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Cover Page Footnote

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GETTING A FULL BITE OF THE APPLE: WHEN SHOULD THE DOCTRINE OF ISSUE PRECLUSION MAKE AN ADMINISTRATIVE OR ARBITRAL DETERMINATION BINDING IN A COURT OF LAW?

*JAY CARLISLE**

INTRODUCTION

NEW York courts have recently expanded[1] the scope of collateral estoppel,[2] also known as issue preclusion,[3] by applying this doctrine to

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1. *See* Siegel, *Expanding Applications of Collateral Estoppel (Issue Preclusion),* 309 N.Y. St. L. Dig. 1 (1985).

2. Collateral estoppel is one of a number of doctrines collectively referred to as "res judicata." *See* 5 J. Weinstein, H. Korn & A. Miller, New York Civil Practice, ¶ 5011.08, at 50-95 (1985) (citing Restatement (Second) of Judgments). The principle of collateral estoppel precludes relitigation of factual issues decided by a court in a prior suit. It is to be distinguished from direct estoppel, which prohibits relitigation of issues actually litigated and determined in the first action when a second action is brought on the same claim. *See* F. James, Jr. & G. Hazard, Jr., Civil Procedure § 11.16 (3d ed. 1985); D. Siegel, New York Practice § 443 (1978). A narrower species of res judicata, collateral estoppel basically "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984). Its typical application occurs when one of the parties to a civil action argues that preclusive effect should be given to one or more issues determined in an earlier civil action between the same parties in the same jurisdiction. Restatement (Second) of Judgments, Introduction at 1 (1982).

The United States Supreme Court recently explained the difference between collateral estoppel and res judicata in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979):

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Id. at 326 n.5 (quoting 1B J. Moore, J.D. Lucas & T.S. Currier, Federal Practice ¶ 0.405[1], at 622-24 (2d ed. 1974)). *See generally* Montana v. United States, 440 U.S. 147, 153 (1979) (modern formulation of issue preclusion); Cromwell v. County of Sacramento, 94 U.S. 351, 352-55 (1876) (setting forth fundamental historical differences between res judicata and collateral estoppel); 1B J. Moore, J.D. Lucas & T.S. Currier, Federal Prac-

the results of administrative hearings,[4] arbitrations,[5] and third party litigations[6]. Traditionally, issue preclusion is applied when a question of fact or law resolved in a prior litigation is raised in a subsequent proceeding based on a different cause of action.[7] The judgment in the prior fo-

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tice, § 0.405(1) (3d ed. 1984) (discussing issue preclusion in federal courts) [hereinafter 1B Moore]; King, *Collateral Estoppel and Motor Vehicle Accident Litigation in New York*, 36 Fordham L. Rev. 1, 11 & nn.72-79 (1967) (distinguishing issue preclusion from res judicata). Rosenberg, *Collateral Estoppel in New York*, 44 St. John's L. Rev. 165, 166 (1969) ("[c]ollateral estoppel falls into the category of partial res judicata because its binding effect is limited to certain of the issues formerly in dispute, rather than extending to the entire controversy").

3. Modern approaches usually refer to both direct and collateral estoppel as "issue preclusion." *See generally* Restatement (Second) of Judgments, Ch. 3, introductory note at 131 (1982) (distinguishing direct and collateral estoppel).

The New York State Court of Appeals has adopted this terminology. *See* American Ins. Co., 43 N.Y.2d 184, 189 n.2, 371 N.E.2d 798, 801 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977). *But see* Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 310-11 (1979) (court uses res judicata and collateral estoppel terminology).

Consistent use of the terms "claim preclusion" and "issue preclusion" will help clarify the distinction between the two concepts in judicial opinions and will minimize the confusion created when "res judicata" is used to describe both of them.

4. *See* Brugman v. City of New York, 64 N.Y.2d 1011, 1012, 478 N.E.2d 195, 196, 489 N.Y.S.2d 54, 55 (1985) (administrative findings given preclusive effect, thereby preventing plaintiff from litigating issue of defendant's negligence in subsequent lawsuit); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 502, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 828 (1984) (preclusive effect given to administrative findings made in an unemployment insurance proceeding to estop plaintiff from maintaining a plenary damage suit for slander, false arrest, and wrongful discharge); Liss v. Trans Auto Sys., 109 A.D.2d 430, 434-35, 492 N.Y.S.2d 394, 398 (1st Dep't 1985) (preclusive effect given to administrative findings), *rev'd on other grounds*, 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986). Administrative determinations of New York State agencies also have been given preclusive effect in federal courts. *See* Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985). *But see* Hill v. Coca Cola Bottling Co., 786 F.2d 550, 554 (2d Cir. 1986) (court refused to give administrative determination preclusive effect because defendant was not accorded full and fair opportunity to litigate claim).

5. *See* Clemens v. Apple, 65 N.Y.2d 746, 749, 481 N.E.2d 560, 561, 492 N.Y.S.2d 20, 21 (1985) (issue preclusion applied to arbitral determination to bar plaintiff from relitigating cause of injury); Fischer v. Broady, 118 A.D.2d 827, 828, 500 N.Y.S.2d 311, 313 (2d Dep't 1986) (court grants preclusive effect to arbitral determination); Guarantee Ins. Co. v. D'Alleva, 113 A.D.2d 941, 941-42, 493 N.Y.S.2d 632, 633 (2d Dep't 1985) (arbitral determination given preclusive effect in subsequent litigation); Hendershot v. Utica Mut. Ins. Co., 101 A.D.2d 649, 475 N.Y.S.2d 558 (3d Dep't 1984) (same).

6. Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 453, 482 N.E.2d 63, 65-66, 492 N.Y.S.2d 584, 586-87 (1985) (issue preclusion applied to third-party litigation); Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 554, 468 N.E.2d 1, 4, 479 N.Y.S.2d 163, 166 (1984) (same), *cert. denied*, 105 S. Ct. 1177 (1985); Schaeffer v. Eli Lilly & Co., 113 A.D.2d 827, 829, 493 N.Y.S.2d 501, 502 (2d Dep't 1984) (same). *But see* Liss v. Trans Auto Sys., 68 N.Y.2d 15, 22-23, 496 N.E.2d 851, 856, 505 N.Y.S.2d 831, 836 (1986) (court refused to give preclusive effect to determination of administrative proceeding when defendant in second action was not party to previous action).

7. *See* Capital Tel. Co. v. Pattersonville Tel. Co., 56 N.Y.2d 11, 17, 436 N.E.2d 461, 463, 451 N.Y.S.2d 11, 13 (1982) (collateral estoppel bars relitigation of issue determined in previous action); Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808-09, 441 N.Y.S.2d 49, 50-51 (1981) (same); Shanley v. Callanan Indus., 54 N.Y.2d 52, 55, 429 N.E.2d 104, 106, 444 N.Y.S.2d 585, 587 (1981) (collateral estoppel refers to the preclu-

rum precludes a redetermination of the issues necessary to the outcome of the first action.[8] Issue preclusion minimizes inconsistent determinations of factual issues among different forums,[9] and promotes judicial economy.[10] The doctrine is customarily considered in terms of fundamental notions of justice and fairness.[11] While some courts have used "res judicata" as a catch-all term[12] for both claim preclusion[13] and issue

sive effect given to the determination of matters actually litigated in one action when those matters are raised in a subseqent action based upon a different claim.) *See generally*, 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, ¶¶ 5011.14, 5011.24, & n. 223; Restatement (Second) of Judgments § 27 (1982); O. Chase, *Civil Litigation in New York*, § 21.03 (1983); Chase, *Trends and Cross-Trends in Res Judicata*, N.Y.L.J. May 25, 1982, at 1, col. 1.

8. Traditionally, the application of issue preclusion required that an issue of fact, necessary and essential to the judgment, had been actually litigated and determined by a final judgment. *See* Commissioners of the State Ins. v. Low, 3 N.Y.2d 590, 595, 148 N.E.2d 136, 138-39, 170 N.Y.S.2d 795,798 (1958). The Court of Appeals has expanded application of the doctrine to include matters that were necessarily decided in the prior action, though not actually litigated. See Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969).

9. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 74, 246 N.E.2d 725, 730-31, 298 N.Y.S.2d 955, 962 (1969) (issue preclusion reduces "the number of inconsistent results which are always a blemish on a judicial system."); Cummings v. Dresher, 18 N.Y.2d 105, 107-08, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977 (1966) (" 'One who has had his day in court should not be permitted to litigate the question anew.' ") (quoting Israel v. Wood Dolson Co., 1 N.Y.2d 116, 119, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 4 (1956)); New York State Lab. Rel. Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493, 63 N.E.2d 68, 74 (1945) (" 'The fundamental principle governing the general doctrine of [issue preclusion]' is 'that a party shall not be heard a second time on an issue which he has once been called upon and permitted to try and contest.' ") (quoting Hendrick v. Biggar, 209 N.Y. 440, 444, 103 N.E. 763, 764 (1913)). *See generally*, Restatement (Second) of Judgments § 27 (1982) (discussing issue preclusion); D. Siegel, *supra* note 2, §§ 443, 457 (same); Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 Cornell L. Rev. 564, 574-75 (1981) (same); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 (1942) (same).

10. *See* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985); Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981). *See also* University of Tenn. v. Elliot, 106 S. Ct. 3220, 3226 (1986) (collateral estoppel serves both the parties' interest in avoiding the expense and trouble of repetitous litigation and the public's interest in conserving judicial resources).

11. *See* Shanley v. Callanan Indus., 54 N.Y.2d 52, 55, 429 N.E.2d 104, 106, 444 N.Y.S.2d 585, 587 (1981) (applying full and fair opportunity test); Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981) (issue preclusion must be analyzed in terms of fairness); People v. Plevy, 52 N.Y.2d. 58, 64-65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980) (issue preclusion not to be mechanically applied and must occasionally yield to questions of fairness); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 73, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 962 (1969) ("No one would contend that the doctrine of collateral estoppel should be applied rigidly."). *See generally* 5 J. Weinstein, H. Korn, & A. Miller, *supra* note 2 at ¶ 5011.42; Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 Stan. L. Rev. 281, 285-89 (1957); Herman, *The New York Rulemaking Process: Rulemaking Procedures in New York*, 47 Alb. L. Rev. 1051, 1075-80 (1983); Rosenberg, *supra* note 2 at 194. Commentators, however, are skeptical of whether the concern of the courts over due process and fairness is manifested when applying the doctrines of claim preclusion and issue preclusion. *See* Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 Colum. L. Rev. 1551 (1979); Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1496-1501 (1974).

12. In its broadest sense, the term "res judicata" has been used to refer to a variety of

preclusion[14], the doctrines have different origins[15] and serve distinct functions.[16]

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concepts dealing with the preclusive effects of a judgment on subsequent litigation. *See* James & Hazard, *supra* note 2 at § 11.31; 1B Moore, *supra* note 2, ¶0.405(1); 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, ¶¶ 5011.10-5011.22; Cleary, *Res Judicata Reexamined*, 57 Yale L.J. 339 (1948); Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976); Holland, *Modernizing Res Judicata: Reflections on the* Parklane *Doctrine*, 55 Ind. L.J. 615 (1980); Vestal, *Rationale of Preclusion*, 9 St. Louis U.L.J. 29 (1964); Note, *The Expansion of Res Judicata in New York*, 48 Alb. L. Rev. 210, 213-15 n.13 (1983) (author: Ann M. Williams) [hereinafter *Res Judicata in N.Y.*]; Note, *Developments In The Law Res Judicata*, 65 Harv. L. Rev. 818 (1952) [hereinafter *Developments*].

13. Claim preclusion is the doctrine that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Giacamazzo v. Moreno, 94 A.D.2d 369, 371, 464 N.Y.S.2d 485, 486 (1st Dep't 1983) (citing Reilly v. Reid, 45 N.Y.2d 24, 29-30, 379 N.E.2d 172, 175-76, 407 N.Y.S.2d 645, 648-49 (1978)). *But see* City of New York v. Caristo Const. Co., 62 N.Y.2d 819, 820-21, 466 N.E.2d 143, 144, 477 N.Y.S. 603, 603-04 (1984) (provision in judgment that dismissal was without prejudice saved it from claim preclusion under "transactional analysis" approach); *Res Judicata in New York*, *supra* note 12, at 232 n.74; *see also* Santangelo v. YMCA 100 A.D.2d 581, 582, 473 N.Y.S.2d 520, 521 (2d Dep't 1984) (transactional analysis applied to unappealed order granting summary judgment); Cimino v. Cimino, 98 A.D.2d 706, 706, 469 N.Y.S.2d 103, 104 (2d Dep't 1983) (transactional analysis applied to divorce proceeding); Pauk v. Board of Trustees, 119 Misc. 2d 663, 666, 464 N.Y.S.2d 953, 955 (Sup. Ct. 1983) (transactional analysis applied in breach of contract action), *modified*, 111 A.D.2d 17, 488 N.Y.S.2d 685 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 702, 497 N.E.2d 675, 506 N.Y.S.2d 308 (1986); Shartrand v. Town of Glenville, 118 Misc. 2d 128, 130, 460 N.Y.S.2d 220, 222 (Sup. Ct. 1983) (transactional analysis applied to action involving property damage). *See generally* 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, ¶¶ 5011.10-5011.22 (discussing res judicata).

14. For a discussion of issue preclusion, see *supra* notes 2-3 and accompanying text.

15. Although the concepts of claim preclusion and issue preclusion appear in English common law, each doctrine has a different origin. Claim preclusion is a Roman law concept while issue preclusion originated in Germanic law. The notion that a judgment has an independent preclusive effect is characteristic of Roman law while early Germanic law permitted a subsequent action and new judgment. *See Developments*, *supra* note 12, at 820-21 nn.1-6. *See generally* Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 U. Ill. L. Rev. 41, 41-42 (1940) (translating Seelman, *Der Rechtszug im alteren deutschen Recht*, 107 Gierkes Untersuchungen zur deutschen Staats - und Rechtsgeschichte 90, 103, 198-99 (1911)).

16. *See* Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929). Distinguishing claim preclusion from issue preclusion, Judge Cardozo stated:

> A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. It is not conclusive, however, to the same extent when the two causes of action are different, not in form only, but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined.

Id., 165 N.E.2d at 457 (citations omitted). The first quoted sentence describes the doctrine of claim preclusion. The next two sentences describe the doctrine of issue preclusion. *See* D. Siegel, *supra* note 2, § 457 at 605.

The distinction between the doctrines was recognized by the United States Supreme Court as early as 1877. *See* Cromwell v. County of Sacramento., 94 U.S. 351, 352-53 (1877). *See generally* Hazard, *supra* note 9, at 580-86 (distinguishing collateral estoppel

Recent New York cases have affirmed summary judgments on the basis of issue preclusion, in effect allowing prior administrative and arbitral issue determination to bar litigation of claims in a judicial forum.[17] The high volume of actions filed each year in New York courts[18] may furnish some judges with an incentive to use issue preclusion as a means of controlling their calendars by prohibiting some parties from relitigating decisive issues determined against them in administrative and arbitral forums.[19] In this sense, some judges may be inclined to conserve judicial resources and reduce burdensome caseloads by relaxing their demands on traditional requirements of fairness, as embodied in the "full and fair opportunity" test.[20]

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from claim preclusion); Vestal, *Extent of Claim Preclusion*, 54 Iowa L. Rev. 1, 3-4 (1968) (illustrating distinction between claim preclusion and issue preclusion); Vestal, *Procedural Aspects of Res Judicata/Preclusion*, 1 U. Tol. L. Rev. 15, 28 (1969) (same); *Res Judicata in N.Y.*, *supra* note 12, at 216-17 nn.17-22 (discussing *Schuylkill Fuel*).

17. *See* Clemens v. Apple, 65 N.Y.2d 746, 748-49, 481 N.E.2d 560, 560-61, 492 N.Y.S.2d 20, 20-21 (1985); Brugman v. City of New York, 64 N.Y.2d 1011, 1012, 478 N.E.2d 195, 196, 489 N.Y.S.2d 54, 55 (1985); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 502, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984); *see also* Green v. Ingber, 80 A.D.2d 928, 928, 437 N.Y.S.2d 761, 763 (3d Dep't 1981) (administrative board's decision entitled to binding effect within state's courts so long as it was within board's power to make determination); Bernstein v. Birch Wathen School, 71 A.D.2d 129, 132, 421 N.Y.S.2d 574, 575 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 932, 434 N.Y.S.2d 994 (1980) (the principles of issue preclusion are applicable to the quasi-judicial determinations of administrative agencies and are, if final, binding in a court of law); O. Chase, CPLR Manual § 25.04(e) (1985) (issue preclusion applicable to arbitral determinations). The application of issue preclusion to administrative and arbitral determinations in subsequent court proceedings is to be distinguished from the preclusive effect given by one administrative body to the prior decision of another administrative body. This application should also be distinguished from the preclusive effect of a judicial determination in a subsequent arbitral proceeding. *See* Newsday, Inc. v. Ross, 80 A.D.2d 1, 5, 437 N.Y.S.2d 376, 379-80 (2d Dep't 1981); Note, *Res Judicata/Collateral Estoppel Effect of a Court Determination in a Subsequent Arbitration*, 45 Alb. L. Rev. 1029, 1048-56 (1981) (author: Melissa Hope Biren); *see also infra* note 177 and accompanying text.

18. Over 2.5 million actions are filed each year in New York courts. New York Times, Jan. 6, 1986, at B1, col. 3; Letter from Alyson M. Brenner, Office of the Director of Programs and Planning of the State of New York Unified Court System Office of Management Support (Office of Court Administration) to Professor Jay C. Carlisle, dated October 29, 1986 (computer breakdown of actions filed in New York State Courts) (available in the files of *Fordham Law Review*).

19. Courts have been using issue preclusion to support the granting of defendants' motions for summary judgment. *See supra* notes 11, 17 and accompanying text. *See also* King, *supra* note 2, at 2 (application of issue preclusion "could result in minimizing delays and repetitious litigation").

20. The Court of Appeals first explicitly adopted the "full and fair opportunity" test in Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969).

In *Schwartz* a judgment was granted in favor of a passenger in an action against the operators of two colliding vehicles. *See id.* at 75-76, 246 N.E.2d at 731-32, 298 N.Y.S.2d at 963-64. In a second action the operator of the first vehicle sued the operator of the second vehicle and the latter was permitted to use a prior finding of negligence against both drivers in order to preclude the lawsuit. *See id.* at 74-75, 246 N.E.2d at 731, 298 N.Y.S.2d at 963. Under the law of contributory negligence in effect at the time, both drivers were barred from any recovery. *See id.* at 75-76, 246 N.E.2d at 731-32, 298

Satisfaction of the full and fair opportunity test requires a comparison of the procedural opportunities available to the litigants in the initial and subsequent forums.[21] Indeed, the New York State Court of Appeals has stated that issue preclusion cannot be invoked if dissimilar procedural opportunities could result in the same issue being determined differently in the second forum.[22] Implicit in the Court of Appeals' decision to apply

N.Y.S.2d at 963-64. The Court of Appeals noted that the doctrine of collateral estoppel should not be applied rigidly and stressed that each case should be decided on its facts. *See id.* at 73, 246 N.E.2d at 730, 298 N.Y.S.2d at 962. Nonetheless, the court observed that its recent decisions had recognized the need for a prompt and non-repetitious judicial system. *See id.* at 69, 246 N.E.2d at 727, 298 N.Y.S.2d at 958. The court went on to state:

> New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of [issue preclusion]. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.

Id. at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

The court explained that common sense and the realities of the usual collision accident established identity of the issues, *see id.* at 74-75, 246 N.E.2d at 731, 298 N.Y.S.2d at 962-63, but it did not set forth any guidelines to delineate which issue in the second action was, or was not, foreclosed by the prior judgment. By its failure to critically analyze this question, which had long been one of the most difficult problems in the application of issue preclusion, the court, in effect, implied that the "identity of issue" prerequisite should be of less importance than the "full and fair opportunity" requirement. While the court's approach might prevent much legal talent and energy from being dissipated in litigating the interminable procession of motor vehicle negligence cases, it also portended a greater emphasis on judicial economy. The shift in emphasis is underscored by the court's discussion of the public's concern about the great delays in accident litigation. *See id.* at 74, 246 N.E.2d at 731, 298 N.Y.S.2d at 962. Surely, the court was hinting that it would flexibly apply the identity of issue requirement, not only to prevent inconsistent judgments, but to reduce the heavy caseloads that were becoming increasingly burdensome to the judicial system. *See id.*, 246 N.E.2d at 730, 298 N.Y.S.2d at 962.

While acknowledging that each case must be decided on its own facts, the Court of Appeals enumerated several factors to be considered in determining whether a party has had a full and fair opportunity to be heard in the earlier action. Although not intending to formulate an exclusive list, the court suggested that the following factors be considered: "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigations." *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961. For a discussion of other factors, *see* A. Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 Geo. L.J. 857, 885-89 (1966); Restatement (Second) of Judgments §§ 27-29 (1982).

21. *See* Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 555 n.4, 468 N.E.2d 1, 4-5 n.4, 479 N.Y.S.2d 163, 166-67 n.4 (1984) (citing Restatement (Second) of Judgments § 29 (1982)), *cert. denied*, 105 S. Ct. 1177 (1985).

22. *See id.* at 555 n.4, 468 N.E.2d at 4-5 n.4, 476 N.Y.S.2d at 166-67 (citing Restatement (Second) of Judgments § 29 (1982)). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979) ("might be unfair to apply offensive estoppel [when] the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result") (footnote omitted). When administrative forums have substantially different procedural rules, the doctrine has not been applied. *See* Board of Educ. v. New York State Human Rights Appeal Bd., 106 A.D.2d 364, 365-66, 482 N.Y.S.2d 495, 496-97 (2d Dep't 1984) (issue preclusion not granted to prior administration because complainant's allegation that she had been subjected to a racial slur was only

this doctrine to administrative hearings and arbitral determinations, however, is the notion that the full and fair opportunity test can be satisfied without these procedural safeguards. While the *Restatement (Second) of Judgments* supports granting preclusive effect to administrative determinations,[23] other commentators have questioned the applicability of issue preclusion to arbitral and administrative proceedings conducted without pre-trial discovery or strict adherence to rules of evidence.[24]

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briefly explored); *see also* Willer v. New York State Bd. of Regents, 101 A.D.2d 937, 938, 475 N.Y.S.2d 656, 658 (3d Dep't 1984) (issue preclusion effect not given because prior administrative hearing did not give petitioner full and fair opportunity to litigate his claim).

23. Restatement (Second) of Judgments, § 83 (1982); *see also* University of Tenn. v. Elliot, 106 S. Ct. 3220, 3227 (1986) ("Federal courts must give the [state] agency's factfinding the same preclusive effect to which it would be entitled in state courts.").

24. *See* D. Siegel, *supra* note 2, § 456. Professor Siegel noted that "one hears criticism of the [*Ryan*] case . . . because many lawyers believe that an administrative proceeding - at least one allowed impact in subsequent judicial proceedings - can't be said to be of the kind contemplated by the 'full and fair opportunity' requirement." *Id.* at 95 (Supp. 1985). He further noted that since rules of evidence do not apply in administrative hearings and disclosure devices are unavailable, "rights jealously guarded in direct litigation can lose sanctity when asserted in the format of a collateral estoppel issue." *Id. See* Connolly & Moorehead, *Res Judicata Effect of Rulings by State Administrative Agencies*, N.Y.L.J., Sept. 5, 1985, at 1, col.1; Schwartz, *Administrative Res Judicata*, Vol. 193, N.Y.L.J., June 18, 1985, at 2, col. 2-3; Hoguet, *Recent Appeals Court Cases Change Scope of Collateral Estoppel*, N.Y.L.J., Nov. 13, 1984 at 5, col. 1).

In December 1985, the Committee on Labor and Unemployment Law of the Association of the Bar of the City of New York recommended legislation to limit the preclusive effect of decisions made by some Administrative Law Judges. The Committee on Labor and Employment Law of the Association of the Bar of the City of New York, *Unemployment Insurance Decisions and the Doctrine of Collateral Estoppel*, 40 The Record 738, 748 (1985) [hereinafter *The Record*]. The Committee proposed that

> section 623 of New York State Labor Law be amended as follows: Renumber present Section 623 as subdivision (1) and add a new subdivision (2) to read, "Notwithstanding the above, no finding of fact or law contained in a decision of an Administrative Law Judge, the Appeal Board or a Court, obtained under this article, shall be deemed preclusive in any other action or proceeding, excepting proceedings under this article."

Id. at 748-49.

The Committee's recommendation, which was based on a report criticizing the Court of Appeals decision in Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984), concluded that preclusive effect should not be given to administrative findings made in unemployment insurance proceedings:

> It is the Committee's view (a) that unemployment insurance proceedings, designed for quickly determining the narrow issue of benefit eligibility, do not afford the kind of hearing and review that should warrant giving preclusive effect to the finding or determinations made; and (b) that it would frustrate the purposes of the Unemployment Insurance Law to force adjudication of questions relating to other potential civil litigation into that forum. The Committee also believes that deciding on an *ad hoc* basis whether any particular unemployment insurance determination might properly be given preclusive effect creates an undesirable lack of certainty about the possible future ramifications of the agency's actions. This uncertainty will inevitably cause parties to seek to resolve collateral matters before the unemployment insurance referees (also called Administrative Law Judges or "ALJ's") or before the Unemployment Insurance Board.

In recent years, alternative means of dispute resolution have become important resources.[25] Therefore, the question of when the determination of issues at administrative hearings and arbitrations should be granted preclusive effect in subsequent judicial litigations requires critical evaluation. Part I of this Article focuses on the general evolution of issue preclusion in New York. Part II discusses recent New York case law giving preclusive effect to administrative and arbitral issue determinations in subsequent state court proceedings. Part III analyzes the policy reasons for applying issue preclusion to administrative and arbitral issue determinations in such proceedings. Part IV concludes that the preclusive effect of these determinations in judicial forums should be limited by shifting the burden of satisfying the full and fair opportunity requirement to the party seeking to invoke the doctrine.

I. ISSUE PRECLUSION IN NEW YORK: EVOLUTION OF THE CURRENT LAW

A. *Origins of Issue Preclusion in New York*

Originally, the common law doctrine of issue preclusion[26] provided a narrow rule prohibiting a party from relitigating any issue clearly raised in a prior action and decided against that party.[27] In New York it was used primarily in cases involving indemnity relationships or employment

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Id. at 738.

25. *See* Breger, *The A P A: An Administrative Conference Perspective*, 72 Va. L. Rev. 337, 355 (1986) [hereinafter *The APA*]; Breger, *The Justice Conundrum*, 28 Vill. L. Rev. 923, 952-55 (1983); Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loy. L. Rev. 493, 501 (1978).

Bernard H. Goldstein, one of the deans of the New York Bar, recently remarked:

> The congestion plaguing both federal and state courts has focused public attention on the efficiency of our judicial system. Awareness of the existing burden on the judiciary, coupled with projections of increasingly frequent resort to litigation, has disturbed the public, distressed the legal profession, and threatened to diminish the quality of justice dispensed by our courts.

Goldstein, *Alternatives for Resolving Business Transaction Disputes*, 58 St. John's L. Rev. 69, 69 (1983) (footnotes omitted); *see also* Bell, *Crisis in the Courts: Proposals for Change*, 31 Vand. L. Rev. 3, 4-5 (1978) (court system is severely pressured by increase in number of litigations); Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274, 274 (1982) (acceptable results in civil litigation drained of value by delay, expense and emotional stress).

26. In New York State the concept of res judicata is largely a common law doctrine. *See* Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118, 134 N.E.2d 97, 98, 151 N.Y.S.2d 1, 3 (1956). There are no statutes which specifically require its application. As a result of the requirement that a judgment be "on the merits" in order for the doctrine of res judicata to be invoked, there are, however, statutes which affect the doctrine. *See* D. Siegel, *supra* at note 2, § 442 at 586; *see also* N.Y. Civ. Prac. L. & R. § 5013 (McKinney 1963) (defining when a dismissal is on the merits); N.Y. Civ. Prac. L. & R. § 3216 (a) (dismissal for want of prosecution not on merits); N.Y. Civ. Prac. L. & R. § 3217 (b) (discontinuance by means of notice operates as judgment on merits). *See generally* 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2 ¶ 5013.01 (question of when dismissal is on the merits has impact on area of res judicata).

27. *See* D. Siegel, *supra* note 2, §§ 442-443.

and agency matters,[28] and "was permitted in those cases only to avoid the absurd result of having the indemnitor exonerated, while the indemnitee was held liable."[29]

The traditional doctrine of issue preclusion applied to individual issues of law or fact rather than to whole claims or defenses.[30] In the past, issue preclusion has been based more on the concern that it would be unfair to permit a party to relitigate an issue that had been fully litigated in a prior action and less on the notion of finality.[31] Thus, issue preclusion could be invoked even when the subsequent litigation involved a different cause of action, provided that the issue concerned questions of law or fact actually litigated and finally determined between the parties or their privies in the first case.[32] Unlike claim preclusion, issue preclusion did not bar the presentation of matters that could have been determined in the first action but were not.[33]

Initially, the question of whether to grant issue preclusion was analyzed with regard to the relationship of the parties[34] and the identity of the issue.[35] The relationship of the parties was considered in terms of (1) privity of the parties, (2) their adversarial status, and (3) their mutuality with the lawsuit.[36] New York courts were bound by the concept of "mutuality of estoppel,"[37] which prohibited a plaintiff who had not been a party to the first action from using issue preclusion offensively against the

28. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 69, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 958 (1969).

29. *Id.* at 69, 246 N.E.2d at 728, 298 N.Y.S.2d 958.

30. *See supra* notes 7, 8, 16 and accompanying text.

31. *See supra* note 11 and accompanying text.

32. *See* Chase, *supra* note 7, § 21.03, at 799 ("Issues of law are less subject to preclusion than those of fact."). The Restatement (Second) of Judgments states that decisions on issues of law should not be given preclusive effect, if "(a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws" Restatement (Second) of Judgments § 28(2) (1982). It has been held in New York that "unmixed" issues of law are not subject to preclusion. *See* Department of Personnel v. City Civil Serv. Comm'n, 94 A.D.2d 5, 7, 462 N.Y.S.2d 878, 879 (1st Dep't 1983) (quoting McGrath v. Gold, 36 N.Y.2d 406, 411, 330 N.E.2d 35, 37, 369 N.Y.S.2d 62, 65 (1975)).

33. *See supra* note 8 and accompanying text. However, the issue precluded need not actually have been litigated. It is enough that it was implicitly decided. *See* Reich v. Cochran, 151 N.Y. 122, 127-28, 45 N.E. 367, 368 (1896) (Court of Appeals held that " '[w]hatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided.' ")(quoting Pray v. Hegeman, 98 N.Y. 351 (1885)).

34. *See* King, *supra* note 2, at 11-12 nn.80-87.

35. *See generally* Rosenberg, *supra* note 2, at 171-72 ("It would be irrational and unjust to bind a party by a former finding on an issue, unless that very issue had been adjudicated.").

36. *See* King, *supra* note 2, at 11-12 nn.80-87.

37. *See* 5 Weinstein, Korn & Miller, *supra* note 2, ¶ 5011.38 ("Mutuality of estoppel referred to the prior rule, now discarded, that a party was not permitted to take advantage of the result in a prior action unless he could meet the same standards of participation or privity as a party who was bound by the judgment in that action.").

same defendant in a second action.[38]

The identity of issue requirement provided that "[a] former adjudication will be binding in a subsequent litigation . . . provided that the issue presented (a) is identical, (b) was actually litigated, (c) essential to the determination, and (d) was 'ultimate' or 'material' in the prior action and is also 'ultimate' or 'material' in the [latter] suit."[39] In cases where the disputed facts which arose from the subsequent action were identical to facts that had been actually litigated in an earlier action the test was satisfied by meeting the first two requirements.[40] The third and fourth factors were considered only in more complicated cases.[41]

B. *The Modern Application of Issue Preclusion in New York*

After eliminating the mutuality of estoppel requirement two years earlier,[42] the Court of Appeals introduced major revisions to the doctrine of

38. Mutuality was based on the concern that unfair results might occur if issue preclusion was applied to persons not actually before the court in the first action. *See* D. Siegel, *supra* note 2, § 460; Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies — Two California Cases*, 57 Harv. L. Rev. 98, 99 (1943); Note, *Res Judicata and the Automobile Accident*, 8 Brooklyn L. Rev. 224, 225 (1938); *see also* B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 602 (1967) (Breital, J., dissenting) (courts should be cautious when permitting offensive use of prior judgment by one not in privity to original suit).

39. Rosenberg, *supra* note 2, at 171; *see also* Restatement Judgments § 68(1) (1942) (issue of fact had to be actually litigated for application of collateral estoppel).

40. 2 A. Freeman, Law of Judgments § 691 (5th Ed. 1925). The "actually litigated" requirement was gradually modified. *See* Statter v. Statter, 2 N.Y.2d 668, 672, 143 N.E.2d 10, 12, 163 N.Y.S.2d 13, 16 (1957) (first judgment of separation established validity of marriage and therefore precluded a second action for annulment). The Court of Appeals held that issue preclusion bars the relitigation of any issue that was necessarily determined in a prior suit. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 960 (1969) (in an automobile tort case where a plaintiff passenger established liability as against both his own driver and the other car's driver, a subsequent suit by the passenger's driver against the other driver was deemed precluded); Israel v. Wood Dolsen Co., 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 5 (1956) (in a commercial case a prior decision by one court that a contract had not been breached would preclude the same plaintiff from contending, in a second action, that a third party had induced the breach).

41. *See* Rosenberg, *supra* note 2, at 182-85 (when identity between issues is not complete, courts consider whether such issues were ultimate or material and essential to the determination in both matters). New York courts traditionally distinguished between "ultimate facts" and "evidentiary facts" giving preclusive effect only to the former. *See* J. Weinstein, H. Korn & A. Miller, *supra* note 2, ¶ 5011.29. The Court of Appeals qualified the distinction in Hinchey v. Sellers, 7 N.Y.2d 287, 293, 165 N.E.2d 156, 159, 197 N.Y.S.2d 129, 133 (1959) (the court extended issue preclusion to the evidentiary findings of a New Hampshire court, notwithstanding its conclusion that the ultimate issue was different in New York.); *see also* Restatement (Second) of Judgments § 27 comment (j) (1982) (even when a determination is necessary to judgment it may not be granted preclusive effect if it relates to an evidentiary fact rather than to an issue of law).

42. Although the Court of Appeals recognized the proliferation of exceptions to the mutuality doctrine as early as 1937, *see* Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 17-18, 9 N.E.2d 758, 759 (1937) *See generally* 5 J. Weinstein, H. Korn & A. Miller, *supra*, note 2 ¶ 5011.39, nn. 357-61 (derivative liability exception extended to situations where party to be bound by the prior judgment was the defendant in the first

issue preclusion in 1969.[43] Both issues of law and fact may now be the

action and the plaintiff in the second), it was not until 1967 that the court eliminated mutuality altogether. *See* B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967). In *DeWitt*, the court stressed the identity of issue requirement despite an absence of total identity of parties and concluded that the doctrine of mutuality was a "dead letter." *Id.*, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.

Speaking through Judge Scileppi, the *DeWitt* court stated: "[I]t becomes increasingly obvious that this court looks to the issue involved in a prior judgment rather than to any hypertechnical rule of mutuality. . . ." *Id.* at 146, 225 N.E.2d at 197, 278 N.Y.S.2d at 600 (citing Hinchey v. Sellers, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959)). Thus, a truck owner, suing a jeep owner for property damage was permitted to invoke issue preclusion against the jeep owner because of the truck driver's prior successful verdict against the same jeep owner on a personal injury claim. Consequently, even though the truck owner was not a party to the first action, the court held that he derived his right to preclude the issue from the driver. *See id.* at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02. The court was quick to point out that the truck driver and truck owner "do not technically stand in . . . privity," but held that their relationship was sufficient to invoke estoppel. *See id.* at 146, 148, 225 N.E.2d at 197, 199, 278 N.Y.S.2d at 600, 602.

43. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 70, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969). In *Schwartz*, the Court of Appeals recognized the need for flexibility in the application of issue preclusion, *see id.* at 73, 246 N.E.2d at 730, 298 N.Y.S.2d at 962 ("[n]o one would contend that the doctrine of collateral estoppel should be applied rigidly") and stressed that the decision to grant issue preclusion should be determined by the facts of the specific case. *See id.* at 70-72, 246 N.E.2d at 728-30, 298 N.Y.S.2d at 959-961. Nonetheless, the court observed that its recent decisions had stressed the "need for a 'prompt and nonrepetitious judicial system'." *Id.* at 69, 246 N.E.2d at 727, 298 N.Y.S.2d at 958.

The *Schwartz* court expanded the application of issue preclusion to include matters that were necessarily decided in the prior action, but not actually litigated, *see id.* at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960. It affirmed the abandonment of the mutuality doctrine and substituted in its stead the full and fair opportunity requirement, stating:

> [T]here are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.

Id. at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960. *See also supra* note 20 and accompanying text (discussing the full and fair opportunity requirement).

Although the *Schwartz* court explained that the common sense and the realities of the usual collision accident established the identity of issues common to both actions, it failed to critically analyze this question, that had long been one of the most difficult problems in the application of issue preclusion. *See Schwartz*, 24 N.Y.2d at 74-75, 246 N.E.2d at 731, 298 N.Y.S.2d at 963. The court in effect implied that the "identity of issue" prerequisite should be of less importance than the "full and fair opportunity" requirement. *See id.* at 72-73, 246 N.E.2d at 729-30, 298 N.Y.S.2d at 961-62; *supra* note 20 and accompanying text.

Finally, the court diminished the privity concept stating that it had, "already discarded, as irrelevant . . . the fact that there may or may not have been any significant jural relationship between the party seeking to invoke the doctrine and the prior victor." *Id.* at 70, 246 N.E.2d at 728, 298 N.Y.S.2d at 958-59 (citations omitted).

Today, "strict privity" (decedent-representative, trustee-beneficiary, guardian-ward, committee-incompetent) is still used in connection with issue preclusion. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984). Except for the use of "strict privity," the privity concept has little practical relevance or utility. *See* D. Siegel, *supra* note 2, § 461. Professor Siegel points out that New York has abandoned the privity requirement when issue preclusion is used defensively in the second action, but that the doctrine "still hovers about, threatening if not belligerent,

bases for preclusion.[44] The doctrine was made applicable to cases involving tort claims,[45] product liability matters,[46] criminal convictions,[47] medical malpractice,[48] contract disputes,[49] and bankruptcy determinations,[50] as well as administrative decisions,[51] and arbitration awards.[52]

As the doctrine now stands, a valid[53] final judgment[54] on the merits[55]

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when offensive use is sought." *Id.* at 609. The diminishing of the privity doctrine has resulted in issue preclusion being utilized by persons who were not a party to the original action. *See, e.g.,* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 453, 482 N.E.2d 63, 65, 492 N.Y.S.2d 584, 586 (1985) (third party permitted use of issue preclusion); Strauss v. Belle Realty Co., 65 N.Y.2d 399, 401, 482 N.E.2d 34, 35, 492 N.Y.S.2d 555 (1985) (same); Schultz v. Boy Scouts of Amer., 65 N.Y.2d 189, 192, 480 N.E.2d 679, 681, 491 N.Y.S.2d 90, 92 (1985) (same). *But see* Liss v. Trans Auto Sys., 68 N.Y.2d 15, 22-23, 496 N.E.2d 851, 856, 505 N.Y.S.2d 831, 836 (1986) (Court of Appeals refuses to give preclusive effect to determination of administrative proceeding when defendant in second action was not party to previous action).

44. "Issues of law are less subject to preclusion than those of fact." O. Chase, *supra* note 7, § 21.03, 799. "Unmixed" issues of law are not subject to preclusion. *See* McGrath v. Gold, 36 N.Y.2d 406, 411, 330 N.E.2d 35, 38, 369 N.Y.S.2d 62, 65 (1975); *see also* Restatement (Second) Judgments § 28, comment B (1982) ("the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide").

45. *See* Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 552-53, 468 N.E.2d 1, 3-4, 479 N.Y.S.2d 163, 165-66 (1984), *cert. denied*, 105 S. Ct. 1177 (1985); Malloy v. Trombey, 50 N.Y.2d 46, 51, 405 N.E.2d 213, 215, 427 N.Y.S.2d 969, 972 (1980).

46. *See* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 453, 482 N.E.2d 63, 65, 492 N.Y.S.2d 584, 586 (1985).

47. *See* Merchants Mut. Ins. Co. v. Arzillo, 98 A.D.2d 495, 496-97, 472 N.Y.S.2d 97, 98 (2d Dep't 1984). *See also* 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at ¶ 5011.23, nn.203-05; ¶ 5011.26, n.241 (operation of issue preclusion in criminal cases differs in some respects from civil matters). *But see* Davis v. Hanna, 97 A.D.2d 943, 944, 468 N.Y.S.2d 729, 730 (4th Dep't 1983) (conviction after a guilty plea does not serve as a bar in subsequent civil litigation.)

48. *See* Kret v. Brookdale Hosp. Medical Center, 93 A.D.2d 449, 449-50, 462 N.Y.S.2d 896, 897 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 861, 462 N.E.2d 147, 473 N.Y.S.2d 970 (1984).

49. *See* Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 483, 386 N.E.2d 1328, 1330, 414 N.Y.S.2d 308, 310 (1979) (assuming privity requirements are met doctrine of issue preclusion is applicable to contract claims).

50. *See* Exchange Nat. Bank v. Ferridge Properties, 112A.D.2d 33, 34, 490 N.Y.S.2d 656, 657 (4th Dep't 1985).

51. Brugman v. City of New York, 64 N.Y.2d 1011, 1011, 478 N.E.2d 195, 195, 489 N.Y.S.2d 54, 54, (1985); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 489-90, 478 N.Y.S.2d 823, 825-26 (1984). *See generally infra* notes 80 - 106 and accompanying text (discussing the granting of preclusive effect to administrative determinations in judicial forums).

52. Clemens v. Apple, 65 N.Y.2d 746, 747-48, 481 N.E.2d 560, 560-61, 492 N.Y.S.2d 20, 20-21 (1985). *See generally infra* notes 107-18 and accompanying text (discussing the granting of preclusive effect to determinations in judicial forums).

53. *See* O. Chase, *supra* note 17, § 25.04[b] ("A judgment which is not valid can have no binding effect and its validity can be collaterally attacked.")

54. *See id.* § 25.04[a] ("The result in the first action will not generally have a binding effect on a subsequent action unless a final judgment has been reached in the first."). However, "[t]he pendency of an appeal does not effect the judgment's use for [issue preclusion purposes]." 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at ¶ 5011.23b, n.220.

55. *See* O. Chase, *supra* note 17 § 25.04[c] ("The traditional rule is that a judgment

prevents parties or their privies[56] from relitigating issues of fact or law actually litigated or necessarily determined, in an earlier action.[57] In order to invoke issue preclusion the movant must establish the "identity of an issue" that was necessarily decided in the earlier proceeding with one that is decisive in the second action.[58] The doctrine will be applied, however, only if the opposing party fails to show that he was denied a full and fair opportunity to contest the issue in the first proceeding.[59] Thus, application of the doctrine hinges on showing the identity of the issues and satisfaction of the full and fair opportunity test.

1. Identity of Issue

In applying the identity of issue test, a court will review the record in the first action to determine if an issue actually litigated and necessary to a final judgment on the merits is the same as an issue decisive to the second action.[60] Thus, if the legal theory in both actions is the same and there are no significant differences in the facts upon which both theories are based, identity of issue is generally satisfied.[61] This is true even when

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must be on the merits before full res judicata effect can be given to it."). *But see* Smith v. Russell Sage College, 54 N.Y.2d 185, 194 n.3, 429 N.E.2d 746, 750 n.3 445 N.Y.S.2d 68, 72 n.3 (1981) ("It is pertinent that the Restatement [of Judgments], 2d has completely abandoned the term 'on the merits.' "). *See generally* N.Y. Civ. Prac. L. & R. § 5013 (McKinney 1963) (defining a "dismissal on the merits").

56. The general rule is that only persons who were parties to the original action can be bound by its result in a later proceeding. *See* Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 486, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 311 (1979); 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at ¶¶ 5011.32-to.37. The rule is subject to exceptions when persons are in privity with a party to the original action. *See* O. Chase, *supra* note 17, § 25.04[f]. Similarly, "[a] person who controls the conduct of litigation in furtherance of his own self-interest will be bound, ... even though he is not a party of record or otherwise in privity with a party." *Id.*

57. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984).

58. *See* Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 554, 468 N.E.2d 1, 4, 479 N.Y.S.2d 163, 166 (1984), *cert. denied*, 105 S. Ct. 1177 (1985); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-01, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984). *Cf.* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 457-58, 482 N.E.2d 63, 68-69, 492 N.Y.S.2d 584, 589-90 (1985) (if issue is not litigated there is no identity of issue).

59. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 501, 467 N.E.2d 487, 490-91, 478 N.Y.S.2d 823, 826-27 (1984) (party against whom estoppel is sought must be allowed to contend he was not afforded full and fair opportunity to litigate issue); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969) ("New York has adopted the full and fair opportunity test in applying the doctrine of collateral estoppel.").

60. *See* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455-56, 482 N.E.2d 63, 68, 492 N.Y.S.2d 584, 588 (1985); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 960 (1969). *See also* O. Chase, *supra* note 17, ¶ 25.03[b] 25-9 (legal conclusion in two cases based on same facts should not differ).

61. *See* O. Chase, *supra* note 17, 25.03[b], at 25-8-to-9. *But see* Peresluha v. City of New York, 60 A.D.2d 226, 230, 400 N.Y.S.2d 818, 819-20 (1st Dep't 1977) (finding of negligence in prior litigation did not estop plaintiff from bringing subsequent malicious prosecution action arising from same facts); Vincent v. Thompson, 50 A.D.2d 211, 218, 377 N.Y.S.2d 118, 125 (2d Dep't 1975) (in products liability action where plaintiffs

many parties assert the same claims in different actions arising from one transaction or occurrence against the same defendant.[62]

Generally, the identity of issue requirement is not satisfied if the issue determination in the first action was merely an alternative ground for deciding the case.[63] In at least one instance, however, the Court of Appeals has held that if an alternative issue determination was fully argued and carefully considered, it cannot be relitigated.[64]

2. Full and Fair Opportunity Test

Satisfaction of the "full and fair opportunity test" requires the examination of a number of factors first set forth by the Court of Appeals in *Schwartz v. Public Administrator*.[65] These factors, which the *Schwartz* court described as modern and stable standards for invoking issue preclusion in New York, include "the size of the claim, the forum of the prior litigation, . . . the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation."[66]

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sought to preclude the issue of whether the drug was defective, Appellate Division refused to apply the doctrine since the ultimate issue as to causal relationship between the defect and the injuries was not identical in the two actions).

62. *See* Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 557, 468 N.E.2d 1, 5-6, 479 N.Y.S.2d 163, 167-68 (1984), *cert. denied*, 105 S. Ct. 1177 (1985).

63. *See* O'Conner v. G & R Packing Co., 53 N.Y.2d 278, 282-83, 423 N.E.2d 397, 398-99, 440 N.Y.S.2d 920, 921-22 (1981) (alternative ground for deciding first action may be relitigated because the judge did not consider the effect of his holding on the second action); Restatement (Second) of Judgments § 27 comment (i) (1982) (alternative grounds should not be granted preclusive effect); 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at ¶ 5011.28 ("There exists concern that, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta.' ") (quoting Restatment (Second) of Judgments § 27 comment (i) (1982)).

64. Malloy v. Trombly, 50 N.Y.2d 46, 49-50, 405 N.E.2d 213, 215, 427 N.Y.S.2d 969, 971 (1980) (divided Court of Appeals held that a plaintiff motorist's action against a defendant motorist was precluded because the plaintiff had been found to have been contributorily negligent in a prior action involving the same facts). Although the earlier issue determination was neither necessary nor essential to the Court of Claims' decision, the Court of Appeals held that, since the determination was neither "causal [nor] of any lesser quality than [it would have been] had the outcome of the trial depended solely on this issue," the same issue could not be relitigated. *Id.* at 52, 405 N.E.2d at 216, 427 N.Y.S.2d at 973 (footnote omitted).

In a vigorous dissent, Judge Meyer criticized the majority for invoking issue preclusion merely to conserve judicial resources. Judge Meyer noted that, "[i]n my view our recent decisions have accelerated [the] expansion [of issue preclusion] until the means threatens to become the end, to the detriment of litigants foreclosed by it, and without reasonable relation to the policy factors giving rise to the doctrine in the first instance." *Id.* at 58, 405 N.E.2d at 220, 427 N.Y.S.2d at 976.

65. 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969). *See supra* notes 20, 43 and accompanying text.

66. Schwartz v. Public Adm'r, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969). *See supra* notes 20, 43 and accompanying text. Applying the test, the court remarked that the plaintiffs in the second action were full participants in the earlier

The full and fair opportunity requirement extends beyond terms of traditional notions of due process.[67] Satisfaction of this test requires a comparison of the procedural opportunities available in both forums.[68] The Court of Appeals has suggested that issue preclusion cannot be invoked if a forum in the second action affords a party, against whom preclusion is invoked, new procedural opportunities that could result in inconsistent determinations.[69]

II. The Application of Issue Preclusion to Administrative and Arbitral Determinations in Subsequent Civil Litigation in Judicial Forums

A. *Historical Background*

Traditionally, when a non-judicial tribunal acts in a quasi-judicial manner, its determinations are entitled to the same effect as a duly rendered judicial determination.[70] In 1952, the Court of Appeals granted preclusive effect to a determination by a Workmen's Compensation Board when the same issue was raised in a subsequent negligence action.[71] The court held that since the employer had successfully contested the claim before the Workmen's Compensation Board, the employer could not interpose a contrary defense in a tort action pending in a judicial forum.[72] Nonetheless, the court did not preclude the employer de-

cases. *Schwartz*, 24 N.Y.2d at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961. In addition to a vigorous fight on the issue of liability, each of the plaintiffs "had a full opportunity to tell his story at the first trial. . . ." *Id.*, 246 N.E.2d at 730, 298 N.Y.S.2d at 961. None claimed a "lack of adequate representation." *Id.*, 246 N.E.2d at 730, 298 N.Y.S.2d at 961. Nor was any one able to show "prejudice because of the forum of the earlier action." *Id.*, 246 N.E.2d at 730, 298 N.Y.S.2d at 961, nor that his adversary had "any tactical advantages." *Id.*, 246 N.E.2d at 730, 298 N.Y.S.2d at 961. The court held that, "[i]t is, therefore, utterly fair to apply the doctrine of collateral estoppel here and to the typical case where driver sues driver following a verdict by a passenger against both." *Id.* at 72-73, 246 N.E.2d at 730, 298 N.Y.S.2d at 961. *See supra* notes 44-52 and accompanying text.

67. *See* People v. Plevy, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980). Although Plevy had been given due process in the sense that he had had a full opportunity to testify, the Court of Appeals noted that: "other circumstances which, although not legal impediments, may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *Id.* 417 N.E.2d at 522, 436 N.Y.S.2d at 228 (citing Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969)).

68. *See* Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 555 n.4, 468 N.E.2d 1, 4 n.4, 479 N.Y.S.2d 163, 166 n.4 (1984) (quoting Restatement (Second) of Judgments § 29 (1982)), *cert. denied*, 105 S. Ct. 1177 (1985).

69. *Id.* at 556, 468 N.E.2d 1, 5, 479 N.Y.S.2d 163, 167 (judicial determinations may be inconsistent with "those in cases tried in the Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable . . . ."); *see also infra* note 172 and accompanying text.

70. *See* D. Siegel, *supra* note 2, at § 456 (citing Evans v. Monaghan, 306 N.Y. 312, 118 N.E.2d 452 (1954)). *See also* 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at ¶ 5011.23, n.210.

71. *See* Ogino v. Black, 304 N.Y. 872, 873, 109 N.E.2d 884, 884 (1952).

72. *See id.*, 109 N.E.2d at 884 (because Workmen's Compensation Board determined

fendant from contesting the issue of his alleged liability.[73]

Two years later, the Court of Appeals articulated its reasons for giving administrative agency decisions preclusive effect in subsequent judicial proceedings.[74] Although the court pointed out that the rule of res judicata should be applicable in administrative determinations, it refused to apply the doctrine in light of newly discovered evidence.[75] In subsequent cases, the Court of Appeals continued to suggest that general principles of res judicata were applicable to adminstrative decisions.[76] The Court of Appeals has noted, however, that the decision whether to grant such determinations preclusive effect proved remarkably elusive.[77]

B. *Granting Preclusive Effect to Adminstrative Determinations*

In *Ryan v. New York Telephone Co.*,[78] the Court of Appeals held that the determinations of an administrative agency have preclusive effect in subsequent judicial proceedings.[79] Ryan was discharged by the New York Telephone Company after being arrested for theft of company property. The arrest was based on the testimony of two security investigators who claimed that Ryan had removed company property from the

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accidental injuries did not arise out of plaintiff-employee's course of employment, defendant-employer could not claim that Workmen's Compensation Law was plaintiff's exclusive remedy).

73. *See id.*, 109 N.E.2d at 884.

74. *See* Evans v. Monaghan, 306 N.Y. 312, 323-26, 118 N.E.2d 452, 457-59 (1954). The court stated that:

> Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible. The . . . rule of *res judicata* is applicable . . . wherever consistent with the purposes of the tribunal, board or officer. . . . Indeed, it is the instinct of our jurisprudence to extend court principles to administrative or quasi-judicial hearings insofar as they may be adapted to such procedures.

Id. at 323-24, 118 N.E.2d at 457-58 (citation omitted).

75. *Id.* at 324, 118 N.E.2d at 458 ("The unsealing of Harry Gross' lips after he had refused to testify at the first departmental trial, is tantamount to newly discovered evidence."); *see also* N.Y. Times, *The Lonely Death of a Man Who Made a Scandal*, April 5, 1986 at L1, col. 1 (traces rise and fall of Harry Gross and the scandal which prompted the departure of Police Commissioner William P. O'Brien and other city officials and the resignation of Mayor William O'Dwyer).

76. *See* Capital Tel. Co. v. Pattersonville Tel. Co., 56 N.Y.2d 11, 15-16, 436 N.E.2d 461, 462-63, 451 N.Y.S.2d 11, 12-13 (1982); Venes v. Community School Bd., 43 N.Y.2d 520, 524, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978).

77. *See* Venes v. Community School Bd., 43 N.Y.2d 520, 523, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 808-09 (1978).

78. 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

79. *Id.* at 505, 467 N.E.2d at 493, N.Y.S.2d at 829. The Court of Appeals decision to give preclusive effect in a judicial forum to an administrative determination followed the lead of several earlier decisions by federal courts in New York and the New York State appellate divisions. *See, e.g.*, Mitchell v. National Broadcasting Co., 553 F.2d 265, 268-69 (2d Cir. 1977); DeSimone v. South African Marine Corp., 82 A.D.2d 820, 821, 439 N.Y.S.2d 436, 438 (2d Dep't 1981); Newsday, Inc. v. Ross, 80 A.D.2d 1, 5, 437 N.Y.S.2d 376, 379 (2d Dep't 1981); Bernstein v. Birch Wathen School, 71 A.D.2d 129, 132, 421 N.Y.S.2d 574, 575 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 932, 415 N.E.2d 982, 434 N.Y.S.2d 994 (1980); Blanco v. Blum, 67 A.D.2d 947, 948, 413 N.Y.S.2d 215, 216 (2d Dep't 1979).

workplace. After his discharge, Ryan applied for unemployment insurance benefits, but his application was rejected by a claims examiner on the ground that the discharge was the result of Ryan's own misconduct.

Ryan filed an administrative appeal and was granted a hearing before an Unemployment Insurance Administrative Law Judge ("ALJ").[80] After considering the testimony of Ryan and the hearsay testimony of one witness, the ALJ sustained the ruling of the claims examiner and found that the " 'claimant was seen . . . removing company property from the company premises.' "[81] The ALJ then affirmed the denial of Ryan's unemployment benefits. This ruling was affirmed by the Unemployment Insurance Appeal Board, and upheld by the Appellate Division.[82] Prior to the Appellate Division's affirmation of the administrative determination, Ryan filed a tort action for false arrest, malicious prosecution, slander and wrongful discharge. The defendant raised an affirmative defense that because this action turned on the question of Ryan's misconduct, res judicata barred relitigation of the issue. The affirmative defense was dismissed by the Special Term and the Appellate Division affirmed.[83] The Court of Appeals reversed, holding that issue preclusion applied.[84]

The *Ryan* decision illustrates the increasing level of respect given by the Court of Appeals to administrative determinations.[85] The Court of Appeals, using the terms issue preclusion and claim preclusion interchangeably, first stressed that res judicata was founded upon the belief that it is in the public's interest to finalize litigation.[86] It then stated that the controlling factor for issue preclusion is "the identity of the issue which has necessarily been decided in the prior action."[87] The court found that the identity of issue test had been met. It recognized that the agency's determinations that Ryan was guilty of stealing company property and was terminated for cause, were essential factors in deciding the validity of his tort claims.[88] As these issues were material to the administrative determination and decisive to the claim raised by Ryan in his lawsuit, the doctrine of issue preclusion could be invoked to prevent their relitigation.[89]

The court pointed out that Ryan had testified on his own behalf and, through his union representative, had cross-examined the defendant's

80. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 497-98, 467 N.E.2d 487, 489, 478 N.Y.S.2d 823, 825 (1984).

81. *See id.* at 498, 467 N.E.2d at 489, 478 N.Y.S.2d at 825 (quoting findings of the ALJ) (ellipsis in original).

82. *See id.*, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

83. *See id.* at 498-99, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

84. *See id.* at 505, 467 N.E.2d at 493, 478 N.Y.S.2d at 829.

85. *See* D. Siegel, *supra* note 2, § 456, at 95 (Supp. 1985).

86. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984).

87. *Id.*, 467 N.E.2d at 490, 478 N.Y.S.2d at 826.

88. *See id.* at 502, 467 N.E.2d at 490, 478 N.Y.S.2d at 827-28.

89. *Id.* at 500-03, 467 N.E.2d at 490-92, 478 N.Y.S.2d at 826-28.

witnesses at the hearing.[90] In addition, the court noted that Ryan had voluntarily initiated the hearing, knowingly chose to appear before it without legal counsel and that the hearing was held before an ALJ. Moreover, the record demonstrated to the court that the administrative procedure was fair and that Ryan had a full opportunity to litigate the issue of misconduct.[91] Thus, the court held that the prior litigation had been sufficiently extensive and adversarial to constitute a full and fair hearing.[92]

In contrast to the court's findings, the circumstances surrounding the prior litigation suggest that Ryan was inadequately represented before the ALJ and, therefore, had been denied a full and fair opportunity to litigate the issue at the previous hearing. Ryan's union representative was not an attorney; and it is unlikely that Ryan, who was on welfare,[93] could have afforded legal counsel.[94] Additionally, Ryan's representative was frequently interrupted by the ALJ and continually urged to complete his case.[95] The Court of Appeals did not explain how the full and fair opportunity requirement could be satisfied in a proceeding conducted without the benefit of pre-trial disclosure or formal rules of evidence. Nor did the court discuss the differences between appellate review of evidentiary rulings in administrative and judicial forums.[96]

There are substantial procedural differences between judicial and administrative forums.[97] These differences were underscored by the ALJ's insistence that the hearing was not a trial.[98] Furthermore, the ALJ lim-

90. *Id.* at 503, 467 N.E.2d at 492, 478 N.Y.S.2d at 828.

91. *Id.* at 503-04, 467 N.E.2d at 492, 478 N.Y.S.2d at 828.

92. *Id.*, 467 N.E.2d at 492, 478 N.Y.S.2d at 828.

93. Record on Appeal at 21, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); *see* Plaintiff-Respondents Brief at 5, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

94. The court has indicated that it will not apply issue preclusion against a defendant who testified at, but was not a party to, an administrative hearing. Preclusion was not granted because such a person lacks control over his testimony, the opportunity for cross-examination and the guidance of counsel, *see* Liss v. Trans Auto Supply Co., 68 N.Y.2d 15, 22, 496 N.E.2d 851, 856, 505 N.Y.S.2d 831, 836 (1986), the *Ryan* decision suggests that such counsel need not be an attorney. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 503-04, 467 N.E.2d 487, 492, 478 N.Y.S.2d 823, 828 (1984).

95. Record on Appeal at 60-61, 69-70, 72-73, 78, 81-82, 88, 101, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

96. *See* 8 J. Weinstein, H. Korn & A. Miller, New York Civil Practice, at ¶ 7803.02 and nn.6-9, ¶ 7803.04. *See generally* O. Chase, *supra* note 17, at §§ 26.04-.06 (discussing questions available for review by appellate courts once the appeal is properly filed); *id.* at § 32.04 (issues available for review in an Article 78 proceeding). Since judicial review is limited to the administrative record, matters such as objections relating to hearsay evidence and failure to comply with the rules of evidence cannot be considered.

97. *See* N.Y. Comp. R. & Reg. tit. 12(c) § 461.4 (1982) ("[t]he administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure."); *cf.* D. Siegel, *supra* note 2, at § 597 ("the usual evidentiary rules applicable in court are waived in arbitration").

98. *See* Record on Appeal at 67, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984) ("this isn't a criminal trial").

ited cross-examination of the only witness testifying against Ryan.[99] Much of this witness' testimony was based on hearsay,[100] and the ALJ refused to allow an adjournment that would have permitted a witness having direct knowledge of Ryan's alleged misconduct to testify.[101] The hearing's transcript implies that no one contemplated that an issue determination by an ALJ would be dispositive of Ryan's tort claim in a judicial forum.[102]

In *Brugman v City of New York*,[103] the Court of Appeals gave preclusive effect to an administrative determination that rested soley on written documents and was conducted without a hearing of any type.[104] Both the Supreme Court and the Appellate Division affirmed the New York City Employee's Retirement System (NYCERS) administrative decision denying Brugman's application for accidental disability status.[105] In a subsequent tort action to recover damages resulting from the incident considered before the NYCERS, the defendants moved to amend their answer to assert issue preclusion as an affirmative defense. The motion was granted and Brugman's tort action was dismissed.[106] Special Term's decision was affirmed by the Appellate Division with a dissenting opin-

99. *See id.* at 67 ("I understand all the lighting and the distance have to do with the quality of the testimony, but I ask you to keep all your questions relevant."); *id.* at 103 ("I don't feel—whether or not he feels the witness is lying is necessary to todays [sic] hearing").

100. Record on Appeal at 74-76, Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); *see also id.* at 195 (use of hearsay testimony at administrative hearing attacked in claimant's brief to appellate division).

101. *Id.* at 101.

102. *See supra* notes 93-101 and accompanying text.

103. 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

104. During the pendency of Brugman's action to recover damages for injuries allegedly sustained on August 30, 1979, Brugman v. City of New York, 102 A.D.2d 413, 413, 477 N.Y.S.2d 636, 636 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985), which Brugman claimed occurred while he was working as a sanitation worker, Record on Appeal at 24-25, 49, 86, 90, Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985), the Board of Trustees of the New York City Employee's Retirement System ("NYCERS") denied Brugman's application for accidental disability status on the grounds that Brugman's accident reports and hospital records indicated that the injury was the result of lifting heavy garbage containers. Record on Appeal at 53, 56, 66, 67, Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985) (No. 80-6935). Brugman then resubmitted his application, supported by photographs of the accident site and the sworn statement of a witness to the accident, *see id.* at 73-77, but the Board affirmed its previous decision, *see id.* at 98-99, primarily basing its affirmation on two letters from doctors who examined the patient. *See id.* at 56-57, 111. One of these letters relied on by the Board stated, "[I]n my opinion, the conclusion reached by Dr. Cheung with regard to the relationship of this patient's condition to the incident when he developed pain on his back while lifting a *can* is a *totally unwarranted conclusion*." *Id.* at 111 (emphasis added). This apparently contradicts the Board's conclusion.

105. *See* Brugman v. Board of Trustees, 91 A.D.2d 872, 458 N.Y.S.2d 965 (1st Dep't 1982).

106. Brugman v. City of New York, 102 A.D.2d 413, 419, 477 N.Y.S.2d 636, 640 (1st Dep't 1984), *aff'd*, 62 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

ion.[107] The dissent argued that the procedures followed by the NYCERS Board did not satisfy the full and fair opportunity requirement because they were not "substantially similar to those used in a court of law."[108] The majority concluded, however, that issue preclusion was proper because the issues presented in both forums were identical and Brugman had failed to show that he was denied a full and fair opportunity to litigate the issues before the NYCERS Board.[109] The majority also stressed that the administrative determination by the NYCERS was affirmed in three administrative proceedings, and reviewed in a special judicial proceeding.[110]

The Court of Appeals, in a memorandum opinion, unanimously adopted the majority's position.[111] Implicit in the *Brugman* decision is the court's determination that the full and fair opportunity requirement can be satisfied on the basis of a paper record, without the application of formal rules of evidence.[112]

In *Liss v. Trans Auto Systems,*[113] the Court of Appeals clarified the extent to which administrative determinations are given preclusive effect. The court held that issue preclusion could not be applied against a defendant who was neither a party[114] nor a party in interest[115] to the administrative hearing. It recognized that the full and fair opportunity requirement cannot be satisfied without the occasion to present evidence

107. *Id.* at 419, 477 N.Y.S.2d at 640.

108. *Id.* at 420, 477 N.Y.S.2d at 641 (Silverman, J., dissenting) (quoting Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984)). The dissent argued that, "[t]he administrative forum must have the 'essential procedural characteristics of a court.' The procedure of the Retirement System does not meet these requirements . . . there is no court-like hearing—no examination and cross-examintion of witnesses, no presiding officer performing the functions of a judge, no 'adversary proceeding.' " *Id.* at 420-21, 477 N.Y.S.2d 641 (Silverman, J., dissenting) (citations omitted).

109. *Id.* at 415, 417-18, 477 N.Y.S.2d at 639.

110. *Id.* at 415, 477 N.Y.S.2d at 637.

111. Brugman v. City of New York, 64 N.Y.2d 1011, 1012, 478 N.E.2d 195, 196, 489 N.Y.S.2d 54, 55 (1985). The Court of Appeals pointed out that the plaintiff had "no occasion for cross-examination." *Id.* at 1012, 478 N.E.2d at 196, 489 N.Y.S.2d at 55. Thus, the court implicitly adopted the Appellate Division's contention that the full and fair opportunity requirement could be applied to administrative determinations absent "a court-like hearing [and the] examination or cross-examination of witnesses." *See* Brugman v. City of New York, 102 A.D.2d 413, 417, 477 N.Y.S.2d 636, 639 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

112. *See* Brugman v. City of New York, 64 N.Y.2d 1011, 1012, 478 N.E.2d 195, 196, 489 N.Y.S.2d 54, 55 (1985); *supra* notes 103-10 and accompanying text. The *Brugman* court reasoned that since plaintiff was the only witness before the Board, cross examination was unnecessary. Additionally, plaintiff admitted on argument that "he had no other evidence to present and was unaware of any evidence that might be discoverable." *Brugman*, 64 N.Y.2d at 1012, 478 N.E.2d at 196, 489 N.Y.S.2d at 55. Thus, the court held that, in this case, the full and fair opportunity requirement was satisfied absent these procedures. *See id.*, 478 N.E.2d at 196, 489 N.Y.S.2d at 55.

113. 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986).

114. *See id.* at 18, 496 N.E.2d at 853, 505 N.Y.S.2d at 833.

115. *See id.* at 22, 496 N.E.2d at 855, 505 N.Y.S.2d at 835.

and to cross-examine witnesses.[116] Additionally even if the party against whom preclusion is sought testified at the hearing, he must have had both the opportunity to control the development of his testimony and the guidance of counsel.[117]

C. *Granting Preclusive Effect to Arbitral Determinations*

In *Clemens v. Apple*,[118] the Court of Appeals affirmed the Appellate Division's decision granting preclusive effect to an issue determined at an arbitration before a Health Services Administrative (HSA) Panel,[119] noting that the decision was fully consistent with *Ryan v. New York Telephone Co.*[120] The court emphasized that the full and fair opportunity requirement had been satisfied, stressing that Clemens, who was represented by counsel, freely chose arbitration after the commencement of his personal injury action. It concluded that Clemens, therefore, could have foreseen the possibility that an adverse arbitral award would preclude relitigation of the causal factors relating to his suit.[121]

In *Clemens*, the HSA Arbitration Panel based its decision on an informal fifteen minute hearing before a two-doctor Panel that did not call any witnesses.[122] In addition, the substantive and procedural law of New York were not binding on the HSA Panel and the judicial review available was far less stringent than for administrative determinations.[123]

The *Clemens* decision suggests a shift in emphasis by the Court of Appeals from achieving a just result for litigants to conserving of judicial resources.[124] This shift has serious policy implications. For example, making the results of an issue determination at a voluntary arbitration

116. *See id.*, 496 N.E.2d at 855, 505 N.Y.S.2d at 835.

117. *See id.*, 496 N.E.2d at 856, 505 N.Y.S.2d at 836. *But see supra* note 94 and accompanying text (guidance need not be provided by attorney).

118. 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985).

119. Clemens v. Apple, 102 A.D.2d 236, 477 N.Y.S.2d 774 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985). The Appellate Division held "it is apparent from the record that Clemens was accorded a full and fair opportunity to litigate his claim . . . ." *Id.* at 237, 477 N.Y.S.2d at 775.

120. *See* Clemens v. Apple, 65 N.Y.2d 746, 748, 481 N.E.2d 560, 560, 492 N.Y.S.2d 20, 20 (1985).

121. *See id.* at 749, 481 N.E.2d at 561, 492 N.Y.S.2d at 21.

122. Record on Appeal at 68-69, Clemens v. Apple, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985) (plaintiff's affidavit in opposition to defendant's motion for partial summary judgment). The report on which the arbitrators relied was based on one brief examination of Clemens on January 19, 1978, where a doctor stated that: "[t]he patient's diagnosis at this time is a cervical sprain secondary to his automobile accident . . . ." *Id.* at 49. The other report, which was not utilized by the panel, related the herniated disc injury to the automobile accident, was based on a continual series of treatments from May 18, 1979 through February 18, 1980. *Id.* at 74-83.

123. *Compare* N.Y. Civ. Prac. L. & R. § 7511 (McKinney 1981) (governing review of arbitral decisions) *with* N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1981) (governing review of administrative determinations). *See* D. Siegal, Expanding Applications of Collateral Estoppel (Issue Preclusion), 310 N.Y. St. L. Dig. 1 (1985).

124. *See* Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. Cal. L. Rev. 357, 359 (1974) (judicial economy furthered through granting of issue preclusion).

binding at a subsequent litigation may discourage the use of arbitration, and encourage the use of the courts, defeating the court's attempt to reduce congestion.[125] Well-advised plaintiffs may forego a simplified determination of disputes with their carriers, while uninformed plaintiffs may be bound by decisions of arbitrators, made without the procedural safeguards present in judicial forums.[126] Finally, this shift might impose unanticipated hardships on accident victims.[127]

III. POLICY ANALYSIS OF THE APPLICATION OF ISSUE PRECLUSION TO ADMINISTRATIVE AND ARBITRAL DETERMINATIONS

The policies supporting the doctrine of issue preclusion[128] include society's desire to: (1) promote fairness;[129] (2) prevent inconsistent judgments and to achieve uniformity and certainty;[130] (3) finalize disputes among the parties;[131] and (4) conserve judicial resources.[132] This section will analyze the Court of Appeals' expansion of the doctrine's scope[133] in terms of the interaction of these considerations to guide the courts in granting preclusive effect administrative and arbitral issue determinations in subsequent judicial litigations.

A. *Consideration of Fairness*

Concepts of fair play and due process have consistently been important

125. *Cf.* University of Tenn. v. Elliot, 106 S. Ct. 3220, 3228 (1986) (Stevens, J., concurring in part and dissenting in part) (litigants may forego state administrative determinations as a result of their fear of future preclusive effect).

126. *Cf. id.* (Stevens, J., concurring in part and dissenting in part).

127. *See infra* Parts III-IV.

128. *See supra* notes 7-20 and accompanying text.

129. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-01, 467 N.E.2d 487, 490-91, 478 N.Y.S.2d 823, 826-27 (1984) (issue preclusion only applies when issue has been fairly litigated); Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981) (same); People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521, 436 N.Y.S.2d 224, 227 (1980) (same); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 69, 246 N.E.2d 725, 727-28, 298 N.Y.S.2d 955, 958 (1969) (same).

130. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 501, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984) (issue preclusion applies when different result in second proceeding would destroy rights created in first).

131. *See id.* at 500, 467 N.E.2d at 490, 478 N.Y.S.2d at 826 (1984) ("[O]nce . . . tried, all litigation of that question, and between those parties, should be closed forever." (quoting Fish v. Vanderlip, 218 N.Y. 29, 36-37, 112 N.E. 425, 428 (1916) (quoting Greenleaf's Evidence §§ 522, 523)); People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521, 436 N.Y.S.2d 224, 227 (1980) (doctrine provides means for swift resolution of disputes); Venes v. Community School Bd., 43 N.Y.2d 520, 523-24, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978) (decisions need to be granted as much finality as possible) (citing Matter of Evans v. Monaghan, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58 (1954)).

132. *See* Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981) (doctrine conserves resources of courts and litigant). *See supra* notes 2-4 and accompanying text.

133. *See* D. Siegel, *supra* note 2, § 456 95, (Supp. 1985).

policy considerations for courts when considering issue preclusion.[134] These considerations are manifest in the Court of Appeals' "full and fair opportunity" test which requires the court to consider such factors as, the forum of the prior litigation, the foreseeability of the subsequent action the size of the plaintiff's claim and the ability of the party's counsel.[135]

Satisfaction of the full and fair opportunity test requires more than traditional notions of due process and fair play.[136] In *Parklane Hosiery v. Shore*,[137] the Supreme Court admonished that issue preclusion should seldom be applied if a second forum affords a party procedural opportunities, such as full discovery and the benefit of evidentiary rules, that were unavailable in the first forum and could cause a different result.[138] The *Ryan* court, balancing the consideration of fairness and the need for finality, cited *Parklane* to support its invocation of issue preclusion.[139] The Court of Appeals did not, however, establish standards for determining what administrative or arbitral procedures, if any, are necessary for satisfaction of the full and fair opportunity requirement.[140] Implicit in

134. *See supra* notes 11, 129 and accompanying text; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (fairness dictates when offensive use of doctrine permitted); Capital Tel. Co. v. Pattersonville Tel. Co., 56 N.Y.2d 11, 21, 436 N.E.2d 461, 465, 451 N.Y.S.2d 11, 15 (1982) (plaintiffs did not have a full and fair opportunity to contest the issue because no evidentiary hearing was held); Venes v. Community School Bd., 43 N.Y.2d 520, 524-25, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978) (determination of a school board not acting in a quasi-judicial capacity should not be given res judicata effect).

135. *See supra* notes 20, 65-69 and accompanying text.

136. People v. Plevy, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980) ("when the application of collateral estoppel is at issue, any question as to whether a party had 'a full and fair opportunity' to litigate the prior determination is not concluded by a finding that there was no violation of due process").

137. 439 U.S. 322 (1979).

138. *Id.* 330-31. In *Parklane*, the Supreme Court permitted offensive use of nonmutual issue preclusion by plaintiff stockholders who, although they were not parties or privies to an earlier adjudication by the SEC, sought to preclude the defendants from relitigating the issue of an alleged violation of federal securities laws. *Parklane* has generated extensive commentary of its own. *See, e.g.*, Collen & Kadue, *To Bury Mutuality, Not to Praise It: an Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 Hastings L.J. 755 (1980); Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 Ariz. St. L.J. 45; Kempkes, *Issue Preclusion: Parklane Hosiery Co. v. Shore Revisited*, 31 Drake L. Rev. 111 (1981). Prior to *Parklane* the Supreme Court had granted preclusive effect to administrative findings. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 400-01, 418-19 (1966) (an administrative contract appeals agency made factual findings which were later held as conclusive, on principles of issue preclusion, in a civil action). As commentators have noted, after *Utah* federal courts have often held that precluding relitigation of administrative issue determinations is a useful tool for reducing caseloads. *See, e.g.*, Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. Fla. L. Rev. 422, 432-444; Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 Geo. Wash. L. Rev. 65, 70-71 (1977).

139. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 489, 478 N.Y.S.2d 823, 825 (1984).

140. *Cf.* McDonald v. City of W. Branch, 466 U.S. 284, 290-92 (1984) (United States Supreme Court analyzed arbitral procedures and concluded that they were not sufficient

the Court of Appeals' granting preclusive effect to the administrative determinations in *Ryan*[141] and *Brugman*[142] and the arbitral determinations in *Clemens*,[143] is the notion that the requirement can be satisfied without pre-trial discovery or formal application of the rules of evidence. This raises the question of whether litigants should be deprived of rights traditionally guaranteed them by our adversarial system.[144]

There are several advantages to extensive discovery: it assures fairness to the litigants and prevents surprises it encourages settlements and it usually improves both the efficiency of a trial or hearing and the quality of the decision made therein.[145] In New York, administrative agencies are not required to permit discovery.[146] Agency decisions to prohibit or limit a party's discovery rights do not violate due process.[147] Thus, a litigant is not guaranteed access to relevant and nonprivileged information which is in the exclusive possession of his adversary. This may prevent him from developing or formulating issues as he would in a court of

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to apply issue preclusion in federal court to unappealed arbitration awards in actions brought under 42 U.S.C. § 1983); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483-85 (1982) (in confirming issue preclusion bar of Title VII claim, the Court analyzed panoply of administrative procedures followed by New York State and concluded they were sufficient under due process clause.). *But see* University of Tenn. v. Elliot, 106 S. Ct. 3220, 3227 (1986) ("[W]e hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issue of fact properly before it which the parties have had an adequate opportunity to litigate' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in state courts.") (citations omitted).

Commentators have suggested that the full and fair opportunity requirement, which the Court of Appeals has extended beyond terms of traditional notions of due process, contemplates full disclosure and trial-like procedures. *See supra* note 24 and accompanying text. Thus, although neither the N.Y. State Administrative Procedure Act (A.P.A.) nor case law requires that administrative procedure conform with traditional judicial models, satisfaction of the full and fair opportunity requirement places a higher burden of procedural fairness upon administrative and arbitral tribunals. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (judicial mode of an evidentiary hearing is not required prior to the termination of disability benefits); Schwartz, *Administrative Law*, 36 Syracuse L. Rev. 1, 5-6 (1985) (although "not governed by rules of evidence, . . . basic principles of fairness do apply"). To meet this burden, the party invoking issue preclusion should be required to show that the administrative or arbitral determination was sufficiently court-like to rebut the presumption against applying the doctrine to such decisions. *See infra* note 212 and accompanying text.

141. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

142. Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

143. Clemens v. Apple, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985).

144. *See generally* Morgan, *Playing by the Rules: Due Process and Errors of State Procedural Law*, 63 Wash. U.L.Q. 1, 17-24 (1985).

145. *See generally* C. Wright, *Law of Federal Courts*, § 81, at 540-44 (1976).

146. *See* Heim v. Regan, 90 A.D.2d 656, 657, 456 N.Y.S.2d 257, 258 (3d Dep't 1982); N.Y. A.P.A., § 305 (McKinney 1984) ("Each agency having power to conduct adjudicatory proceedings *may* adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings." (emphasis added)); *infra* note 188 and accompanying text.

147. *See* N.Y. A.P.A. § 305 (McKinney 1984); *supra* note 138 and accompanying text.

law. It is, therefore, questionable whether the full and fair opportunity test can be satisfied absent this procedure in the prior proceeding.

Administrative tribunals are not bound by the rules of evidence.[148] Rules of evidence define what is relevant and privileged in court proceedings; hearsay testimony is prohibited the plaintiff's burden of proof is measured by the preponderance of evidence standard, and the judicial and fact-finding roles are clearly differentiated.[149] Thus, at administrative or arbitral hearings, an issue may be decided on the basis of evidence that would be inadmissible or insufficient in a court of law.

To the extent that notions of efficiency and reduction of caseloads inevitably conflict with concepts of fairness and substantial justice for the individual litigant, the nature of this conflict differs between judicial forums and administrative or arbitral forums. Justice and fairness in judicial forums are viewed in terms of formal rituals supervised by an impartial and independent judiciary.[150] These rituals are governed by rules of evidence and procedure and by case law. Justice and fairness in administrative and arbitral forums, however, have traditionally been viewed in terms of permitting citizens access to a simplified, expedited and informal dispute resolution system.[151] Indeed, elaborate pre-trial discovery and lengthy evidentiary hearings with technical rules of evidence are often inimical to achieving administrative and arbitral justice.[152]

Many hearing officers and administrative law judges are employed by the same agencies that promulgate the regulations that these officials are supposed to be applying in an impartial manner. Unlike judicial forums, agencies have tasks other than resolving judicial disputes.[153] Thus,

148. *See* N.Y. A.P.A. § 306 (McKinney 1984) (administrative tribunals not bound by the rules of evidence); *supra* notes 97-100 and accompanying text.

149. *See* Schwartz, Administrative Law §§ 7.1, 7.2, 7.7-.10 (2d ed. 1984); Abramson, *Administrative Procedures for Resolving Complex Policy Questions: a Proposal for Proof Dissection*, 47 Alb. L. Rev. 1086, 1096 (1983).

150. Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 852-54 (1984).

151. *See The APA*, *supra* note 25, at 339 n.8. *See also* California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 135 (1971) (objective of Congress in creating the system for unemployment insurance was "getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible."); *The Record*, *supra* note 24, at 740-42 ("Promptness in meeting the financial needs of the unemployed has always—and properly—been a critical concern of the unemployment insurance system.").

152. *See* McDonald v. City of W. Branch, 466 U.S. 284, 290-92 (1984) (because of deficiencies in arbitral fact finding, court refused to give preclusive effect to arbitration awards in § 1983 actions); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974) (informal procedures of arbitrations insufficient to protect federal rights). *Cf.* California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 135 (1970) (purpose of unemployment compensation hearing is getting money as quickly as possible to the unemployed worker at the earliest point that is administratively feasible); N.Y. A.P.A. § 100 (McKinney 1984) (APA provides for simple, uniform procedures).

153. Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon Its Structure and Legislative History*, 26 Buffalo L. Rev. 589, 614-20 (1977) (agency tasks include, inter alia, rulemaking, setting rates, and granting licenses).

agency determinations are influenced by the policies, aims, personalities, and sources of power sustaining the agency.[154] This, again, raises the question of whether the full and fair opportunity standard permits granting preclusive effect to such determinations on a wholesale basis.

B. *The Minimization of Inconsistent Judgments*

The belief that society desires to minimize inconsistent decisions is a significant historical justification for issue preclusion.[155] Courts have, however, permitted the relitigation of issue determinations in subsequent actions, despite the risk of inconsistent results, on the grounds of substantial justice and fairness.[156] Indeed, the Court of Appeals has stressed that issue preclusion should not be applied when circumstances exist that, although not legal impediments, may have the practical effect of discouraging or deterring a party from fully litigating an issue.[157] The court has further stated that the invocation of issue preclusion should depend on the context in which the disputed facts were considered.[158] By emphasizing that "other circumstances" may cause facts in one proceeding to have different meanings and consequences in another setting, the court has shown that concern about placing inconsistent duties on a party is more a function of claim preclusion than issue preclusion.[159]

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154. *See* Heflin, *A Question of Independence*, 19 New Eng. L. Rev. 693, 694 (1984) ("[s]ubtle forms of influence also exist, including budget control and assignment of office space by the agency"); Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 New Eng. L. Rev. 733, 734-35 (1984). *But see The APA*, *supra* note 25, at 350 nn.67-68 (in most respects ALJs are independent of the agency that employs them).

155. *See supra* note 9 and accompanying text; *see also* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S.2d 584, 588 (1985) ("[Issue preclusion] is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it.").

156. *See* Shanley v. Callanan Indus., 54 N.Y.2d 52, 57, 427 N.E.2d 104, 107, 444 N.Y.S.2d 585, 588 (1981) (issue of driver's negligence allowed to be relitigated); Gilberg v. Barbieri, 53 N.Y.2d 285, 291, 423 N.E.2d 807, 808, 441 N.Y.S.2d 49, 50 (1981) (because issue preclusion is rooted in fairness, "there are few immutable rules"); People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521, 436 N.Y.S.2d 224, 227 (1980) ("The doctrine [issue preclusion], however, is not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns.").

157. *See* People v. Plevy, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980).

158. *See id.*

159. *See* Restatement (Second) of Judgments § 26 (1982). The Restatement (Second) points out that "[t]here is a close relationship between the definition of a 'claim' and the sweep of the rule of issue preclusion." *Id.* at 250. It notes:

> Courts laboring under a narrow view of the dimensions of a claim may on occasion have expanded concepts of issue preclusion in order to avoid relitigation of what is essentially the same dispute. Under a transaction approach to the concept of a claim, on the other hand, there is less need to rely on issue preclusion to put an end to the litigation of a particular controversy.

Id.

Thus since the Court of Appeals' adoption of the Restatement (Second) of Judge-

In *Gilberg v. Barbieri*,[160] the Court of Appeals held that a harassment conviction would not preclude relitigation of the same material issue in a civil lawsuit, despite the possibility of an inconsistent determination of the issue.[161] The *Gilberg* court held that because the parties could not foresee that the conviction would later be used to establish conclusive liability in a $250,000 personal injury suit, they were not accorded a full and fair opportunity to litigate the issue.[162] The court also emphasized the brisk and informal manner of the prior hearing and observed that the defendant had neither the opportunity nor the incentive to litigate as thoroughly as he might have if the stakes had been greater.[163] This decision is consistent both with earlier cases refusing to grant issue preclusion when a party could not foresee that the issue would arise in subsequent litigation,[164] and with the Court of Appeals decision in *Koch v. Consolidated Edison Co.*,[165] where issue preclusion was granted on the grounds that the defendant should have foreseen that the same issue determination in an earlier proceeding would be conclusive in later actions.[166]

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ments' "transactional analysis" approach in Reilly v. Reid, 45 N.Y.2d 24, 29-30, 379 N.E.2d 172, 175-76, 407 N.Y.S.2d 645, 648 (1978), it follows that the application of issue preclusion should be restricted, *see also* O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 429 N.E.2d 1158,1159, 445 N.Y.S.2d 687, 688 (1981) (approving transactional analysis). *See* Chase, *Trends and Cross Trends in Res Judicata*, N.Y.L.J., May 25, 1982, at 2, col. 4.

160. 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981).

161. *Id.* at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The Court of Appeals framed the issue as "[W]hether a conviction for the petty offense of harassment can later be used to preclude the defendant from disputing the merits of a civil suit for assault, involving the same incident and seeking a quarter of a million dollars." *Id.* at 288, 423 N.E.2d at 807, 441 N.Y.S.2d at 49. A divided Court of Appeals refused to give conclusive effect to the prior determination beyond the proceeding in which it was made. *See id.* at 292, 423 N.E.2d at 809, 441 N.Y.S.2d at 51. The majority found that the defendant was afforded neither an opportunity nor an incentive to litigate the harassment conviction thoroughly or as thoroughly as he might have if more were at stake. *See id.* at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The court noted that a contrary ruling would encourage civil litigants to file criminal complaints which would frustrate the very purpose of res judicata. *See id.* at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The court also observed that future parties would be compelled to defend minor criminal charges with a vigor out of proportion to the charge and at variance with the proper function of the local criminal courts. *See id.*, 423 N.E.2d at 810, 411 N.Y.S.2d at 52.

162. *See id.*, 423 N.E.2d at 810, 411 N.Y.S.2d at 52.

163. *See id.* at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (it may be unfair to permit offensive use of collateral estoppel if defendant in first action was sued for nominal or small damages and subsequent lawsuit is unforeseeable because he may not have incentive to "defend vigorously").

164. *See* O'Conner v. G & R Packing Co., 53 N.Y.2d 278, 283, 423 N.E.2d 397, 399, 440 N.Y.S.2d 920, 922 (1981) (trial court did not examine foreseeability of later preclusion and thus its determination that plaintiff was contributorily negligent was not specifically decided); Shanley v. Callanan Indus., 54 N.Y.2d 52, 56, 429 N.E.2d 104, 106, 444 N.Y.S.2d 585, 587 (1981) ("The test of a full and fair opportunity to litigate is designed to assure that the party against whom collateral estoppel is being invoked has had an opportunity to present his case.").

165. 62 N.Y.2d 548, 468 N.E.2d 1, 479 N.Y.S.2d 163 (1984), *cert. denied*, 105 S. Ct. 1177 (1985).

166. *Id.* at 557, 468 N.E.2d at 6, 479 N.Y.S.2d at 168 (Court of Appeals held that the

It is difficult to reconcile the court's decisions denying preclusive effect to issue determinations made at hearings when either the stakes were minimal or the procedures overly informal, and its decisions granting preclusive effect to administrative and arbitral determinations.[167] In *Gilberg v. Barbieri*, for example, there was more at stake and Barbieri had as much reason to litigate in the City Court as Brugman, Clemens or Ryan did to litigate in their respective administrative and arbitral forums.[168] In addition, Barbieri had greater procedural benefits than Ryan, Brugman, or Clemens.[169] Neither Brugman nor Clemens had any adversarial hearing before binding issue determinations were made against them by non-lawyers.[170] Although Ryan had a hearing, he was not represented by an attorney nor did he benefit from pretrial discovery or technical rules of evidence.[171]

Most people seek administrative and arbitral relief without contemplating legal action or the preclusive impact that a nonjudicial issue determination will have on their right to litigate a claim in a court of law.[172] In cases such as *Koch v. Consolidated Edison Co.*,[173] where the court found the subsequent action foreseeable,[174] the parties were sophisticated litigants with access to expert counsel, and, thus, could foresee that the earlier issue determination could act as a bar in a subsequent proceeding. Administrative forums are intended as places where parties

full and fair opportunity requirement was satisfied because the defendant "recognizing the potential preclusive effects of an adverse determination in that case, had every incentive to defend that action fully and vigorously.").

167. *See The Record, supra* note 24, at 746.

168. Barbieri, charged with harassment, *see* N.Y. Penal Law § 240.25(5) (McKinney 1985) (harassment is a violation), and if convicted faced a possible fifteen day jail sentence. *See* N.Y. Penal Law § 70.15(4) (McKinney 1975). In contrast, Clemens sought approximately $1,700 in medical fees. *See* Clemens v. Apple, 102 A.D.2d 236, 237, 477 N.Y.S.2d 774, 776 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985). Brugman sought partial disability, *see* Record on Appeal at 50-51, 56, Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985). The benefits sought by Ryan were minimal. *See supra* notes 93-102 and accompanying text; *see also The Record, supra* note 24, at 746 (Barbieri faced a fifteen day jail sentence if convicted of harassment, while the average unemployment award, such as that sought by Ryan, is roughly $1500).

169. Barbieri had the right to a court appointed attorney if he had been unable to afford one, *see generally* W.R. LaFave & J.H. Israel, Criminal Procedure § 6.4 (1985) (criminal defendants have right to counsel); findings of fact must have been established beyond a reasonable doubt. *See id.* at § 1.4(n).

170. *See generally* Clemens v. Apple, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985); Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985).

171. *See supra* notes 93-102 and accompanying text.

172. *See The Record, supra* note 24, at 743 ("It is unlikely that most claimants, even those who may ultimately bring a charge or suit relating to their discharges, know at the time they file for unemployment benefits that there will be future litigation or that the doctrine of collateral estoppel may impinge on such later proceeding.").

173. Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 468 N.E.2d 1, 479 N.Y.S.2d 163 (1984), *cert. denied*, 105 S. Ct. 1177 (1985).

174. *Id.* at 557, 468 N.E.2d at 6, 479 N.Y.S.2d at 168.

can have their claims processed without hiring a lawyer or incurring other expenses.[175] Custom suggests that lay representation is more successful than representation by an attorney in administrative and arbitral forums.[176] It is likely that indigent litigants in administrative and arbitral forums will favor lay representation that may be insensitive to the effect of issue determinations on subsequent litigation. Thus, courts should be wary of granting such determinations preclusive effect. If not, parties may be forced, in effect, to forego small claims because they cannot afford legal counsel to litigate administrative issues, that may later be decisive in unanticipated lawsuits.

Although disputed factual issues may arise from the same transaction or occurrence, it is important to recognize that they may be developed differently in a judicial forum than in an administrative or arbitral hearing. Pre-trial discovery, evidentiary objections at trial, artful cross-examination, and a skillful summation before a jury may logically lead to a decision in a court of law that is justifiably inconsistent with a decision made by an administrative hearing officer or a panel of arbitrators. Thus, general policy notions of inconsistency, which courts have not hesitated to disregard in interforum matters, are of little importance when deciding if an administrative or arbitral determination should be conclusive in a judicial forum.[177]

C. *Finality and the Conservation of Resources*

In *Ryan v. New York Telephone Co.*,[178] the Court of Appeals primarily relied on the concept of finality to justify its holding that an administra-

175. O. Chase, *supra* note 17, at § 31.01 (1986). *See generally* Gellhorn & Benjamin, Administrative Adjudication in the State of New York 326-68 (1942) (administrative action may be pursued without an attorney); Note, *Rabbinical Courts: Modern Day Solomons*, 6 Colum. J.L. & Soc. Probs. 49, 69 (1970) (alternative resources provide inexpensive forums for dispute resolution).

176. Report by the New York Assembly Standing Committee on Labor (Frank J. Barbaro, Chairman), *Due Process in the Unemployment Insurance System in New York State*, 7 (1981) (available in the files of *Fordham Law Review* (citing 1979 study conducted by National Commission on Unemployment Compensation which indicates how infrequently parties in fact obtain counsel); *see also* N.Y. Comp. Codes R. & Reg. tit. 12 § 462.4(c) (statutory restrictions on payment of attorney fees).

177. This observation is qualified when issue preclusion is given to the determination of one agency to preclude relitigation of a decisive issue before another agency which has similar procedural rules. *See* Mallia v. Webb, 103 A.D.2d 559, 563, 481 N.Y.S.2d 805, 808 (3d Dep't 1984) (earlier determination, on application for aid to dependent children benefits, was entitled to preclusive effect in determining subsequent eligibility for food stamps). On the other hand, when administrative forums have substantially different procedural rules, the doctrine has not been applied. *See, e.g.*, Manhasset Bd. of Educ. v. N.Y.S. Human Rights, 106 A.D.2d 364, 366, 482 N.Y.S.2d 495, 497 (2d Dep't 1984) (preclusive effect not given to prior administration because complainants' allegation that she had been subjected to a racial slur was only briefly explored there.); *see also* Willer v. New York State Bd. of Regents, 101 A.D.2d 937, 937, 475 N.Y.S.2d 656, 657 (3d Dep't 1984) (preclusive effect not given because prior administrative hearing did not give petitioner full and fair opportunity to litigate his claim).

178. 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

tive issue determination precluded relitigation of the same decisive issue in a judicial forum.[179] The court found support for granting preclusive effect to an administrative determination[180] in *Evans v. Monaghan*[181] and *In re Venes*.[182] In these decisions, the court emphasized that finality was the fundamental justification for claim preclusion in an admininstrative context, stating that "[s]ecurity of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible."[183] Neither case, however, involved the question of whether an administrative finding on which its determination rested, should preclude litigation of the same decisive issue in a judicial forum. Thus, the *Ryan* court, in citing these cases as support for applying issue preclusion relied on dicta. Issues do not have independent significance in the sense that claims do.[184] Issue preclusion differs from claim preclusion in that it merely prohibits, in the interest of fairness,[185] the subsequent litigation of some, but not necessarily all, prior adjudicated issues.[186]

It is crucial to note that the principle of finality and the related need to conserve judicial resources evolved as justifications for issue preclusion in the context of judicial proceedings.[187] Administrative and arbitral forums resolve disputed issues with less stringent procedural safeguards than judicial proceedings which include pre-trial discovery, lengthy evidentiary hearings and technical rules of evidence.[188] Justice in adminis-

179. *Id.* at 499-500, 467 N.E.2d at 490, 478 N.Y.S.2d at 826 (" 'Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.' ") (quoting Fish v. Vanderlip, 218 N.Y. 29, 36-37, 112 N.E. 425, 427-28 (1916) (quoting Greenleaf, Evidence, §§ 522-23)).

180. *See* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 489-90, 478 N.Y.2d 823, 825-26 (1984).

181. 306 N.Y. 312, 118 N.E.2d 452 (1954).

182. 43 N.Y.2d 520, 373 N.E.2d 987, 402 N.Y.S.2d 807 (1978).

183. *Id.* at 524, 373 N.E.2d at 989, 402 N.Y.S.2d at 809 (quoting Evans v. Monaghan, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58 (1954)).

184. *See supra* notes 13-16 and accompanying text.

185. The primary policy justification for issue preclusion has traditionally rested on society's belief that it is unfair for courts to permit a party who has unsuccessfully asserted one position in a particular matter to relitigate that assertion (or a consistent assertion) in a later proceeding based upon the same facts. *See supra* notes 13-16 and accompanying text; *see also* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 490, 478 N.Y.S.2d 823, 826 (1984) ("The doctrine of collateral estoppel [issue preclusion], a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding . . . .").

186. *See supra* notes 13-16 and accompanying text.

187. *See* Venes v. Community School Bd., 43 N.Y.2d 520, 523, 373 N.E.2d 987, 988, 402 N.Y.S.2d 807, 808-09 (1978) ("*Res judicata* is a doctrine associated with dispute-resolution. . . . Its application to administrative proceedings is remarkably elusive, for it has in large part been developed not in decisions applying *res judicata* to administrative adjudications, but rather by courts which . . . found the doctrine inapplicable to the cases before them.").

188. *See* Sinha v. Ambach, 91 A.D.2d 703, 457 N.Y.S.2d 603 (3d Dep't 1982) ("Due process considerations do not require the full panoply of procedural tools available to

trative and arbritral forums has traditionally been viewed in terms of permitting citizens access to a simplified and informal dispute system that expeditiously resolves conflicts.[189] The procedural safeguards are often inimical to acheiving administrative and arbitral justice. The absence of these procedures, however, increases the possibility "that grave errors may go uncorrected."[190] Thus, reliance on finality as a primary policy justification for the application of issue preclusion to administrative and arbitral determinations is misplaced. Although the notion that some administrative decisions should be considered final in order to relieve the judicial system of adjudicating certain disputes is reasonable, it should not apply when a different result is possible because the second forum affords a party procedural opportunities unavailable in the first.[191]

The aim of conserving judicial resources is furthered by both according finality to subordinate court decisions and reducing incentives to appeal.[192] Granting preclusive effect to arbitral and administrative determinations, however, may compel a party to appeal in anticipation of subsequent litigation in which the issue determined will assume greater importance.[193] The Court of Appeals has given little guidance for determining when decisions of administrative agencies and arbitral tribunals will have preclusive consequences in other actions.[194] Thus, litigants, will be compelled to dedicate resources to contest simple matters for fear that issues decided against them will be given estoppel effect in a subsequent lawsuit. Parties appearing before administrative and arbitral bodies will make increased discovery demands. There will be a reluctance by many parties to arbitrate unless there is a stipulation limiting the preclusive effect of the award. Although caseloads may be reuced, the practical effect is that dispute resolution resources will not be conserved. Rather, they will be re-allocated to administrative and arbitral forums. Treating

civil litigants in an administrative proceeding."); Heim v. Regan, 90 A.D.2d 656, 657, 456 N.Y.S.2d 257, 258 (3d Dep't 1982) (not necessary to apply discovery rules, as embodied in CPLR article 31 to administrative hearings).

189. *See* Goldstein, *supra* note 25, at 69-70 (congestion of courts and complexity of civil litigation support development of alternative forums); 3 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 3031.01 (1986) (imperfection of judicial process may be resolved through creation of alternative forums); 3 *N.Y. Judicial Conference Report* 94-97 (1958) (the imperfections of the judicial system most frequently noted as reasons for the movement away from the courts are: (1) crowded calendars and attendant delay; (2) limitations on the scope of permissible evidence because of the exclusionary rules applied by the courts; (3) protracted trials; (4) unwanted publicity; harrassment of witnesses during cross-examination; (5) lack of confidence in the ability of judges to determine disputes; and (6) high cost of counsel fees resulting from the length of the litigation process).

190. 3 J. Weinstein, H. Korn & A. Miller, *supra* note 189, ¶ 3031.01.

191. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979) ("Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.").

192. Hazard, *supra* note 9, at 91 (1984).

193. *Id.*

194. *See The Record*, *supra* note 24, at 744-48.

administrative and arbitral determinations as final for purposes of issue preclusion may ultimately conflict with the need to conserve resources. In addition, when courts make these issue determinations decisive in an administrative or arbitral forum, they surrender their authority to a hidden judiciary.[195] An independent judiciary may be compromised when its authority is diffused and re-allocated under the banner of conserving resources and reducing caseloads.

IV. When an Administrative or Arbitral Issue Determination Should Preclude Relitigation of the Same Decisive Issue in a Judicial Forum

Government services in New York are provided by 56 federal agencies, 133 state departments and agencies, 62 counties, 62 districts, 5383 special districts, 2202 public authorities, 122 urban renewal agencies, and 104 industrial development agencies.[196] Most of these agencies have specialized functions and make regulatory and adjudicative determinations[197] that are regulated by the New York State Administrative Procedures Act("A.P.A.").[198] Thus, if the purpose of our judicial system is to re-

195. *See* Clemens v. Apple, 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985) (arbitral issue determination given effect by court of law); Brugman v. City of New York, 64 N.Y.2d 1011, 478 N.E.2d 195, 489 N.Y.S.2d 54 (1985) (administrative issue determination given effect by court of law).

196. New York State Bar Association, *New York State Regulatory Reform* (Report of Action Unit No. 5), 54 (1982).

197. *Id.* at 37.

198. N. Y. A.P.A., (McKinney 1976 amended 1984). This is a uniform code of administrative adjudications by state agencies. Under A.P.A. an "adjudicatory proceeding" generally means "any activity which is not a rule making proceeding or an employee disciplinary action." N.Y. A.P.A. § 102(3) (McKinney 1984). Although Article III of A.P.A. spells out in detail the elements of an adjudicatory proceeding, it is still frequently difficult to differentiate between rule-making determinations and adjudicative determinations. Adjudicative proceedings are those in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing. *See, e.g.*, Restatement (Second) of Judgments § 83, Comment (b) (1982); Abramson, *supra* note 149, at 1096-98 (1983); Maines, *Offensive Collateral Estoppel in Mass Tort or Products Liability Cases: The Potential for Corporate Catastrophe from Prior Administrative Proceedings*, 5 Admin. L. Rev. 327, 345 (1983). It is generally clear that adjudicatory action involves the resolution of disputed issues of past conduct while legislative agency action involves the fashioning of prospective rules to govern future conduct. *See* Maines, *supra*, at 345 (citing K. Davis, 2 Administrative L. Treatise, § 18.08, at 597 (1958)).

Article III of A.P.A. is entitled "Adjudicatory Proceedings." Its provisions, which relate to (1) hearings, (2) the record, (3) presiding officer, (4) powers of presiding officers, (5) disclosure, (6) evidence and (7) decisions, determinations and orders, are made applicable to "any department, board, bureau, commission, division, office, council, committee or officer of the state, or a public benefit corporation or public authority . . . authorized by law to make . . . final decisions in adjudicatory proceedings . . ." N.Y. A.P.A. § 102(1) (McKinney 1984). Article III is not applicable to "agencies in the legislative and judicial branches, agencies created by interstate compact. . ., the state insurance fund, the unemployment insurance appeal board and the workers' compensation board . . ." *Id.* Nor does it apply to "an administrative tribunal created by statute to hear or determine allega-

solve disputes, and if principles of issue preclusion further this goal by preventing the relitigation of issue determinations,[199] it is consistent with the purposes of the doctrine to apply it, when appropriate, to administrative rulings in order to relieve courts of the burden of resolving certain disputes.[200] If every administrative dispute could be re-litigated in court, many agency proceedings would be unnecessarily duplicated.[201] These concerns also apply to arbitration awards, which resolve many disputes

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tions of traffic infractions . . ." *See id.* § 102(3). New York State agencies subject to A.P.A. are required to "adopt rules governing the procedures on adjudicatory proceedings and appeals . . . [and to] prepare a summary of such proceedings in plain language," *id.* § 301(3), which shall be made available to the public on request. *See id.* These agency "adjudicatory procedures" provide that all parties be given an opportunity for a hearing within reasonable time. *See* N.Y. A.P.A. § 301(1) (McKinney 1984). Reasonable notice of the hearing includes:

> (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted.

Id. § 301(2). These procedures afford all parties participating in the hearing an "opportunity to present written argument on issues of law and an opportunity to present evidence" before an impartial hearing officer. *Id.* § 301(4). The officer can "[a]dminister oaths and affirmations," *Id.* § 304(1), "[s]ign and issue subpoenas in the name of the agency," *id.* § 304(2), "[p]rovide for the taking of testimony by deposition," *id. § 304(3), "[r]egulate the course of the hearings," id.* § 304(4), and actively promote "simplification of the issues by consent of the parties." *Id.* § 304(5). Agencies may, but are not specifically required to, "adopt rules providing for discovery and depositions." *Id.* § 305. All evidence on which the agency will rely including records and documents in its possession are usually offered and made a part of the record. *Id.* § 306(2). This record must be a "complete record" of the entire proceeding. *Id.* § 302(2). It is similar, in many respects, to records made at the trial level in the court system and includes "findings of fact" which are based exclusively on the evidence presented to the hearing officer. Unless otherwise provided by any statute, agencies need not observe the formal rules of evidence applicable in the courts and may, when appropriate, permit submission of all or part of the evidence in written form. *See id.* § 306(4). Parties have the right of cross-examination, but the hearing officer has discretion to exclude irrelevant or "unduly repetitious evidence or cross-examination may be excluded." *Id.* § 306(1). "[T]he burden of proof [is generally] upon the party who initiated the proceeding." *Id.* § 306(1). For a discussion of the controversy over the adoption of A.P.A. see Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon Its Structure and Legislative History*, 26 Buffalo L. Rev. 589 (1977).

199. *See supra* notes 2-7 and accompanying text.

200. This is particularly true in New York, where over twenty percent of the nation's lawsuits are filed and where the annual number of cases disposed of by the state's courts is ten times the number of cases disposed of each year by the entire federal judiciary. *See* Remarks by Honorable Sol Wachler, Chief Judge of the Court of Appeals, before Annual Dinner of the New York State Bar Association, January 17, 1986 (available in the files of *Fordham Law Review*).

201. *See* Evans v. Monaghan, 306 N.Y. 312, 323, 118 N.E.2d 452, 457 (1954) ("determinations in the field of administrative law should be given as much finality as is reasonably possible."); Restatement (Second) of Judgments § 83 comment b (1982) ("the social importance of stability in the results of [administrative and arbitral] decisions corresponds to the importance of stability in judicial judgments"). *But see* SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 793, 358 N.E.2d 1024, 1028, 390 N.Y.S.2d 398, 403 (1976) (arbitral awards should not have the precedential value of judicial determinations).

that would otherwise burden the courts.[202]

Litigants in administrative and arbitral proceedings are free to hire counsel and in some instances benefit from adjudicatory rules of discovery and evidence that are similar to those available in courts of law.[203] Ideally, justice in these forums is fairly and efficiently administered by experts in the relevant area of law.[204] In addition, judicial review of administrative determinations of arbitral awards is available under New York law.[205] Thus, if an administrative or arbitral issue determination is quasi-judicial in nature[206] and if it is subject to judicial appellate review,

202. D. Siegel, *supra* note 2, § 456 (1978) ("Any other conclusion would undermine the important and expanding arbitration process . . . ") (footnote omitted).

203. *See supra* note 195 and accompanying text. *See generally* Schwartz, *Administrative Law*, 30 Syracuse L. Rev. 1, 7 (1979). The minimal procedural standards are set forth in N.Y. Civ. Prac. L. & R. § 7506 (McKinney 1980). These are, basically, that the arbitrator be sworn to decide the disputed issues fairly, *see id.* § 7506(a) and that each party have notice, *see id.* an opportunity to present evidence and cross-examine witnesses, *see id.* at § 7506(b), and be represented by an attorney. *See id.* at § 7506(d); *see also* SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 792-793, 358 N.E.2d 1024, 1028, 390 N.Y.S.2d 398, 402 (1976) (discussing procedures at arbitration).

204. *See* Siegel v. Lewis, 40 N.Y.2d 687, 689-90, 358 N.E.2d 484, 485-86, 389 N.Y.S.2d 800, 802 (1976) (arbitrator's expertise may be desireable to one of parties); Palmer, *The Evolving Role of Administrative Law Judges*, 19 New Eng. L. Rev. 755, 755 (1983-84) (administrative judiciary should be composed of experts).

205. *See* N.Y. Civ. Prac. L. & R. §§ 7511, 7803 (McKinney 1980). To be final, an administrative determination must not be subject to appellate review by the agency or to judicial review under article 78 of the New York Civil Practice Laws and Rules. *See* Restatement (Second) of Judgments, § 83 comment a, § 84, 8 J. Weinstein, H. Korn & A. Miller, *supra* note 96, at §§ 75.01, 78.01, 78.04 (g). *See generally* D. Siegel, *supra* note 123, at 1 (discussing application of issue preclusion to administrative and arbitral determinations).

206. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 489, 478 N.Y.S.2d 823, 825 (1984) ("At the outset, it should be made clear that the doctrines of *res judicata* [claim preclusion] and collateral estoppel [issue preclusion] are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies.") (citations omitted). Thus, if the issue is determined at a tribunal which has the power to conduct a hearing and decide an issue, *see* 8 J. Weinstein, H. Korn & A. Miller, *supra* note 96, § 7803.11 (factors used when classifying action as administrative or quasi-judicial), whether it is a board, commission, agency or other body, it is "entitled to the same treatment that a duly rendered judicial judgment gets." D. Siegel, *supra* note 2, § 456, at 603 (1978). In such instances, issue preclusion will be permitted if not incompatible with legislative policy. *See* Restatement (Second) of Judgments §§ 83(4), 84(3) (1982). Other general limitations are suggested by the Restatement (Second). *See id.* §§ 83 comment h, 84 comment f.

Courts often have difficulty in defining the term quasi-judicial, usually viewing it in terms of the nature of the precise power being exercised by the administrative agency. *See, e.g.*, Venes v. Community School Bd., 43 N.Y.2d 520, 524-25, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978) (issue preclusion not applied to determination by school board because it was not, in terms of the precise power being exercised, a quasi-judicial decision); Evans v. Monaghan, 306 N.Y. 312, 324, 118 N.E.2d 452, 457-58 (1954) ("Such departures from the rule as there may be in administrative law appear to spring from the peculiar necessities of the particular case or the nature of the precise power being exercised, rather than from any general distinction between courts and administrative tribunals."); Turner Constr. Co. v. State Tax Comm'n, 57 A.D.2d 201, 204, 394 N.Y.S.2d 78, 81 (3d Dep't 1977) (Tax commission determination would not be given preclusive effect in later judicial action because it was ministerial in light of the " 'necessities of the partic-

it is reasonable to preclude relitigation of the same decisive issue in a judicial forum. However, if the peculiar necessities of a case and the nature of the precise administrative or arbitral power involved indicate that a decision was not made in a quasi-judicial, adversarial setting with a full and fair hearing, then the doctrine should not be applied in subsequent judicial action.[207]

It should be recognized that the typical justifications for giving preclusive effect to administrative and arbitral determinations should have limited application in judicial proceedings.[208] "The vagaries of the administrative process"[209] under The New York State Administrative Procedures Act ("APA") and the informality of arbitration proceedings argue against the Court of Appeals' decision that administrative and arbitral determinations should be given preclusive effect in judicial proceedings.[210] Rather, before applying the doctrine of issue preclusion to administrative and arbitral determinations, courts should permit the party seeking to avoid preclusion to show factors which can raise a rebuttable presumption that the non-judicial determination be denied preclusive effect.[211] Although a decision to grant issue preclusion needs to be decided on the specific circumstances of each case, such factors should include, inter alia: (1) the existence of admissible evidence, unavailable at the previous hearing (because, for example, full disclosure was not available, tending to support the position of the party defending against preclusion); (2) a showing that the party defending against preclusion was denied the opportunity to present evidence and cross-examine witnesses, or that the effectiveness of such presentation and cross-examination was

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ular case or the nature of the precise power being exercised' ") (quoting *Evans*, 306 N.Y. at 324, 118 N.E.2d at 457-58).

207. *See* Venes v. Community School Bd., 43 N.Y.2d 520, 524, 373 N.E.2d 987, 989, 402 N.Y.S.2d 807, 809 (1978) ("the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others") (quoting K. Davis, Administrative L. Treatise § 18.10, at 371 (3d ed. 1972)). In *Venes*, the court also directed that "[b]efore applying the doctrine of *res judicata* to an administrative determination, it is necessary to determine whether to do so would be consistent with the function of the administrative agency involved . . . ," *id.*, 373 N.E.2d at 989, 402 N.Y.S.2d at 809, and that the doctrine "is to be applied to an agency determination only if such application is consistent with the nature of the particular administrative adjudication." *Id.*, 373 N.E.2d at 989, 402 N.Y.S.2d at 809.

208. *See supra* Part III.

209. *Cf.* Perschbacher, *supra* note 138, at 459 (discussing federal administrative proceedings).

210. *See supra* Part III, notes 147-48 and accompanying text. *Cf.* Perschbacher, *supra* note 138, at 459 (discussing the federal court system).

211. *Cf.* Perschbacher, *supra* note 138, at 459 (discussing the federal court system). This is contrary to the approach taken by the Restatement (Second) of Judgments (1982) § 83(1) that is based on the assumption that "proof-taking in an administrative or arbitration tribunal may be relatively informal but may nevertheless permit the parties to present substantially the same evidence that might be adduced through the more formal procedures characteristic of courts." *Id.*, §§ 83-87 introductory note at 265. This assumption lacks merit because judges can seldom verify the impact of evidence that was not admitted or considered.

severely limited by the presiding officer at the non-judicial forum or because the evidence was inadmissible under the rules of that forum; and (3) a showing that the party was not represented by an attorney in the previous action. When this presumption is raised on the ground of the existence of new evidence, the party seeking to invoke preclusion may rebut by showing that the sum of the evidence, viewed in the light most favorable to the party defending against preclusion, could not support an alternate finding. Similarly, when the presumption is raised on the ground of a denial of the opportunity to present evidence and cross-examine witnesses or the severe limitation of this opportunity, the party seeking to invoke preclusion must demonstrate that such opportunity would not have resulted in a different determination. Finally, when the party defending against preclusion has raised this presumption by showing that he was not represented by an attorney, the party seeking preclusion may successfully rebut it by demonstrating either (a) that the defending party was fully aware of the possible preclusive effect of the earlier determination (such as by showing that the judicial action was commenced prior to the one in the non-judicial forum) and that the party was afforded an opportunity to present evidence and cross-examine witnesses; or (b) that the party had both the opportunity to present evidence and cross-examine witnesses and that the evidence on which the non-judicial determination was based was sufficiently reliable to be admitted in a judicial action.

The application of issue preclusion should not circumvent the legislative intent of APA which mandates expeditious administrative proceedings.[212] Issue preclusion should neither interfere with the equitable administration of laws[213] nor conflict with legislative policy that determinations of non-judicial bodies should not be accorded conclusive effect in subsequent court proceedings.[214]

It does not perforce that denying preclusive effect to arbitral and administrative decisions will render these determinations meaningless. Administrative and arbitral findings would be admissible as evidence in subsequent court proceedings subject to the usual rules of evidence.[215]

212. *See* N.Y. A.P.A. § 100 (McKinney 1984) (the purpose of the Act is to provide people with simple uniform procedures).

213. Restatement (Second) of Judgments § 83(3)(4) (1982); *The Record, supra* note 24, at 739 ("The Purpose and Nature of Unemployment Insurance Proceedings").

214. Restatement (Second) of Judgments § 83(4)(a) (1982).

215. A similar approach is followed in federal Title VII litigation. *See* Perschbacher, *supra* note 138 at 461 nn.182-83. Determinations of the Equal Employment Opportunity Commission are admissible as evidence. *Id.* In addition, administrative agencies usually admit the record and findings of fact in earlier related proceedings as evidence at subsequent hearings. *See* N.Y. A.P.A. § 306(2) (McKinney 1984) (all evidence in possession of agency may be made part of record). The New York courts should adopt a related process. Thus any adverse statement made by a witness under oath at an administrative or arbitration hearing can be used to impeach his credibility in a court of law. *See* 5 J. Weinstein, H. Korn & A. Miller, *supra* note 2, at § 4514 (1985) (impeachment of witness by prior inconsistent statement).

This approach would permit many findings of fact to be used for impeachment purposes without encouraging courts to extend the doctrine of issue preclusion by what Professor Currie refers to as the "logical processes of manipulation."[216]

Finally, the legislature should enact rules that limit the preclusive effect of some findings of fact or law made by administrative agencies and arbitral tribunals.[217] Indeed, issue preclusion does not apply to decisions in minor cases such as small claims actions[218] because as the Court of Appeals has pointed out, "[t]he brisk, often informal way in which these matters must be tried, as well as the relative insignificance of the outcome, afford the party neither opportunity nor incentive to litigate thoroughly or as thoroughly as he might if more were at stake."[219] Thus, because preclusive effect cannot be applied to informal judicial proceedings, the same logic should be true for most administrative and arbitration hearings.

CONCLUSION

There is great emphasis today on the development of alternative dispute resolutions such as arbitration and administrative adjudication.[220] These procedures provide our citizens with efficient and inexpensive access to justice. Our society also has a strong but not unequivocal interest in seeing that things judicially decided stay decided. While the doctrines of claim preclusion and issue preclusion have been used to achieve this goal, the Court of Appeals has required that their application to judicial determinations be balanced with fundamental notions of fairness.[221]

Denying issue preclusion to administrative and arbitral determinations

216. Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 Stan. L. Rev. 281, 289 (1957).

217. *See The Record*, *supra* note 24, at 748-49 (1985). A similar result is suggested by Professor Abramson, who urges that A.P.A. be amended to assure informed decision making. *See* Abramson, *supra* note 144, at 1096-98 (1983).

218. *See* N.Y. City Civ. Ct. Act § 1808 (McKinney 1963 & Supp. 1986) ("A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court."); Koch v. Consolidated Edison Co., 62 N.Y.2d 548, 556, 468 N.E.2d 1, 5, 479 N.Y.S.2d 163, 167, (1984), *cert. denied*, 105 S.Ct. 1177 (1985) (court refuses to give res judicata effect to small claim determination (citing City Civ. Ct. Act § 1804, 1808)).

219. Gilberg v. Barbieri, 53 N.Y.2d 285, 293, 423 N.E.2d 807, 810, 441 N.Y.S.2d 49, 52, (1981).

220. *See The APA supra* note 25, at 355-58; Breger *supra* note 25, at 951-55; Green, Marks & Olsen, *supra* note 25, at 501. *See generally* Keller, *Mini-trial Procedures of the American Arbitration Association*, Arbitration Times Winter 1986, 5; Burger, *Chief Justice Supports Arbitration*, Arbitration Times, Fall 1985, 1; Metaxas, *Alternatives to Litigation are Maturing*, 8 Nat'l. L. J., May 12, 1986, at 1; *Judges End Cases Faster Using Trial Alternatives*, New York Times, Friday January 3, 1986, A-8; *Business and the Law: The Big Debate Over Litigation*, N.Y. Times, Tuesday, May 13, 1986, at D-2; *Neighborhood Justice of Chicage - The Success and the Challenge*, 18 Dispute Resolution (American Bar Association Special Committee on Dispute Resolution) 1, 16 (Spring 1986).

221. *See supra* note 20 and accompanying text.

will not overwhelm our courts. The judicial time saving that presumably results by application of the doctrine has been overestimated.[222] It will, however, minimize the potential for unfairness. Administrative and arbitral procedures are substantially different from judicial procedure. By performing adjudicative and management functions, non-judicial personnel serve functions other than the objective and impartial resolution of disputes. Judges can seldom verify whether these functions comport with the basic notions of due process that are essential to our judicial system.[223] Hence, issue preclusion should be used only to give conclusive effect to administrative and arbitral forums in a court of law when the party seeking to invoke it has established that the full and fair opportunity requirement has been satisfied.

222. *See* Metaxas, *supra* note 220, at D-2 (time saving contemplated by alternative dispute resolution less than anticipated); Motley, *Why We are a Nation of Litigators*, 6 U. Bridgeport L. Rev. 9, 17 (litigation tide which currently engulfs us is healthy and has its roots in American judicial system); Resnik, *supra* note 150, at 942, n.480 (numbers other than filing rates must be examined to account for increased litigation.)

223. K. Davis, Administrative Law Text, § 4.02 (3d ed. 1972) ("much informal action is not even theoretically reviewable and more than ninety-nine percent of what is reviewable is not in fact reviewed").