongful death under a California statute.[60] The manufacturer demurred, arguing that the suit was barred by California's claim preclusion doctrine because Boeken's wrongful death action involved the same primary right as her previous loss of consortium action.[61] The trial court sustained the demurrer, and the appellate court affirmed.[62]

The California Supreme Court, in a 4-3 decision, affirmed the appellate court, holding that Boeken's wrongful death action was barred by claim preclusion because it involved the same primary right—"the right not to be wrongfully deprived of spousal companionship and affection"—as her loss of consortium action.[63] The majority applied *Agarwal*'s "harm suffered" approach, finding that both actions involved the plaintiff's permanent deprivation of her husband's companionship and affection.[64]

The dissenting opinion criticized the majority's characterization of the primary rights at issue in Boeken's loss of consortium and

55. *See* Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 306 (Cal. 2002); Crowley v. Katleman, 881 P.2d 1083, 1090 (Cal. 1994), *as modified* (Nov. 30, 1994).

56. 230 P.3d 342 (Cal. 2010).

57. *Id.* at 344.

58. *Id.* at 345.

59. *Id.* ("[F]or purposes of [claim preclusion], a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action.").

60. *Id.*

61. *Id.*

62. *Id.* at 345–46.

63. *Id.* at 352.

64. *Id.* at 348.

wrongful death actions.[65] As it explained, "a wrongful death action consists of several separate primary rights: the right to economic support, the right to consortium, the right to funeral expenses, and only the loss of consortium 'primary right' is foreclosed by a prior common law loss of consortium action."[66] As later cases show, the court's split decision in *Boeken* further served to confuse courts in California and elsewhere tasked with applying the primary rights approach.

B. Defining the Primary Right Since Boeken

Since *Boeken*, the California Supreme Court has not addressed the "same claim" element of claim preclusion. Thus, California state courts and federal courts have attempted to define the "primary right" according to *Boeken*'s perplexing guidance. As the following cases illustrate, courts continue to find the doctrine "elusive and subject to dispute and misconception."[67]

1. California Courts

a. Villacres v. ABM Industries, Inc.

The California Court of Appeal issued a decision in *Villacres v. ABM Industries, Inc.*[68] five months after *Boeken*. In *Villacres*, a class of security guards brought a class action against their employer, alleging failure to pay overtime and failure to pay wages for a split shift in violation of the California Labor Code.[69] The parties reached a tentative settlement, and notice of that settlement was mailed to more than 11,000 putative class members.[70] The settlement stated in part that the class members agreed to waive all claims that "could have been raised as part of the Plaintiffs' claims."[71] Carlos Villacres was one of those class members; he did not opt out of the class, object to the settlement, or seek to intervene in the suit. The parties entered into the settlement agreement, and the court dismissed the suit with prejudice.[72]

65. *Id.* at 355 (Moreno, J., dissenting).
66. *Id.*
67. WITKIN, *supra* note 24, § 24.
68. 117 Cal. Rptr. 3d 398 (Ct. App. 2010).
69. *Id.* at 404–05.
70. *Id.* at 405.
71. *Id.* at 406.
72. *Id.*

Two days later, Villacres filed a second action against the same employer as "an individual on behalf of himself and other aggrieved employees."[73] Villacres alleged the following violations of the California Labor Code: failure to pay overtime compensation, failure to furnish employees with complete wage statements, failure to provide meal and rest periods, failure to indemnify employees for business expenses and losses, and failure to pay wages on a timely basis. He also sought civil penalties and attorney fees under the Labor Code Private Attorneys General Act of 2004 ("PAGA").[74]

The defendant employer filed a motion for summary judgment on the ground that Villacres's second action was barred by the settlement and dismissal with prejudice in the first action.[75] The trial judge agreed, stating that "the claims at issue in [this action] fall into the category of claims that could have been asserted in the [first] . . . matter."[76] Villacres appealed, arguing that his action did not involve a claim that could have been raised in the first action because each Labor Code provision involves a distinct primary right, and because the recovery of unpaid wages for a Labor Code violation involves a different primary right as the recovery of a civil penalty under PAGA for the same violation.[77]

In a disorienting 2-1 opinion, the appellate court affirmed.[78] Although the majority stated that it "need not decide whether . . . every Labor Code violation and PAGA penalty involves a separate primary right," it nevertheless "conclude[d] this suit alleges the same cause of action asserted and settled in [the first action]."[79] It appears the majority meant that Villacres's suit did indeed constitute a "claim that could have been raised" within the meaning of the settlement agreement, but the discussion draws on preclusion laws of other jurisdictions in coming to that conclusion; it does not explain how California's preclusion law enters into the analysis.[80] The majority decision is thus more in line with the transactional approach than the primary rights approach.

---

73. *Id.* at 407.
74. *Id.* at 407–08.
75. *Id.* at 408.
76. *Id.*
77. *Id.* at 408, 413.
78. *Id.* at 404.
79. *Id.* at 414, 422.
80. *Id.* at 418.

The dissenting opinion criticized the majority's merger of claim preclusion law and contract interpretation.[81] In contrast, the dissent separated its claim preclusion discussion from that of its interpretation of the contract.[82] It first applied the claim preclusion analysis to Villacres's action.[83] It agreed that Villacres's overtime claims were barred, but found that his non-overtime claims were not.[84]

> That plaintiff's non-overtime claims do not involve the same causes of action as the [first action's] overtime and split-shift claims should be plain. A cause of action is identified by examining one party's right and the other's obligation. An employee's right to receive premium payment for overtime stems from the Legislature's determination that too much work in a day or week can be harmful. It is not the same as his or her right to receive wages promptly, to receive detailed and accurate wage data, to be reimbursed for required expenses, or to receive meal and rest breaks.[85]

The dissent then analogized the contractual language, "claims that could have been raised," to that language as used in the claim preclusion context.[86] Because the settlement was entered into in California, the dissent found that the parties intended to release only claims which would be barred by California claim preclusion law.[87] Thus, the non-overtime claims were barred by neither preclusion law nor by the settlement agreement.

Villacres highlights the difficulty courts have had in harmonizing California preclusion law with contractual waivers. Although the result reached by the majority is efficient, its analysis is puzzling because it is at odds with the primary rights model.

---

81. *Id.* at 423 (Chaney, J., dissenting).
82. *Id.* at 424–30.
83. *Id.* at 424–26.
84. *Id.* at 425–26.
85. *Id.*
86. *Id.* at 427 (quoting Price v. Sixth Dist. Agric. Ass'n, 258 P. 387, 391 (Cal. 1927)) ("In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto.").
87. *Villacres*, 117 Cal. Rptr. 3d at 428. The dissent explains: "If the parties had intended a broader release they could have released 'all claims,' or even 'all claims that could have been raised' in the [prior] litigation, not merely claims that could have been raised 'as part of' the plaintiffs' claims." *Id.*

b. Fujifilm Corp. v. Yang

A California appellate court's attempt in *Fujifilm Corp. v. Yang*[88] to further clarify the scope of a primary right is similarly perplexing. That case involved not one, but two prior actions.[89] In the first, Fujifilm Corp. ("Fuji") brought a patent-infringement suit in federal court against Yet Chan, Cindy Yang, and others.[90] The parties executed a settlement agreement under which all defendants except Yang agreed to make six payments to Fuji.[91] Under the agreement's terms, if those defendants missed a payment, Yang would become liable for a portion of the remaining balance equal to the value of any property that Chan transferred to her, fraudulently or otherwise.[92] After the defendants missed a payment, Yang refused to pay Fuji.[93] Fuji then filed a second federal suit against Yang for breach of the agreement.[94] In its complaint, Fuji demanded $700,000 in cash and a piece of real property that Chan had transferred to Yang.[95] Yang argued that the agreement did not apply to those transfers because they were made before the agreement's effective date.[96] The district court agreed.[97]

Fuji then filed a third complaint in California state court, alleging that Yang committed fraudulent transfers by transferring assets for the purpose of frustrating Fuji's ability to enforce the agreement.[98] Yang moved for summary judgment on the ground that Fuji's fraudulent transfer claims could have been litigated in the second suit, and thus were barred by California's claim preclusion law.[99] The trial court rejected Yang's argument, applying the "harm suffered" approach to preclusion in finding that the two suits involved different primary rights. [100] It found that "[t]he first harm was Fuji 'didn't get paid

88. 167 Cal. Rptr. 3d 241 (Ct. App. 2014).
89. *Id.* at 243.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 243–44. Although the second suit was litigated in federal court, California preclusion law applied because the federal court sat in diversity and decided issues of California contract law. *See infra* note 116 and accompanying text.
100. *Fujifilm Corp.*, 167 Cal. Rptr. 3d at 244.

money under the settlement agreement. And the [second] harm, based on the fraudulent transfer, is [Fuji isn't] able to collect the money that [Fuji is] owed because [Chan] fraudulently transferred assets and, therefore, [Fuji has] no place to go.'"[101] A jury later found in Fuji's favor, and Yang appealed.[102]

On appeal, although Yang urged the court to adopt the transactional approach to claim preclusion in reaching its decision, the court explicitly refused to consider her request, stating that it was "not free to depart from binding Supreme Court precedent."[103] Instead, the appellate court, affirming the district court, attempted to clarify the "harm suffered" approach to the primary right: "A plaintiff's primary right is defined by the *legally protected interest* which is harmed by defendant's wrongful act, and is not necessarily coextensive with the *consequence* of that wrongful act."[104] But rather than clarify the approach, the court appears to endorse a hybrid analysis that appropriates the first of Pomeroy's three prongs. The court ultimately found that "because breaching a contract inflicts harm on a legally protected interest different from tortious conduct that renders uncollectable a judgment arising from the breach of contract, two different primary rights arise."[105]

c. DKN Holdings LLC v. Faerber

A year later, in *DKN Holdings LLC v. Faerber*,[106] the California Court of Appeals focused exclusively on primary rights at the expense of another requisite claim preclusion element. There, a commercial landlord leased property to three individual tenants, who were jointly and severally liable.[107] The tenants defaulted, and one sued the landlord.[108] The landlord cross-complained against all three tenants but later dismissed two tenants without prejudice.[109] After the landlord obtained a judgment against the first tenant, he brought a separate

101. *Id.*
102. *Id.*
103. *Id.* at 246.
104. *Id.* at 245 (quoting Henderson v. Newport-Mesa Unified Sch. Dist., 154 Cal. Rptr. 3d 222, 238 (Ct. App. 2013), *reh'g denied* (Apr. 10, 2013), *review denied* (June 26, 2013)).
105. *Id.*
106. 170 Cal. Rptr. 3d 745 (Ct. App. 2014), *rev'd*, 352 P.3d 378 (Cal. 2015).
107. *Id.* at 748.
108. *Id.*
109. *Id.* at 749.

action against the second and third.[110] Those tenants demurred on the ground that the suit was barred by California's claim preclusion doctrine.[111] The trial court sustained the demurrer without leave to amend.[112] The landlord appealed.[113]

The appellate court affirmed, holding that because the landlord's prior lawsuit was based on the same "primary right" as the second suit—the leasehold obligation—the second suit was barred.[114] The California Supreme Court correctly overturned this decision on the ground that it did not satisfy a different element of the claim preclusion doctrine—the second and third tenants were not the same as or in privity with the first tenant.[115] But the appellate court's decision, debating the primary right at the expense of the other requisite claim preclusion elements, indicates the distracting nature of California's definition of a claim.

2. Federal Courts

To determine the preclusive effect of a prior state court decision, a federal court must apply the law of preclusion used by the state in which the decision was rendered.[116] Similarly, state law of preclusion governs the preclusive effect of federal court actions in which jurisdiction is based on diversity of citizenship and the issues involved are those of state law.[117] Thus, federal courts, particularly those in the Ninth Circuit, frequently apply California's outdated preclusion law, and thus, must determine the scope of a primary right.[118]

110. *Id.*
111. *Id.* at 750.
112. *Id.* at 752.
113. *Id.*
114. *Id.* at 755.
115. DKN Holdings LLC v. Faerber, 352 P.3d 378, 387 (Cal. 2015), *reh'g denied* (Aug. 12, 2015).
116. 28 U.S.C. § 1738 (2015); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982) ("Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.").
117. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).
118. *See, e.g.*, Gonzales v. Cal. Dep't of Corr., 739 F.3d 1226, 1233 (9th Cir. 2014) (applying primary rights analysis to find that prisoner's unsuccessful California habeas petition challenging his placement in secure housing unit precluded his subsequent civil rights claim).

a. Wolin v. City of Los Angeles

In 2013, the Ninth Circuit applied California's primary rights approach in *Wolin v. City of Los Angeles*,[119] determining in a 2-1 decision that a prior suit barred the second because the actions involved the same harm suffered.[120] Alicia Wolin, an employee with the Los Angeles Police Department ("LAPD"), filed an administrative action with the LAPD on the ground that it had denied her a promotion because of her gender, in violation of the terms of a consent decree.[121] After the LAPD denied her claim, she petitioned the Superior Court of Los Angeles for a writ of mandate to overturn that denial.[122] LAPD ultimately prevailed in that action.[123] Wolin then filed a second complaint in federal court, alleging that LAPD failed to promote her, in violation of various state and federal laws.[124] The federal court dismissed the action on the basis that her second action was barred by claim preclusion because they involved the same primary right—LAPD's allegedly wrongful refusal to grant her a promotion.[125] Wolin appealed.[126]

The majority affirmed, holding that Wolin's state and federal actions involved the same primary right because "the most significant consideration under California's 'primary rights' theory is the harm suffered by the plaintiff," and the harm suffered in both actions was Wolin's lack of promotion.[127] Judge Berzon dissented, criticizing the majority for addressing only the primary right and not the corresponding duty and breach.[128] Unlike the majority, she opted for the three-prong analysis, explaining that in the first action, the duty breached by the LAPD was the duty to comply with hiring targets identified in a consent decree, and the harm suffered by Wolin was the harm of breach of promise. But in the second action, the duty was not to discriminate against an employee on the basis of her sex, and the

119. 524 F. App'x 331 (9th Cir. 2013).
120. *Id.*
121. *Id.* at 332.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 333.
128. *Id.* (Berzon, J., dissenting).

harm she suffered was discrimination.[129] Thus, the action involved a different primary right and was not barred.[130]

The split panel in this decision derived from the California Supreme Court's inability to decisively define a claim. Indeed, both opinions applied standards endorsed by the California Supreme Court; the majority focused on the *Agarwal* "harm suffered" analysis, while the dissent applied Pomeroy's three-prong approach. Yet as this case illustrates, these two approaches are often incompatible, leading to unpredictable judicial definitions of a primary right.

b. Inoue v. Bank of America, N.A.

A district court in the Northern District of California applied California's law of preclusion in *Inoue v. Bank of America, N.A.*[131] The court's order further demonstrates the inefficiencies of the primary rights approach. Masazumi Inoue filed a wrongful foreclosure action against Bank of America in California Superior Court, alleging fraud, violations of California mortgage lending statutes, and violation of California unfair competition law.[132] The court entered judgment in Bank of America's favor.[133]

Inoue then filed a second action against Bank of America in federal court, alleging wrongful foreclosure, negligence, fraud, negligent and intentional infliction of emotional distress, and violation of California unfair competition law.[134] The second action involved the same foreclosure sale of the same property as the first suit.[135] Bank of America moved to dismiss on the ground that the second action was barred by claim preclusion.[136] The district court agreed.[137] It held that the actions involved the same claim because they "involve the same primary right, or the alleged wrongful foreclosure."[138] It further concluded, "[t]hat the plaintiff adds myriad new factual allegations in

129. *Id.* at 334 ("[T]he settlement agreement allegedly breached ostensibly provided for promotion of individual women who had never been discriminated against, and so did not encompass the right to equal protection, which is the basis of Wolin's § 1983 action.").

130. *Id.*

131. No. 15-CV-1636-YGR, 2015 WL 4498570, at *1 (N.D. Cal. July 23, 2015).

132. *Id.*

133. *Id.* at *2.

134. *Id.*

135. *Id.*

136. *Id.* at *1.

137. *Id.*

138. *Id.* at *4.

the [federal complaint], mostly related to so-called 'dual tracking,' and various new state law claims is not relevant to this inquiry."

But the "various new state law claims" *are* relevant to California's claim preclusion inquiry. For example, the state tort claims of negligent and intentional infliction of emotional distress in the second action involve a different primary right—the right to be free from emotional distress—than the economic and property rights implicated by the fraud and statutory violations alleged in the prior action. Both actions do involve the same transaction—Bank of America's allegedly wrongful foreclosure activities, but they involve different claims for purposes of the primary rights approach to claim preclusion.[139] Thus, although the result in this case serves the preclusion doctrine's purposes of fairness and efficiency, its result was wrong under California preclusion law.

IV. CALIFORNIA SHOULD ADOPT THE SAME TRANSACTION OR OCCURRENCE APPROACH TO PRECLUSION

A. Abandoning the Primary Right: Two Approaches

As illustrated by the cases above, California's attachment to primary rights has led to a disorganized preclusion law that hinders fairness and efficiency. It does not "prevent[] multifarious law suits," nor does it "protect[] persons from being sued twice in the same cause" or "conserve[e] court time by preventing needless relitigation."[140] Rather than continuing to apply this outdated doctrine, California should adopt the transactional approach applied in federal courts and recommended by the Restatement. There are two ways California could accomplish this. First, the California Supreme Court could redefine the doctrine by overruling its precedent and embracing the Restatement's definition of a claim. Alternatively, the California legislature could amend the state's procedural rules to require plaintiffs to join together claims arising out of the same transaction or to adopt the transactional approach as the state's rule of preclusion.

139. Inoue has appealed this decision to the Ninth Circuit, which should address a three-prong primary right analysis for each of Inoue's causes of action.

140. Smith, *supra* note 5, at 414.

1. Through the Courts

The California Supreme Court can redefine claim preclusion by adopting a transactional definition of a claim in favor of the confusing and outdated primary rights approach. For example, Idaho adopted the Restatement approach in 1983, in *Aldape v. Akins*.[141] As that court explained, "the Second Restatement, with its definitive treatment of claim preclusion, clarifies the scope of res judicata."[142] By embracing the Restatement, the California Supreme Court would not only serve the purposes behind claim preclusion, it would also provide comprehensive guidance to other California courts by way of the Restatement's text and comments.

2. Through the Legislature

Currently, although the California Civil Procedure Code has a permissive joinder statute that allows a plaintiff to join all claims he has against any defendant, it does not *require* a plaintiff to join claims.[143] Nevertheless, the California Civil Procedure Code does require a party against whom a claim is made to plead all counterclaims arising out of the same transaction as the original claims.[144]

---

141. 668 P.2d 130, 134 (Id. Ct. App. 1983) ("We believe the time has come in Idaho to state the doctrine of res judicata in terms free from the recrudescent trappings of a cause of action.").

142. *Id*. Many other states have expressly adopted the Restatement as their law of preclusion. *E.g.*, Kauhane v. Acutron Co., Inc., 795 P.2d 276, 279 (Haw. 1990); River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 893 (Ill. 1998); Univ. of Nev. v. Tarkanian, 879 P.2d 1180, 1191–92 (Nev. 1994); Three Rivers Land Co., Inc. v. Maddoux, 652 P.2d 240, 245 (N.M. 1982), *overruled on other grounds by* Universal Life Church v. Coxon, 728 P.2d 467 (N.M. 1986); Hodes v. Axelrod 515 N.E.2d 612, 616 (N.Y. 1987); Drews v. EBI Cos., 795 P.2d 531, 536 (Or. 1990).

143. CAL. CIV. PROC. CODE § 427.10 (West 2015) provides: "A plaintiff who in a complaint, alone or with coplaintiffs, alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with any coplaintiffs against any of such defendants." Corresponding sections allow for permissive joinder of claims in cross-complaints. *See* CIV. PROC. §§ 428.10, 428.30.

144. CIV. PROC. § 426.30. That statute provides:

> Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded. (b) This section does not apply if either of the following are established: (1) The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action. (2) The person who failed to plead the related cause of action did not file an answer to the complaint against him.

Id.

As California's lawmaking body, the California legislature could enact legislation guiding the state towards a more modern definition of a claim. To do so, it could amend the Civil Procedure Code's current joinder statutes to require mandatory joinder of transactionally-related claims. Alternately, it could enact a statute codifying a *res judicata* rule. Similar provisions that other states and the federal courts have enacted provide insight into this approach.

Michigan appears to be the only state that statutorily requires plaintiffs to join all transactionally-related claims.[145] In contrast, most states have modeled their joinder statutes after the Federal Rules of Civil Procedure.[146] In those states, and in federal courts, a party must state as a counterclaim any claim that arises out of the same transaction or occurrence as the claim made by the opposing party.[147]

Louisiana, on the other hand, codified its transactional approach to claim preclusion in a *res judicata* statute:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out

145. Friedenthal, *supra* note 31, at 11. That statute, MICH. CT. R. 2.203(A) (2015), provides,

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Id. Michigan does not have a mandatory counterclaim rule; it is only when a defendant brings one counterclaim that this rule requires him to join all transactionally-related claims. *See id.*

146. For example, forty states and the District of Columbia have enacted compulsory counterclaim rules similar to Federal Rule of Civil Procedure 13. For a full list, *see* Trammell, *supra* note 16, at 1276–78.

147. FED. R. CIV. P. 13(a)(1). Under that rule,

> A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

Id.

> of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action. . . .[148]

A corresponding statute provides three exceptions to the general rule barring a second action: when the first action was dismissed without prejudice, when the judgment reserved the right to bring a second action, and "when exceptional circumstance justify relief."[149]

Of these two options, a codification of the claim preclusion rule would better transition California into a modern approach to claim preclusion. A mandatory joinder statute would only impliedly address a shift to the transactional approach, requiring further input by the courts on the preclusive impact of the joinder statute. But a claim preclusion statute would expressly tackle the issue, better instructing California courts and litigants of the rule's in-practice operation.

B. The Legislature Is the Better Avenue: Proposed Revisions to the California Civil Procedure Code

Although other states have successfully adopted the transactional approach through their judiciaries, enacting compulsory joinder or claim preclusion rules through the legislature is the more fair and efficient approach in California. In 1998, Professor Walter Heiser argued that judicial adoption of the Restatement is preferable to action by the California legislature.[150] Heiser provided three reasons: (1) a judicial overruling would be more expeditious; (2) a mandatory joinder statute could encourage plaintiffs, in an abundance of caution, to allege every conceivable right to relief in one action, and; (3) the Restatement is comprehensive in a way that is unlikely to be duplicated by legislative action.[151] Eighteen years later, the California Supreme Court has not yet adopted the Restatement approach. In fact, it expressly refused to address the question in a case where the result would be the same under either the primary rights or transactional approach.[152] And neither the majority nor the dissent in *Boeken* even

148. LA. STAT. ANN. § 13:4231 (2015).

149. *Id.* § 13:4232.

150. Heiser, *supra* note 9, at 615–16.

151. *Id.*

152. *See* Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 309 n.12 (Cal. 2002) ("Amici curiae urge this court to abandon the primary right theory and adopt the transactional approach of the Restatement Second of Judgments. As the result in this case would be the same under either theory, we decline to reconsider our long-standing approach to res judicata.").

mentioned the Restatement, despite the parties addressing the issue in their briefing.[153] It is time for the California legislature to redirect the California Supreme Court's focus to the policies of fairness and efficiency a claim preclusion doctrine is intended to serve. With respect to Heiser's second and third concerns, by enacting a *res judicata* statute, the legislature can expressly address the Restatement such that it becomes an important aspect of the legislative history. Thus, courts and parties will look to it as persuasive authority in defining a claim for purposes of preclusion, limiting the concerns of overpleading and lack of guidance.

A statute has additional benefits. The legislature has the ability to tailor a statute so that it does not have retroactive impact on parties relying on the current rule of preclusion.[154] Furthermore, the California Civil Procedure Code, like the Restatement and the Louisiana statute, can include equitable considerations in its text to allow for judicial discretion and equitable exclusions.[155]

1. Replacing "Cause of Action" with "Claim"

As an initial matter, California's use of the term "cause of action" "remains elusive and subject to dispute and misconception," in part because courts use the term differently in a variety of contexts.[156] To remedy these disputes and misconceptions, California should, as federal courts did decades ago, replace "cause of action" in the preclusion and pleading context with the term "claim."

2. Enacting a Res Judicata Statute

In light of the foregoing, I propose that California adopt the following statute to incorporate the same-transaction-or-occurrence approach into its claim preclusion law:

153. *See* Brief for Appellant at 22, Boeken v. Philip Morris, USA, Inc., 230 P.3d 342 (Cal. 2010) (No. S162029), 2008 WL 4143645, at *22; Brief for Respondent at 36, Boeken v. Philip Morris, USA, Inc., 230 P.3d 342 (Cal. 2010) (No. S162029), 2008 WL 4736274, at *36. Although the Supreme Court did not address the issue, the Court of Appeals suggested in a footnote that the result would be the same under either theory of claim preclusion. Boeken v. Philip Morris USA, Inc., 72 Cal. Rptr. 3d 454, 460 n.7 (Cal. Ct. App. 2008), *aff'd*, 230 P.3d 342 (Cal. 2010).

154. *Cf.* CAL. CIV. PROC. CODE § 3 (West 2015) ("No part of [this Code] is retroactive, unless expressly so declared.").

155. *See* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 17, § 26. Indeed, the California Civil Procedure Code states that its provisions are to be liberally construed. CIV. PROC. § 4 (2015).

156. WITKIN, *supra* note 24, § 35.

(1) **Definitions**.
   (a) A "claim" includes all rights of a party to remedies against an opposing party in an action with respect to all or any part of the transaction or series of transactions out of which the action arose.
   (b) A "defendant" is the party against whom a claim is made.
   (c) A "plaintiff" is the party who makes a claim against an opposing party.

(2) **Valid and Final Judgment Conclusive**. A valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
   (a) *Judgment for Plaintiff*. When the judgment is rendered in favor of the plaintiff:
      (i) The judgment extinguishes all actions on the same claim or any part thereof and those actions are merged in the judgment; and
      (ii) The plaintiff may maintain an action upon the judgment; and
      (iii) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the action in which the judgment was rendered.
   (b) *Judgment for Defendant*. When the judgment is rendered in favor of the defendant, the judgment extinguishes and bars all actions on the same claim or any part thereof.

(3) **Exceptions**. A judgment, although valid and final, does not bar subsequent actions on the same claim:
   (a) When the judgment dismissed the first action without prejudice;
   (b) When the judgment reserved the right of a party to bring another action;
   (c) When exceptional circumstances justify relief; or
   (d) When otherwise provided by law.

This proposed statute incorporates the same-transaction-or-occurrence definition of a claim as recommended by the Restatement. Furthermore, it draws upon the language of the Restatement such that courts applying and interpreting the statute can refer to the comprehensive commentary to the Restatement and to federal and state courts applying the Restatement to guide their decisions.[157]

V. CONCLUSION

In 1924, Charles Clark harshly criticized the primary rights approach as naïve, meaningless, and elusive.[158] In 1950, a federal appellate court recognized that the meaning of claim "is much broader today than it was earlier"—i.e., when code pleading limited a plaintiff's opportunity to litigate different legal theories in a single action.[159] In 1982, the American Law Institute published the Second Restatement, promoting the same-transaction-or-occurrence approach in "respon[se] to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems."[160] In 2011, the United States Supreme Court gave its seal of approval to the transactional approach as the accepted test in preclusion law.[161] In 2017, 49 states and the District of Columbia apply the Restatement approach or some modification of it.[162] In 2017, California continues to cling to the primary rights approach. In 2017, it is time for the California legislature to redefine the claim.

157. *See* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 17, §§ 18–20, 24.
158. *See* Clark, *supra* note 1, at 826.
159. Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469 (3d Cir. 1950).
160. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 17, § 24, cmt. a.
161. United States v. Tohono O'Odham Nation, 563 U.S. 307, 316 (2011).
162. *See* Trammell, *supra* note 16, at 1276–78.