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The Rule Against Claims Splitting As a Defense to Legal Malpractice Claims

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Many claims against lawyers are initiated by a plaintiff seeking the proverbial "second bite at the apple." The plaintiff has filed Litigation #1. Disappointed with the result, the plaintiff now files Litigation #2 against the attorney who represented his adversary in Litigation #1. The facts sued upon in Litigation #2 are essentially the same as the facts sued upon in Litigation #1. But this time around, the plaintiff asserts "new" causes of action against the lawyer. When presented with this fact pattern, defense counsel should consider the rule against claims splitting as a potential dispositive defense.

This article will discuss the rule against claims splitting, and its relationship to doctrines such as res judicata. It will review substantive areas of legal malpractice litigation – ranging from bankruptcy to divorce to consumer finance – where the rule against claims splitting has proved to be a successful defense. The article then will analyze recent developments in case law concerning whether an attorney-client relationship suffices to establish the essential element of privity. Finally, the article will examine implications of a relaxed view of privity for the defense of claims against lawyers.

I. The Rule Against Claims Splitting.

The rule against claims splitting escapes easy formulation, and courts struggle to define it. The Seventh Circuit Court of Appeals has characterized the rule as "an *aspect* of the law of preclusion."[1] Citing to a case from the Second Circuit Court of Appeals, the Massachusetts Superior Court has held that "[t]he rule against claim splitting is 'distinct from but related to' the doctrine of res judicata.'"[2] The U.S. District Court for the District of Columbia refers to the rule against claims splitting as "a concomitant of the doctrine of claim preclusion."[3] Wright and Miller avoid the phrase entirely, except to acknowledge that "claims splitting" is one type of bar against redundant litigation: "Foreclosure of matters that never have been litigated has traditionally been expressed by stating that a single 'cause of action' cannot be 'split' by advancing one part in a first suit and reserving some other part for a later suit."[4]

Setting aside problems of confusing terminology, the rule against claims splitting is best considered a broad rubric that encompasses three separate, related doctrines: claim preclusion, the prior pending action doctrine, and a court's inherent power to manage its docket. In considering which of these three doctrines is a potentially viable defense to a legal malpractice claim, defense counsel first must determine the procedural posture of the prior litigation.

A. Claim Preclusion

Where the prior litigation has resulted in a judgment, claim preclusion (sometimes referred to as "true" res judicata) is a potential defense. The elements of claim

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1 *Horwitz v. Alloy Auto. Co.*, 992 F.2d 100, 103 (7th Cir. 1993) (emphasis in original) (suggesting that there is no practical difference between pleading as a defense "res judicata" rather than "claim splitting"); *see also Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 986 (10th Cir. 2002) ("recent cases analyze claim-splitting as an aspect of res judicata").

2 *Eight Arlington St., LLC v. Arlington Land Acquisition-99, LLC*, 2007 WL 2367753, *2 (Mass. Super. Ct.) (*quoting Curtis v. Citibank*, 226 F.3d 133, 138 (2d Cir. 2000)).

3 *Plummer v. District of Columbia*, 2008 WL 3972183, *1 (D.D.C. 2008).

4 Alan Wright et al., *Federal Practice & Procedure: Jurisdiction* § 4402 (2nd ed. 2002). Modern decisions favor the plain English terms "claim preclusion" and "issue preclusion" to the nomenclature of "res judicata" and "collateral estoppel." *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). "'Res judicata' is the term traditionally used to describe two discrete effects: (1) what we now call claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it... ; and (2) issue preclusion, long called "collateral estoppel" (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim)...." *Id.*

preclusion generally are: (1) a final judgment on the merits in an earlier suit, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient privity between the parties in the two suits.[5] The application of claim preclusion to legal malpractice actions turns on the second two elements.

In determining whether there is identity between the claims asserted in the earlier and later suits, most courts apply a transactional approach. The broad sweep of this transactional formulation is helpful to the defense attorney arguing that a plaintiff's claim against a lawyer is identical to an earlier claim filed by the plaintiff. The Restatement (Second) of Judgments provides that a final judgment in a prior action extinguishes the plaintiff's right to later pursue remedies "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[6] "What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[7] If this transactional test is satisfied, then claim preclusion may apply "even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action."[8] In other words, the plaintiff does not earn a second bite at the apple simply by filing a complaint that puts fresh, new labels on stale, old facts.

If defense counsel can first establish identity between the claims asserted in the earlier and later suits, claim preclusion then will turn upon establishing sufficient privity between the parties in the two suits. An attorney sued for malpractice may assert claim preclusion as a defense, even if he or she was not a party to the earlier action. For example, if the attorney is being sued for actions taken on behalf of his or her client, and that client was a party to the earlier action, the attorney-client relationship often suffices to establish privity. The element of privity is discussed in more detail below.

B. Prior Pending Action

Where the prior litigation has not yet resulted in a judgment, the prior pending action doctrine may apply.[9] Some jurisdictions have codified this doctrine in their rules of civil procedure.[10] In others, it is a matter of common law.[11] Some states describe this doctrine as an outgrowth of the outmoded plea of abatement.[12]

However described, dismissal under the prior pending doctrine is appropriate where "the parties and issues are identical to those in the prior pending action."[13] Courts will "look to the similarity in the plaintiff's causes of action, the similarity in the factual backgrounds, and the prayers for relief to determine whether the actions are of the same character, between the same parties and seek the same relief."[14] While this inquiry is similar to claim preclusion, the prior pending action doctrine rests upon equitable considerations, and therefore is not considered "a principle of absolute law."[15]

C. Court's Authority to Manage Docket

Finally, in federal court, defense counsel may argue that a court's inherent authority to manage its docket supplies grounds upon which a duplicative lawsuit may be dismissed. As the Second Circuit Court of Appeals has recognized: "As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit."[16]

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5 *See, e.g., FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 79 (1st Cir. 2011) (reciting elements of claim preclusion under federal law). Formulations of claim preclusion differ slightly across jurisdictions. Determining whether federal or state law governs the preclusive effect of the prior action depends upon the forum in the first action, the forum in the second action, and whether the prior action adjudicated questions of federal or state law. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (holding that a federal court must give a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered); *Heck v. Humphrey*, 512 U.S. 477, 488 (1994) (holding that state courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that, where a prior adjudication in federal court decided a question of state law, claim preclusion is decided by applying the law of the state in which the federal diversity court sits).

6 Restatement (Second) of Judgments § 24(1) (1982).

7 *Id.* at § 24(2).

8 *Id.* at § 25.

9 *See* Wright et al, *supra*, at § 4406 ("courts at times express principles of 'claim splitting' that are similar to claim preclusion, but that do not require a prior judgment").

10 *See, e.g.*, Mass. R. Civ. P. 12(b)(9).

11 *See, e.g., Halpern v. Board of Education*, 495 A.2d 264, 266 (Conn. 1985).

12 *See Nationwide Mut. Ins. Co. v. Douglas*, 557 S.E.2d 592, 593 (N.C. Ct. App. 2001).

13 *Harvard Cmty. Health Plan, Inc. v. Zack*, 603 N.E.2d 924, 926 (Mass. App. Ct. 1992).

14 *Hanton v. Williams*, 2011 WL 2611791, *3 (Conn. Super. Ct. 2011) (*citing Halpern*, 495 A.2d at 266).

15 *See Halpern*, 495 A.2d at 266.

16 *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2nd Cir. 2000) (*citing Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

In considering whether the "new" suit is sufficiently duplicative of a prior pending suit that it ought to be dismissed (or stayed), courts will look to principles of claim preclusion, and consider "whether the same or connected transactions are at issue and the same proof is needed to support the claims in both suits or, in other words, whether facts essential to the second suit were present in the first suit."[17]

As with the prior pending action doctrine, this federal rule against duplicative litigation rests upon equitable considerations. These include "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[18] Because dismissal pursuant to a federal court's inherent authority to manage its own docket rests upon an analysis of the equities of the situation presented, dismissal is reviewed under an abuse of discretion standard.[19]

II. Practice Areas.

Depending upon the procedural posture of the prior action, and the forum where the "new" legal malpractice action has been filed, the claims-splitting principles discussed above may supply defense counsel with grounds upon which the entire case can be decided on an early motion to dismiss. This is a potential defense for attorney-defendants across a broad range of practice areas, in both litigation and transactional law.

Claims splitting is a particularly strong defense when a litigator is sued by his client's adversary for actions that he took in the course of representing his client. For example, after a jury dismissed the plaintiff's products liability claim in *Simpson v. Chicago Pneumatic Tool Company,*[20] the disappointed plaintiff filed a separate suit against the defendant and the defendant's lawyer alleging failure to preserve and produce certain critical evidence. In *Chaara v. Lander;*[21] an exceedingly contentious divorce proceeding, a husband sued his wife's divorce attorney for damages allegedly caused by the attorney's failure to make timely delivery of his children's' passports to a guardian ad litem. Debtors repeatedly have sued creditors' counsel for violations of the Fair Debt Collections Practices Act based upon various actions that counsel took in the course of representing creditors in collections and foreclosure actions.[22] All of these claims were successfully dismissed on the grounds that the plaintiff failed to join claims against the attorney in the plaintiff's earlier suit against the attorney's client based upon the same transaction or series of transactions.

In some circumstances, the transactional attorney also may deflect a claim on the basis that it is barred by the plaintiff's failure to have earlier joined that claim in a suit against the attorney's client. For example, in *Verhaggen v. Arroyo,*[23] an attorney was sued for having allegedly assisted his client in causing stock to be issued to his client, in violation of the client's agreement to issue stock instead to the plaintiff. In *Plotner v. AT&T,*[24] a law firm was sued for services that it provided in the course of a real estate transaction. In *Weinberger v. Tucker*,[25] an attorney was sued based upon advice that he provided in the course of negotiating a loan and forming a holding company. The plaintiff in *In re El San Juan Hotel Corporation*[26] sued an attorney based upon assistance that he provided to a bankruptcy trustee who was managing the affairs of a financially distressed hotel. With one exception[27], the claim against the attorney-defendant in each of these cases was barred by the plaintiff's earlier (unsuccessful) action against the attorney-defendant's client.

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17 *Id.* at 139.

18 *Colo. River Water Conservation Dist.*, 424 U.S. at 817 (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

19 *See, e.g., Hartsel Springs Ranch of Colo., Inc.*, 296 F.3d at 985.

20 693 N.W.2d 612, 614 (N.D. 2005).

21 45 P.3d 895, 896 (N.M. 2002).

22 *See, e.g., Jones v. Fisher Law Group, PLLC*, 334 F.Supp.2d 847, 849 (D. Md. 2004); *Vacanti v. Apothaker & Associates, P.C.*, 2010 WL 4702382 (E.D. Pa. 2010); *see also Green v. Ford Motor Credit Co.*, 828 A.2d 821, 838-39 (Md. Ct. Spec. App. 2003) (attorney alleged to have committed violations of state consumer debt collections act during representation of creditor).

23 552 So.2d 1162, 1163 (Fla. Dist. Ct. App. 1989) (holding that claim against attorney barred by issue preclusion). In this case, the attorney served as litigation counsel to his clients in the first action, but withdrew his appearance after the plaintiff filed a separate suit against him. From this short decision, it appears that the plaintiff's claim against the attorney was based upon the attorney's actions as a transactional lawyer, rather than as a litigator. *See also Brennan v. Grover*, 404 P.2d 544, 546 (Colo. 1965) (holding that *pro se* plaintiff's action against his adversary's attorneys to replevy certain corporate stock certificates was bared by earlier action in which plaintiff unsuccessfully litigated title to those same stock certificates).

24 224 F.3d 1161, 1165-66 (10th Cir. 2000).

25 510 F.3d 486, 489-90 (4th Cir. 2007).

26 841 F.2d 6, 8, 10-11 (1st Cir. 1988).

27 In *In re El San Juan Hotel Corporation*, the First Circuit declined to dismiss a claim brought by the former comptroller of the distressed hotel against the trustee's attorney to recover allegedly excessive legal fees charged to the trustee. 841 F.2d at 11.

III. Privity.

The rule against claims splitting may bar a suit against an attorney if there is "privity" between the attorney and a party to the earlier suit. "[T]he term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term."[28] "[I]n certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."[29]

It appears to be a majority view that the attorney-client relationship establishes privity for purposes of res judicata.[30] Many courts, however, have not supported their conclusions with satisfactory reasoning.[31] (Some courts justify their holding by simply stating that their particular jurisdiction generally applies an "expanded," "relaxed," or "lenient" view of privity.[32]) In a recent survey of case law on this topic, the Court of Appeals of Minnesota lamented "the astounding lack of analysis in the cases reviewed (many of which cite each other as authority)...."[33] Many of these cases were decided by courts that understandably seem to have lost patience with vexatious, pro se litigants seeking to maintain an ever expanding multiplicity of lawsuits arising from the same set of alleged wrongs.

Of those courts that have devoted more analysis to this question, the Arkansas Supreme Court recently justified its holding that the attorney-client relationship is sufficient to establish privity based upon a "combination of precedent, policy, and practicalities..."[34] Applying the state's law of res judicata, the court stated that: "Privity exists for purposes of *res judicata* when two parties are so identified with one another that they represent the same legal right."[36] The court found the relationship between client and attorney analogous to that of a principal and agent, and held that: "When dealing with *res judicata* in the principal-agent context, this court has all but done away with the privity requirement, choosing instead to focus on whether or not the plaintiff is attempting to re-litigate an issue that has already been decided."[36]

Other courts that have analyzed the question focus on determining whether the attorney's interests were so identified with the client's interests that the client effectively represented the lawyer's legal rights in the earlier litigation.[37] For example, in *Weinberger*, the underlying litigation concerned the effectiveness of a conflict waiver that an attorney drafted in the course of negotiating a loan guarantee between two of his clients.[38] Because the attorney had an undeniable interest in establishing the enforceability of the loan guarantee that he drafted, and the appropriateness of his conduct in securing the conflict waiver, the court held that the client effectively represented the attorney's legal rights in the prior proceeding such that privity was established.[39]

In establishing privity, other courts focus on the attorney's role in directing and controlling the underlying litigation. Though it is questionable whether this provision was intended to encompass the attorney-client relationship, some courts have cited § 39 of the Restatement (Second) of Judgments which provides: "A person who is not a party to an action but who

28 *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798-99 (1996).

29 *Id.* (*quoting Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)).

30 *See* 47 Am. Jur. 2d Judgments § 617 (collecting cases).

31 *See, e.g., Hughes v. McMenamon*, 379 F.Supp.2d 75, 79 (D. Mass. 2005) ("Where, as here, an attorney is sued for actions taken on behalf of a client, there is a sufficient relationship between the attorney and the client such that non-mutual claim preclusion applies."); *Jones*, 334 F.Supp.2d at 851 ("for the purposes of res judicata, [attorney] is in privity with [clients]...."); *Plotner*, 224 F.3d at 1169 ("The law firm defendants appear by virtue of their activities as representatives of Green and AT&T, also creating privity."); *Verhagen*, 552 So.2d at 1164 ("Arroyo and Gaston and Snow were counsel to defendants to Montigny and Janssens in the Collier County action, and are alleged by plaintiff to have been acting as counsel for those parties when the alleged wrong [sic] acts were committed. Thus, defendants Arroyo and Gaston Snow were, for collateral estoppel purposes, in privity with the defendants...."); *Geringer v. Union Elec. Co.*, 731 S.W.2d 859, 866 (Mo. Ct. App. 1987) ("Lastly, it is clear that Sachs & Miller, P.C., the law firm which represented Union Electric Company in the underlying action, was in privity with Union Electric in the prior adjudication."); *Brennan*, 404 P.2d at 546 ("Although res judicata is usually effective only between parties to former actions governing the same subject matter, we hold that it also encompasses the attorneys of the parties to such prior litigation...."); *see also Stoiber v. Preboski*, 2008 WL 2909855, *2 (Bkrtcy. D. Or. 2008) ("the Defendant [client] was in privity with Mr. Galpern [attorney] in the previous matter by virtue of the attorney-client relationship....").

32 *See, e.g., Jayel Corp.*, 234 S.W.3d at 283 (recognizing "lenient approach to the privity requirement"); *Simpson, supra*, at 616 ("This Court has adopted a somewhat 'expanded' version of the concept of privity regarding res judicata and collateral estoppel."); *Green*, 828 A.2d at 838 ("the requirement that one who invokes *res judicata* and/or collateral estoppel be a party or in privity to a party has been relaxed and would not bar estoppel by judgment (i.e., the bar of either *res judicata* or collateral estoppel) if all the other elements of those doctrines were proven"); *Merchants State Bank v. Light*, 458 N.W.2d 792, 794 (S.D. 1990) ("We see no reason why this relaxed privity concept should not apply to the lawyer who prosecuted and directed the prior litigation.").

33 *Rucker v. Schmidt*, 768 N.W.2d 408, 414 (Minn. Ct. App. 2009), *aff'd*, 794 N.W.2d 114 (Minn. 2011).

34 *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 284 (Ark. 2006).

35 *Id.* at 281.

36 *Id.* at 282.

37 *Weinberger*, 510 F.3d at 493.

38 *Id.*

39 *Id.* at 493; *see also Kalos v. Posner*, 2011 WL 761240, *3-4 (E.D. Va.) (holding that surety company effectively represented the interests of its attorneys is prior foreclosure proceeding, and therefore plaintiff's prior action against surety company barred subsequent suit against surety company's attorneys).

controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party."[40] For example, in *Crooked Creek Properties, Inc. v. Ensley*[41] the court held that the plaintiff's claim against his adversary's attorney was barred by his prior action against the adversary because that attorney, as litigation counsel, "had an ample laboring oar himself in the conduct of the ... proceedings."

These cases are subject to some criticism because of their implication that, during the attorney's appearance in the earlier action, the attorney was looking out for his own legal interests, separate and apart from his client's interests. Picking up on this criticism, the Minnesota Supreme Court recently issued a forceful decision holding that the attorney-client relationship, without more, does not establish privity for purposes of claims preclusion.[42] The plaintiff, Mrs. Rucker, had successfully sued her former husband for committing fraud on the court in the course of a divorce action.[43] Mrs. Rucker alleged that her husband intentionally had undervalued his business interests by several million dollars.[44] After reaching a post-judgment settlement in which her husband paid her $2.6 million in exchange for a release, Mrs. Rucker then filed a separate suit against her husband's attorney based upon that attorney's alleged intimate involvement in his client's fraud. The court found that, in the prior divorce proceeding, this attorney had not represented the same legal right as his client.[45] "Something more than the common objective of attorney and client in obtaining an outcome favorable to the client is necessary to establish privity."[46] Nor was the attorney-client relationship held to be analogous to the principal-agent relationship for purposes of privity.[47] "[W]hile in the principal and agent relationship the agent's duty is to act on behalf of the principal, the attorney, acting on behalf of the client, has a duty not only to the client, but also to the public as an officer of the court in the administration of justice."[48] In sum, after recovering $2.6 million on account of her husband's fraud, Mrs. Rucker was permitted to seek an even greater recovery from a "new" party on account of the same fraud that she litigated to finality in the first action.

In *Rucker*, the plaintiff was permitted a "second bite at the apple" in the form of a suit against her adversary's lawyer. One way to distinguish *Rucker* from the many cases reaching an opposite conclusion is the outcome of the initial action. Unlike stubborn plaintiffs seeking to re-litigate already rejected claims, Mrs. Rucker obtained a substantial recovery the first time around. Perhaps this demonstrates that it is the facts of each individual case and the equities presented, rather than technical formulations of privity, that best predict the circumstances under which a plaintiff will be permitted to file a "new" lawsuit against her former adversary's lawyer.

IV. Implications.

The rule against claims splitting can prove an efficient means of obtaining an early dismissal of a duplicative claim filed against a lawyer by a disappointed, stubborn plaintiff. This may have the unintended effect of forcing a plaintiff to give serious consideration to filing an early claim against an adversary's lawyer. The doctrine poses particular problems where the lawyer who allegedly has aided and abetted the client's wrongful act also is defending his client in litigation arising out of the alleged wrongful act. If the plaintiff then decides to bring or threatens to bring a claim against the lawyer in the initial action, the lawyer's potential liability to the plaintiff may create a conflict of interest requiring the lawyer's withdrawal. More frequent assertion of the rule against claims splitting therefore may have the effect of limiting the litigation role of attorneys who have maintained close relationships with their clients and have advised them on a wide variety of business transactions.

While this concern logically follows from the above analysis, it is difficult to say whether more frequent assertion of the claims-splitting defense will in fact have the effect of encouraging litigation against lawyers. Most plaintiffs still will not give serious consideration to suing their adversaries' lawyers until their cases are lost. As illustrated in the cases cited above, at that point the disappointed plaintiff may have no further recourse.

40 Restatement (Second) of Judgments § 39 (1982).

41 2009 WL 3644835, *18 (M.D. Ala.).

42 *Rucker v. Schmidt*, 794 N.W.2d 114 (Minn. 2011).

43 *Id.* at 116.

44 *Id.*

45 *Id.* at 119.

46 *Id.*

47 *Id.* at 120.

48 *Id.* (internal quotations and citation omitted); *see also Cont'l Sav. Ass'n v. Collins*, 814 S.W.2d 829, 832 (Tex. App. 1991) (rejecting view that attorney-client relationship alone establishes privity; "It would be a surprise to this court and to the lawyers of the state of Texas to learn that by virtue of mere representation a lawyer establishes privity with his client.")