

July 1977

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Recommended Citation

Glenn M. Gottlieb, *Res Judicata and Collateral Estoppel in the Law of Partnership*, 65 CALIF. L. REV. 863 (1977).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38816N>

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NOTES & COMMENTS

Res Judicata and Collateral Estoppel in the Law of Partnership

One of the basic principles of partnership law is that each partner in a partnership is subject to unlimited individual liability for all debts and obligations incurred by the partnership.¹ In accordance with this principle, most states now allow actions to be brought and judgments to be entered both against a partnership and against each partner.² A judgment against the partnership normally binds only the joint partnership property; a judgment against an individual partner may be enforced against the separate property of that partner.³

For a partnership creditor, binding both the partnership and its individual members is desirable. The joint partnership property may not fully satisfy a judgment, but under most circumstances, the combined personal assets of the partners will be sufficient for complete satisfaction. In any case, because the creditor obtains a wider range of assets against which execution is possible, binding the partners' individual assets provides greater security for the judgment and makes its enforcement more flexible.⁴ A plaintiff may encounter difficulties, however, in seeking a judgment against a partnership and all its partners in one lawsuit. A plaintiff may be unable to serve all the partners. For instance, a partner may be outside the jurisdiction of the court and thus beyond service of process. Or a partner may be "dormant" or "silent", that is, unknown to the plaintiff and thus not named or served. A valid personal judgment cannot be rendered against a partner who has not been properly joined.⁵

Questions therefore arise as to the means available for full enforcement of the plaintiff's claim against the unjoined individual partners.

1. *E.g.*, *Mason v. Eldred*, 73 U.S. (6 Wall.) 231 (1867); UNIFORM PARTNERSHIP ACT § 15; J. CRANE & A. BROMBERG, PARTNERSHIP § 1 (1968) [hereinafter cited as CRANE & BROMBERG].

2. See note 48 *infra*, and accompanying text.

3. *E.g.*, *Fazzi v. Peters*, 68 Cal. 2d 590, 595, 440 P.2d 246, 68 Cal. Rptr. 170, 174 (1968); *Tonge v. Item Publishing Co.*, 244 Pa. 417, 91 A. 229 (1914); CAL. CIV. PROC. CODE § 388 (West 1973); RESTATEMENT OF JUDGMENTS § 24, Comments d and e (1942) [hereinafter cited as RESTATEMENT].

4. In addition to cash or bank accounts, individual partners may hold assets like stocks and bonds which are more readily convertible and thus more likely to bring their market value than some partnership assets, such as land.

5. RESTATEMENT, *supra* note 3, § 25.

May the plaintiff bring a second suit against the unjoined partner to enforce her individual liability for the partnership obligation? Does the answer depend upon whether the plaintiff wins or loses the initial suit? If a second suit is permitted, are any of the issues litigated in the first suit considered determined for purposes of the second?

This Comment examines the effects of the doctrines of *res judicata* and collateral estoppel on the rights of a plaintiff who brings a second lawsuit against individual partners who were not joined in a prior suit against their partnership.⁶ Part I surveys the development of the law regarding suits against partnerships. Section A discusses the common law rules; Section B examines the statutory responses to those rules. Part II describes the split among the state statutes on the question of issue preclusion in a second suit. It argues that the majority rule governing issue preclusion was originally formulated under the influence of outdated concepts of due process of law, and is contrary to the policies underlying the modern doctrine of *res judicata*. It therefore proposes more widespread adoption of the procedure followed by the minority of jurisdictions, in accord with public policy and evolving conceptions of *res judicata* and due process.

I

HISTORICAL DEVELOPMENT

A. Common Law

At common law, only legal persons could be named as parties to an action.⁷ A partnership was considered a contractual status rather than a legal entity, and therefore could not be named as a party. A suit could only be brought against the partners themselves.⁸

Suing the partners was fraught with procedural difficulties, how-

6. This Comment uses the term *res judicata* to apply only to bar and merger, or "claim preclusion," unless the sentence indicates that the term is used in its broader sense, as in the discussions of public policy. When used in its technical sense *res judicata* dictates that if a plaintiff wins in a suit on the merits, all claims against the same defendants and their privies arising out of the same cause of action are "merged" in the judgment; the plaintiff cannot bring a second suit on the same cause of action against them. If the plaintiff loses the first suit, *res judicata* "bars" him from maintaining a second suit against the same defendants and their privies on the same cause of action. Collateral estoppel will be used to refer to the more limited "issue preclusion"; collateral estoppel renders a prior judgment on the merits conclusive as to the issues actually litigated and determined between the same parties, or those in privity with them, although the cause of action in the second suit may be different. *See, e.g.*, 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[3] (2d ed., 1974) [hereinafter cited as MOORE].

7. CRANE & BROMBERG, *supra* note 1, §§ 3 (a)-(b), 57.

8. *E.g.*, *Fazzi v. Peters*, 68 Cal. 2d 590, 595, 440 P.2d 242, 246, 68 Cal. Rptr. 170, 174 (1968); CRANE & BROMBERG, *supra* note 1, §§ 3, 58(a).

ever. Debts and other contractual obligations⁹ incurred by partners were considered to be joint liabilities. Under the common law rules governing joint debts, the plaintiff was required to join all partners as parties to an action on a partnership debt.¹⁰ If one partner was not named or joined by a valid service of process, the action could be dismissed.¹¹ Even if the reason for the nonjoinder was that the plaintiff did not know that a partner existed, dismissal was possible. Although this procedure did not bar the suit completely, it often imposed extra delay and expense on the plaintiff who sought to pursue the claim further.¹²

Because of this highly restrictive joinder rule, res judicata and collateral estoppel problems rarely arose in early partnership law. Dismissal for nonjoinder of a party was, however, a waivable right. When the served partners failed to press their claim for dismissal despite the advantages in doing so, the suit could proceed to a judgment on the merits.¹³ If the former plaintiff later discovered or became able to serve process on the unjoined partners, the principles of res judicata determined whether he could bring a second suit against them. Through res judicata, the common law rules of merger and bar complemented the joinder rule to almost always require the plaintiff to settle the cause of action in one lawsuit.

I. Merger

A judgment rendered on a partnership obligation against fewer than all the partners was generally considered to merge the plaintiff's

9. The rules governing liability for torts committed by the partnership differed from the rules governing contractual obligations; the former are discussed separately, in section 3 of this part.

10. *E.g.*, *Fazzi v. Peters*, 68 Cal. 2d 590, 595, 440 P.2d 242, 246, 68 Cal. Rptr. 170, 174 (1968); C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* § 59 (2d ed. 1947) [hereinafter cited as CLARK]; J. KOFFLER & A. REPPY, *HANDBOOK OF COMMON LAW PLEADING* § 207 (1969); [hereinafter cited as KOFFLER & REPPY]; *RESTATEMENT*, *supra* note 3, § 25, Comment a.

11. *E.g.*, *CRANE & BROMBERG*, *supra* note 1, § 58(a); KOFFLER & REPPY, *supra* note 10, § 210; *RESTATEMENT*, *supra* note 3, § 25, Comment a.

12. A plaintiff would eventually be able to bring the suit. In the case of a dormant or otherwise unknown partner, the plaintiff could discover her name and add her to the suit. If a partner was outside the jurisdiction of the court, the common law provided for special forms of process against the remaining partners. In England, the plaintiff would proceed to "outlawry" against absent defendants and could then get judgment against those defendants within the jurisdiction of the court. American practice was to proceed against the remaining partners after a return of summons by the sheriff declaring "non est inventus." *E.g.*, CLARK, *supra* note 10, § 59; *CRANE & BROMBERG*, *supra* note 1, § 58a; *RESTATEMENT*, *supra* note 3, § 25, Comment a.

13. *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 235 (1867); CLARK, *supra* note 10, § 59; *CRANE & BROMBERG*, *supra* note 1, § 58(a).

entire cause of action into the judgment,¹⁴ extinguishing any claim against the partners not served in the prior suit. This rule applied even when the plaintiff failed to sue all the partners because she did not know of them and could not easily have learned of their existence.¹⁵ If a plaintiff won the initial cause of action, *res judicata* prevented the bringing of a second suit against any remaining partners to enforce their individual liability, even if the initial judgment remained unsatisfied.

The common law courts supported this result by two lines of reasoning. First the courts relied on the rules of procedure governing joint obligations. The unjoined partners could not then be sued separately because they had incurred no several obligation. Nor could they be sued jointly with those partners against whom judgment had already been recovered; such a procedure would subject the partner already sued to two suits on the same cause of action.¹⁶ A second rationalization for the merger rule was that the plaintiff had converted the liability on the contract into a liability on the judgment, a security of a higher nature that extinguished the previous security.¹⁷

The inadequacy of both the reasoning and the rule now seems obvious. In relying on the rule that contractual claims against a partnership were to be treated as joint obligations, the common law merger doctrine failed to recognize an important distinction between partnership and other joint obligations. In most joint contracts, the plaintiff knows the identity of all the joint obligors. Where a single partner signed for the partnership, however, the other party to the contract might not have this information.

The "higher security" argument is even more fallacious. If the partners against whom judgment was rendered could satisfy the judg-

14. *E.g.*, *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 238 (1867) and cases cited in Annot., 11 A.L.R.2d 847 (1950). *Contra*, *McLelland v. Ridgeway*, 12 Ala. 482 (1847) (dictum).

15. *E.g.*, *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 238 (1867) and cases cited in Annot., 11 A.L.R.2d 847 (1950). *Contra*, *Scott v. Colmesnil*, 30 Ky. (7 J.J. Marsh.) 416 (1832); *Union Bank v. Hodges*, 45 S.C.L. (11 Rich.) 480 (S.C. 1858). Some jurisdictions made an exception to the merger rule when a creditor had been unable to serve process on a partner in a prior suit because the partner resided outside the jurisdiction. If the plaintiff was later able to obtain jurisdiction in another forum, these courts held that the judgment in his favor in the prior suit did not prevent a second action against the unserved partner. *Crehan v. Megargel*, 234 N.Y. 67, 136 N.E. 296 (1922); *Stone v. Whittaker*, 61 Ohio St. 194, 55 N.E. 614 (1899); *Keith Bros. & Co. v. Stiles*, 92 Wis. 15, 65 N.W. 860 (1896). This exception was by no means universally accepted. *See* Annot., 11 A.L.R.2d 847 (1950). Even where accepted, the exception placed on the plaintiff the extra burden of finding, serving, and maintaining suit against the unserved partner in a foreign jurisdiction.

16. *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 238 (1867).

17. *Fleming v. Ross*, 225 Ill. 149, 80 N.E. 92 (1906); *Cambefort & Co. v. Chapman*, 19 Q.B.D. 229 (1887).

ment, the plaintiff had no reason to pursue the remaining partners. If these partners had insufficient assets to satisfy the judgment, however, the "higher security" created by the judgment was in fact worthless. The judgment creditor could only hope that the debtors would later acquire assets upon which he could execute. Moreover, the rule created unjust results. Merger permitted a dormant partner to receive the profits of the partnership for years and then to escape liability for misfortune by concealing his interest in the partnership. Instead, an innocent third party was forced to bear the loss.¹⁸

The common law, through its joint debtor and merger rules, thus presented a creditor with an unappetizing choice between delaying the action until all partners were within the jurisdiction, or bringing suit at once, at the cost of enabling unserved obligors to escape responsibility. As Lord Penzance aptly noted: "[i]n the first case the rule impedes and obstructs justice, and in the second, denies it altogether."¹⁹

2. Bar

Very few common law cases discuss the res judicata effect of an unsuccessful action against the partnership.²⁰ From those few decisions it appears that if a plaintiff lost his original action against the partners on a partnership obligation, he was barred from bringing a second suit on the same obligation against partners not appearing in the prior suit.²¹ One court argued that if a plaintiff were allowed a second action and prevailed, the copartners, being jointly liable for contribution, would lose the benefit of the prior judgment in their favor.²² The same court also reasoned that a plaintiff deserved but one day in court and should

18. The third party also goes uncompensated, of course, if the partnership has insufficient assets to satisfy the judgment or is dissolved, and the served partners are also insolvent. *E.g.*, *Anderson v. Levan*, 1 Watts and Serg. 334 (Pa. 1841).

19. *Kendall v. Hamilton*, 4 App. Cas. 504, 530 (Eng. 1879) (Lord Penzance dissenting). *See also* *Crehan v. Megargel*, 234 N.Y. 67, 84, 136 N.E. 296, 302 (1922): "[It is] a technical [rule], inherited from the common law, which often has been productive of injustice, and which is enforced by courts with more or less restlessness and repugnance."

20. Cases discussing this point are conspicuously absent from the discussion in *Annot.*, 11 A.L.R.2d 847 (1950); the issue is not fully discussed in *CRANE & BROMBERG*, *supra* note 1. *See* notes 24-30 *infra* and accompanying text. The paucity of cases probably results from the reluctance on the part of former plaintiffs to attempt to seek out and sue unknown or unserved partners on a claim already adjudged as lacking in merit.

21. *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S.W. 1089 (1908).

22. *Id.* at 37, 108 S.W. at 1093. The *Taylor* case concerned a contract on which the partners were made jointly and severally liable by statute, rather than a normal joint liability. The court, however, did not distinguish between the two situations, but reasoned from the rules governing merger to the result on the facts before it. *Cf.* *Fox v. Cleminons*, 30 Ky. 805, 22 S.W. 641 (1907) (judgment against the plaintiff suing F as an individual rendered on the merits of the plaintiff's claim held a bar to a later suit on the same claim against the partnership of which F was a member).

not be permitted as many trials on the merits as there were promisors.²³

The bar rule, however, does not appear to have been as settled as the rule regarding merger. In fact, one authority has stated that at common law, subsequent suits were not barred.²⁴ Yet the cases on which it relies, as well as other cases that appear to support that construction of the rule, are either in the minority or not entirely on point. In *Millie Iron Mining Co. v. McKinney*,²⁵ for instance, the plaintiff's loss of a prior suit against a partnership was held not to bar a subsequent suit against one of the partners on the same obligation. The partnership had defended the first suit, to which this partner had been a party, on the ground that the partner had made the contract in his individual capacity rather than as a representative of the partnership. The second suit, therefore, advanced this theory against the partner. Thus, *Millie Iron Mining* does not contradict the common law rule of bar because in the second suit the plaintiff did not attempt to sue the partner on his individual liability for the partnership obligation.²⁶ Rather, the plaintiff claimed that the partner had a direct individual liability, an entirely different cause of action.

*McLelland v. Ridgeway*²⁷ and *Larison v. Hager*²⁸ also appear to espouse the rule that judgment in favor of the served partners in a previous suit is not a bar against later suing any unserved partner on the same obligation. The *McLelland* court, however, was in the minority of courts not accepting the common law merger rule, while the *Larison* case involved a narrow exception to that rule.²⁹ Those cases, therefore, do not establish that there was no bar at common law, because they involved rules contrary to the majority rule regarding merger, and the results with respect to bar merely followed from the theory of mutuality of estoppel.³⁰

23. 130 Mo. App. at 38, 108 S.W. at 1094.

24. CRANE & BROMBERG, *supra* note 1, § 58(c). The cases cited in support of this conclusion are *McLelland v. Ridgeway*, 12 Ala. 482 (1847) and *Lindsay v. Gager*, 11 App. Div. 93, 42 N.Y.S. 851 (1896). For discussion of *McLelland*, see notes 27-30 *infra* and accompanying text. As to *Lindsay*, see note 26 *infra*.

25. 172 F. 42 (6th Cir. 1909).

26. *Cf.* *Lindsay v. Gager*, 11 App. Div. 93, 42 N.Y.S. 851 (1896) (previous adverse finding in suit against the surviving partners on the claim of a partnership contract was held not to bar suit against the estate of a deceased partner claiming a contract with the testator as an individual).

27. 12 Ala. 482 (1847).

28. 44 F. 49 (D. Minn. 1890).

29. This exception was applied by some jurisdictions following the majority merger rule, in the special case where a creditor had been unable to serve process on a partner in a prior suit because the partner resided outside the jurisdiction. See note 15 *supra*.

30. Under the principle of mutuality, a person may not assert a bar in *res judicata* or collateral estoppel in her own favor unless she could have been bound by the party against whom the plea is asserted had the results of previous litigation been unfavorable. *E.g.*, MOORE, *supra* note 6, ¶ 0.412, RESTATEMENT, *supra* note 3, § 93.

3. Tort Liability

The common law treatment of liability for torts committed within the scope of the partnership business differed from the rules governing contractual obligations. A tort claim was considered a joint and several obligation, rather than merely a joint liability.³¹ The partners therefore could be sued collectively or individually.³² If the plaintiff won in a suit against some of the partners there was no *res judicata* merger of the several liability of the other partners;³³ a second suit could be brought. It can be inferred that a loss in the first suit would similarly not bar the plaintiff from maintaining a subsequent suit against the other partners.³⁴

4. Collateral Estoppel

Since subsequent suits were rarely allowed, the question whether the determination of issues in a prior suit against some partners was binding in a second suit against other partners rarely arose under the common law.³⁵ When a second suit was allowed, however, the issue of liability was not considered determined by the prior litigation.³⁶ The courts usually simply stated that partners were not in "privity" with each other,³⁷ and thus could not be bound by the determination of issues in

31. *E.g.*, UNIFORM PARTNERSHIP ACT § 15; CLARK, *supra* note 10, § 59; CRANE & BROMBERG, *supra* note 1, § 64; KOFFLER & REPPY, *supra* note 10, § 209.

32. CLARK, *supra* note 10, § 59; KOFFLER & REPPY, *supra* note 10, § 209.

33. CRANE & BROMBERG, *supra* note 1, § 64. *See* CLARK, *supra* note 1, § 59, at 374, 376-78; KOFFLER & REPPY, *supra* note 10, § 209; RESTATEMENT, *supra* note 3, § 94. These rules also applied in contract situations where the contract specifically provided that the obligation was joint and several. *Gilman, Bentley & Co. v. Foote & Co.*, 22 Iowa 560 (1867); *Sherman v. Christy*, 17 Iowa 322 (1864); RESTATEMENT, *supra* note 3, § 101(3).

34. The doctrine of mutuality, discussed in note 29 *supra*, supports this inference, for when a second suit was permitted, the plaintiff could not bind the new defendants to the finding of partnership liability in the first suit. *See* note 30 *supra* and text accompanying notes 36-39 *infra*.

35. For example, under the exception discussed in note 15 *supra*, by certain minor courts, *see* note 30 *supra*, and when the liability was in tort, *see* text accompanying notes 31-34 *supra*.

36. *E.g.*, *Larison v. Hager*, 44 F. 49 (D. Minn. 1890); *McLelland v. Ridgeway*, 12 Ala. 482 (1847); *Dillard v. McKnight*, 34 Cal. 2d 209, 209 P.2d 387 (1949). *Contra*, *Smith v. Ayrault*, 71 Mich. 475, 39 N.W. 724 (1888) (in a suit by served partners against an unserved, dormant partner for contribution, the unserved partner was held bound where the firm wound up before the claim was asserted and the partner was notified of the suit and asked to help defend).

37. The relationship of "privity" was confined to narrow cases where the law presumed the relationship between the party and the privy was close enough to fairly conclude the privy by the prior litigation in which the party participated. The doctrine of privity determined who could be bound by prior litigation, as distinguished from the doctrine of mutuality which determined who could invoke the conclusive effect of a judg-

the prior litigation.³⁸ The only exception to the general rule of no collateral estoppel was made when an unnamed or unserved partner actually participated in the prior litigation. Such a partner was bound by the issues determined in that suit.³⁹

B. Statutory Development

The injustice caused by the common law rules did not go unnoticed. When state codes of civil procedure were enacted, the common law rules of joinder and merger were modified. Two types of curative statutes, joint debtor statutes and common name statutes, were devised.⁴⁰

1. Joint Debtor Statutes

Joint debtor statutes typically provide that in a suit against joint obligors the court in which the action is pending has jurisdiction to proceed against the defendants who are served as if they were the only defendants.⁴¹ Thus, such statutes abolish the common law rule requiring joinder—if one partner is beyond the jurisdiction of the court or is otherwise not reachable by process, the action can nevertheless proceed. Any judgment rendered in an action against some of the partners on a partnership debt binds the joint partnership property, at least if all the

ment in his favor. *E.g.*, MOORE, *supra* note 6, ¶ 0.411, at 1251; *see* RESTATEMENT, *supra* note 3 §§ 83, 93; RESTATEMENT (SECOND) OF JUDGMENTS, Explanatory Notes app. § 88 (Tent. Draft No. 3, 1976) [hereinafter cited as RESTATEMENT (SECOND)].

38. *E.g.*, McLelland v. Ridgeway, 12 Ala. 482, 485 (1847). The rule was the same in tort. Dillard v. McKnight, 34 Cal. 2d 209, 214, 209 P.2d 387, 391 (1949). *See* Annot., 11 A.L.R.2d 847 (1950).

39. Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S.W. 729 (1973). This rule is in accord with the normal exception to the privity doctrine that binds a person by a prior litigation if he had a sufficient interest in the suit and participated in and controlled the litigation. MOORE, *supra* note 6, ¶ 0.411, at 1253; RESTATEMENT, *supra* note 3, § 84 (1942); RESTATEMENT (SECOND), *supra* note 37, § 83.

40. Both types of statutes appear in modern codes in forms virtually identical to those in which they were first enacted. *Compare* CAL. CIV. PROC. CODE § 388 (1872) with CAL. CIV. PROC. CODE § 388 (West 1973) (common name statute); *compare* CAL. CIV. PROC. CODE § 414 (1872) with CAL. CIV. PROC. CODE § 410.70 (West 1973) (joint debtor statute); *compare* N.Y. CODE OF PROCEDURE § 136 (Voorhies 1851) with N.Y. CIV. PROC. LAW § 1501 (McKinney 1976).

41. CAL. CIV. PROC. CODE § 410.70 (West 1973). For a partial list of the joint debtor statutes of other states see CRANE & BROMBERG, *supra* note 1, § 59, at 344-46. Some states achieve similar results by a statutory provision that all joint obligations shall be considered joint and several. *Id.* § 59, at 346; Annot., A.L.R.2d 847 (1950). The common law rules as to joint and several obligations then apply. *See* text accompanying notes 31-34 *supra*.

partners are named as parties,⁴² as well as the individual property of the served partners.⁴³

States that have adopted joint debtor statutes generally have also effectively abolished the common law rule of merger.⁴⁴ Under California's statute, once a judgment has been recovered against less than all of the joint obligees, the court may summon the unserved defendants to show cause why they should not be bound by the judgment.⁴⁵ Under this type of statute a second action may be brought to reach the individual liability of any partners unserved in the first action.⁴⁶ Even when the statute does not explicitly authorize a second suit, joint debtor statutes of themselves probably abolish the common law merger doctrine.⁴⁷ A problem these statutes do not solve, however, is that a plaintiff must name all the partners as parties to the suit in order to bind the joint partnership property. A parallel statutory development, the common name statute, solves this problem.

2. Common Name Statutes

In addition to or in lieu of the joint debtor statute, many states have adopted statutes allowing a partnership to be sued by its common name.⁴⁸ The common name statutes effectively abolish the common

42. Traditionally, the plaintiff was required to name all the partners as parties to bind the partnership property. *Fenner, Beane & Ungerleider v. Donosky*, 62 S.W.2d 269 (Tex. Civ. App. 1933); N.Y. CIV. PROC. LAW § 1502 and accompanying commentary (McKinney 1976); CRANE & BROMBERG, *supra* note 1, § 59, at 345. This is also the result in California if a plaintiff fails to comply with the common name provisions of CAL. CIV. PROC. CODE § 388 (West 1973) and CAL. CORP. CODE § 24002 (West Supp. 1976). See note 50 *infra*.

43. CRANE & BROMBERG, *supra* note 1, § 59, at 344-46. CAL. CIV. PROC. CODE § 410.70 (West 1973) does not explicitly provide which property will be bound by a judgment. Its predecessor section explicitly bound both the partnership and the served partners' individual property. The comments of the judicial council and the legislative history indicate that no change was intended so long as all partners are named as parties to the suit. See CAL. CIV. PROC. CODE § 410.70, Comment of the Judicial Council (West 1973).

44. Annot., 1 A.L.R. 1601 (1919).

45. CAL. CIV. PROC. CODE § 989 (West Supp. 1977). See also N.Y. CIV. PROC. LAW § 1502 (McKinney 1976); N.Y. DEBT. & CRED. LAW § 232 (McKinney 1945); MODEL JOINT OBLIGATIONS ACT § 2 (formerly UNIFORM JOINT OBLIGATIONS ACT).

46. This proceeding in California is governed by CAL. CIV. PROC. CODE §§ 989-94 (West 1955 & Supp. 1977). Although the common law merger doctrine is overruled by this type of statute to the extent that it allows a second suit against previously unserved partners, the merger doctrine remains to the extent that the statute contemplates a "proceeding to show cause" why the individual partner should not be bound by the prior judgment. In such a proceeding, the plaintiff is constrained by the pleaded claims and theories of his first action. *Cooper v. Burch*, 140 Cal. 548, 74 P. 37 (1903).

47. See CRANE & BROMBERG, *supra* note 1, § 58, at 339 & n.81. This result accords with the MODEL JOINT OBLIGATIONS ACT § 2.

48. An example is California's statute which provides:

(a) Any partnership or other unincorporated association . . . may sue and

law rule that all partners must be named in an action in order to bind the joint partnership property by a judgment.⁴⁹ Many statutes also expressly provide that a judgment rendered in the action binds not only the joint partnership property, but also the property of those partners served with process.⁵⁰ Moreover, common name statutes, like joint debtor statutes,⁵¹ are often accompanied by provisions that explicitly overrule the common law merger doctrine.⁵² Likewise, common name statutes of themselves should permit subsequent actions against partners not named or joined as parties to the initial suit.⁵³

3. *Bar Under the Statutes*

The result of the joint debtor and common name statutes is that, in most states, *res judicata* no longer prevents a plaintiff who prevails on a claim against the partnership or certain partners from bringing an action

be sued in the name which it has assumed or by which it is known.

(b) Any member of the partnership . . . may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual . . . a judgment against him based on his personal liability may be obtained in the action

CAL. CIV. PROC. CODE § 388 (West 1973). See also N.Y. CIV. PRAC. LAW § 1025 (McKinney 1976); Crane & Bromberg, *supra* note 1, § 60, at 348 n.29 (partial list of state common name statutes).

49. CRANE & BROMBERG, *supra* note 1, § 60, at 349. See, e.g., CAL. CORP. CODE § 24002 (West Supp. 1977).

50. See, e.g., N.Y. CIV. PRAC. LAW § 1025 (McKinney 1976). California law, section 388 of the Code of Civil Procedure, so provided until 1959. Act of March 20, 1907, ch. 371, § 2, 1907 Cal. Stats. 704. Section 410 of the Code of Civil Procedure was then amended to require that a partner be named as a party and individually served in order to bind his individual property in the same action. Act of June 5, 1959, ch. 792, § 1, 1959-1 Cal. Stats. 2805 (current version at CAL. CIV. PROC. CODE § 412.30 (West 1973)). Section 388 continued to read as if it permitted the former procedure until it was amended in 1967 to reflect the change. Act of August 23, 1967, ch. 1324, § 1, 1967-2 Cal. Stats. 3150. CAL. CORP. CODE § 24002 (West 1977) and its commentary made the change explicit. The Supreme Court also retroactively created a requirement that the partner be named, relying on its own brand of legislative history and not mentioning the change in section 410. *Fazzi v. Peters*, 68 Cal. 2d 590, 440 P.2d 242, 68 Cal. Rptr. 170 (1968).

51. See notes 43-46 *supra* and accompanying text.

52. The Illinois statute provides: "An unsatisfied judgment against a partnership in its firm name does not bar an action to enforce the individual liability of any partner." ILL. ANN. STAT. ch. 110, § 27.1 (Civil Practice Act, § 27.1) (Smith-Hurd 1968). Notice that an action against an individual partner may only be brought if the partnership assets are insufficient to satisfy the original judgment. This provision in some states' statutes is discussed in the text following note 75 *infra*. For a partial list of similar common name antimerger provisions of other states see CRANE & BROMBERG, *supra* note 1, at 350 n.40.

53. *Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806 (1911). This result follows from the common name statutes of most states which allow service on less than all partners and individual judgment against those served. CRANE & BROMBERG, *supra* note 1, § 60, at 350.

against partners unnamed or unserved in the prior suit.⁵⁴ Unfortunately, most of the statutes do not explicitly answer whether a plaintiff is barred by a loss in the prior suit from bringing suit against the unserved partners.

It can be inferred from most statutes, however, that despite the abolition of the merger rule, the common law rule as to bar remains.⁵⁵ The California statute, for instance, allows an action against previously unserved partners "[w]hen a judgment is *recovered against* . . . persons, jointly indebted upon an obligation."⁵⁶ No statute specifically authorizes proceedings against unserved partners on the partnership obligation when judgment was in favor of the served partners. That the common law rule of bar was not highly criticized, unlike the rule regarding merger,⁵⁷ supports the inference that the common law rule has not changed.

Equity and conservation of judicial resources favor retaining the common law rule of bar. A critical issue in a second suit against an unserved partner will be the liability of the partnership, a claim the plaintiff failed to establish in the prior suit. The plaintiff who has already had a fair chance to litigate that issue should not be permitted to expend the resources of the courts and burden the previously unserved partner with the costs of litigation.⁵⁸ In addition, a subsequent judgment might deprive the partners in the first suit of the fruits of that victory; if the plaintiff prevails, they will be liable to their copartner for contribution on the now-established partnership obligation.⁵⁹ This result frustrates two primary goals of res judicata: assuring that a party is not burdened with matters already litigated and determined in his favor,⁶⁰ and avoiding the adverse impact of inconsistent results on the

54. This result is in accord with the new draft of the Restatement of Judgments. RESTATEMENT (SECOND), *supra* note 37, § 94.

55. See notes 27-30 *supra* and accompanying text for common law authority holding that where there is no merger there is also no bar, relying on the common-law doctrine of mutuality. The common law distinction between suing an unserved partner on her individual liability for a partnership obligation and suing her on a claim of an individual obligation should be retained. See text accompanying notes 25-26 *supra*.

56. CAL. CIV. PROC. CODE § 989 (West Supp. 1977) (emphasis added). New York's statute and its commentary imply this result, perhaps even more strongly than the California statute. See N.Y. CIV. PRAC. LAW § 1502 (McKinney 1976).

57. See note 19 *supra* and accompanying text.

58. MOORE, *supra* note 6, ¶ 0.405[1] at 628; Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 219 (1954) [hereinafter cited as Polasky]; Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1501 (1974).

59. CLARK, *supra* note 10, at § 59; KOFFLER & REPPY, *supra* note 10, at § 207. See generally RESTATEMENT, *supra* note 3, § 98.

60. RESTATEMENT, *supra* note 3, § 1, Comment a; Polasky, *supra* note 58 at 219-20.

stability of society and the ability of individuals to plan future conduct.⁶¹

In the jurisdictions that do not permit a successful plaintiff to estop a new partner defendant on the issue of partnership liability, the application of bar urged by this Comment would conflict with the common law doctrine of mutuality.⁶² Mutuality, however, has increasingly been discarded in favor of a case by case consideration of the fairness of applying collateral estoppel.⁶³ Those jurisdictions that have rejected the strict mutuality rule have generally adopted the test first announced judicially in *Bernhard v. Bank of America*:⁶⁴

In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?⁶⁵

A suit against a partner not served in a prior suit against the partnership meets all *Bernhard's* criteria for the invocation of bar against the plaintiff. The partnership liability issue was decided in the prior adjudication; there has been a final judgment on the merits; and the plaintiff, the party against whom the bar is asserted, is the same party who litigated and lost the issue in the prior adjudication.

The application of bar against an unsuccessful partnership creditor is consistent with the result reached in other contexts where two parties normally not in privity with each other are made jointly liable for an obligation by statute.⁶⁶ In those settings, plaintiffs have been barred from bringing second actions against defendants not parties or in privity with the parties in the prior suit because the defendants' liability is derivative from and joint with the liability of the parties in the prior suit. Since a partner's individual liability is also a statutory joint liability,

61. Polasky, *supra* note 58, at 219-20; Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1501 (1974).

62. See note 29 *supra*.

63. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Fndtn.*, 402 U.S. 313, 320 (1971); RESTATEMENT (SECOND), *supra* note 37, app. § 88, comments a, b, and explanatory notes.

64. 19 Cal. 2d 807, 122 P.2d 892 (1942).

65. *Id.* at 813, 122 P.2d at 895.

66. *E.g.*, *City of Anderson v. Fleming*, 160 Ind. 597, 67 N.E. 443 (1903) (finding of negligence favorable to contractor bars suit against city jointly liable for excavation in city street into which plaintiff fell); *Sarine v. American Lumbermen's Mut. Cas. Co.*, 258 App. Div. 653, 17 N.Y.S. 2d 754 (1940) (automobile owner statutorily made jointly liable for negligence of operator; determination of issue of negligence in favor of either owner or operator bars action against the other). See also *Good Health Dairy Prods. Corp. v. Emery*, 275 N.Y. 14, 9 N.E.2d 758 (1937); Annot., 112 A.L.R. 404 (1938).

derived from the liability of the partnership, similar principles should apply.⁶⁷

II

COLLATERAL ESTOPPEL UNDER THE STATE STATUTES

A. *The Split Among the States*

Since the common law rule of bar survives under the modern statutes, the question whether the prior judgment on the issue of partnership liability should be given collateral estoppel effect in a subsequent action is important only when the plaintiff has won the initial suit. Current state statutes split on the availability of collateral estoppel. The California and New York statutes typify the majority rule;⁶⁸ the statutes provide for a second suit against partners not served in the first suit, but expressly deny collateral estoppel effect to all issues litigated in the prior suit.⁶⁹ A second suit therefore requires a full retrial of the issue of partnership liability as well as a determination of the defendants' relationship to the partnership.⁷⁰ This type of statute often provides that the amount of any judgment rendered in the second action may not exceed the amount of the original judgment which remains unsatisfied.⁷¹

Other state statutes do not explicitly reach the issue of collateral estoppel in the second action. At least one such antimerger statute, however, has been judicially interpreted to preclude collateral estoppel.⁷²

67. This analysis also supports reversing the rule denying bar in suits over tort liability, discussed in note 34 *supra* and accompanying text.

68. CRANE & BROMBERG, *supra* note 1, § 60, at 347-48. The provisions of the California and New York statutes derive from the old Field Code of Civil Procedure of 1848. See N.Y. CIV. PRAC. LAW § 1502, legislative history (McKinney 1976). The wide acceptance of the Field code explains, at least in part, why the majority of states have similar statutes.

69. See, e.g., CAL. CIV. PROC. CODE §§ 992-94 (West 1955); N.Y. CIV. PRAC. LAW § 1502 (McKinney 1976) and the accompanying commentary; Annot., 11 A.L.R.2d 847 (1950). The California statute provides: "[T]he defendant may answer . . . denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which judgment was recovered, by reason of any defense existing at the commencement of the action." CAL. CIV. PROC. CODE § 992 (West 1955) (emphasis added). The "action" referred to is the original suit against the partnership. *Vincent v. Grayson*, 30 Cal. App. 3d 899, 908 n.5, 106 Cal. Rptr. 733, 740 n.5 (5th Dist. 1973). The New York statute is substantially the same, with the commentary setting forth the rule explicitly. CRANE & BROMBERG, *supra* note 1, § 60, at 350 n.41.

70. The plaintiff is, however, somewhat constrained by the original action. See note 46 *supra*.

71. See, e.g., CAL. CIV. PROC. CODE § 994 (West 1955); N.Y. CIV. PRAC. LAW § 1502 (McKinney 1976). These provisions also stem from the old Field code of 1848. See N.Y. CIV. PRAC. LAW § 1502, legislative history (McKinney 1976).

72. *Lewinson v. First Nat'l Bank*, 11 N.M. 510, 70 P. 567 (1902).

Both the courts and the state legislatures thus support the majority rule. The judgment limitation provision is sound. Such provisions reflect the fact that allowing two suits on the same cause of action puts a strain on the judicial system. There is a danger that, absent a judgment limitation provision, plaintiffs seeking some protection against an unusually low damage award will purposely "fail" to serve at least one partner. A low award could then trigger a second suit against the unserved partner in hopes of a higher verdict. The judgment limitation provision encourages efficiency by giving plaintiffs an incentive to litigate the first suit to its fullest, joining as many partners as possible. It eliminates any incentive to manufacture additional suits. At the same time, the provision enhances the image of stability and fairness in the judicial system by preventing widely differing judgments on the amount of partnership liability.

The soundness of denying collateral estoppel effect to already litigated issues, however, is open to serious question. In fact, the provisions in a minority of states lead to a diametrically opposite result. The Nebraska statute,⁷³ which is typical of the statutes in these states,⁷⁴ is similar to the majority type of statute in allowing a second suit against partners unserved in a prior suit and in limiting any later judgment to the amount of the first.⁷⁵ The remarkable feature of the statute is that it permits a suit against previously unserved partners based on the original judgment against the partnership.⁷⁶ It thus makes the finding of partnership liability in the previous suit binding in the suit against the individual partners.⁷⁷ This result, it is submitted, accords more closely with the modern view of collateral estoppel and *res judicata*.

73. The Nebraska law provides:

If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm.

NEB. REV. STAT. § 25-316 (1943, reissue of 1975).

74. For a partial list of other state statutes following Nebraska's approach, see CRANE & BROMBERG, *supra* note 1, § 59, at 350 n.41.

75. The judgment limitation results from the words, "setting forth his judgment . . . and to have a decree for *the debt*." NEB. REV. STAT. § 25-316 (1943, reissue of 1975) (emphasis added). The Nebraska statute also prohibits the plaintiff from executing on any individual partner's property until she has exhausted the partnership property. *Ruth v. Lowry*, 10 Neb. 260, 4 N.W. 977 (1880).

76. CRANE & BROMBERG, *supra* note 1, § 59.

77. *Winters v. Means*, 50 Neb. 209, 69 N.W. 755 (1897); 1 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 518 (5th ed. 1925). *F.R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 A. 938 (1906) explicitly settles this point in a case involving a slightly more ambiguous version of the Nebraska-type statute.

B. A Comparative Analysis

The law of collateral estoppel balances the public policy in favor of judicial economy against the need for full and fair litigation of each issue.⁷⁸ The question that must be decided in determining whether to apply the doctrine of collateral estoppel is, thus, whether the earlier litigation was so defective that to deny an opportunity to relitigate would work substantial injustice. Only when such injustice appears can the time and expense of a new trial be justified. Use of such an analysis strongly supports the application of collateral estoppel to the issue of partnership liability in a suit against partners unserved in a prior suit against the partnership. Normally, partnership liability will be fully and fairly litigated in the initial suit. Therefore, it is not unfair to bind the defendant partners as to this issue in the second suit. The only issue that would need to be determined in the second suit is whether the defendants were partners at the time the obligation was incurred.

It might be argued that it would be unfair to bind the defendant partners in the second suit by a prior finding of partnership liability when it is possible that representation in the initial suit was inadequate. This argument, however, usually should not carry much weight. Even if only one partner appears to litigate the prior suit,⁷⁹ the served partner has the same incentive to litigate the issue of the partnership liability as the other partners. The served partner may have even more incentive since she risks being immediately bound by the judgment to the full extent of her individual as well as her partnership property.⁸⁰

There are two situations, however, in which representation by the served partners might not be adequate. One is where both the served partners and the partnership have minimal assets. In such a case the served partner has little to lose even if liability is found. The other such circumstance is where the served partner's assets are so large in proportion to the claim against the partnership that it would similarly not be worthwhile for him to conduct a full defense of the partnership liability.⁸¹ In both situations, it is probably necessary that there be a substan-

78. MOORE, *supra* note 6, ¶ 0.405; RESTATEMENT, *supra* note 3, § 1, Comment a.

79. Common name statutes generally require service on only one partner in order to serve the partnership. CRANE & BROMBERG, *supra* note 1, § 60, 347-48 & n.29; *see, e.g.,* CAL. CIV. PROC. CODE § 388 (West 1973); N.Y. CIV. PRAC. LAW § 1501 (McKinney 1976).

80. In most states the served partners' individual property is automatically bound; in the others this usually occurs when the partner is named and served as an individual party defendant. *See* note 50 *supra*.

81. In the first case if the unserved partners' individual assets are of consequence, their incentive will be much higher because they stand to lose more by an unfavorable verdict. In the second case if the unserved partners' individual assets are not as great in relation to the claim, they again might put up a more spirited defense.

tial economic disparity between the served and unserved partners for their incentives to litigate to differ materially.⁸² Such disproportionate wealth among partners probably occurs infrequently.

In any case, all the partners are presumed to be on notice of the pendency of a suit against the partnership.⁸³ Thus any partner who felt the partnership might not be adequately represented could voluntarily submit to the jurisdiction of the court and participate in the partnership defense.⁸⁴ Under a system with no collateral estoppel the unserved partner has much less to lose by staying out of the first suit. If the partnership wins, the plaintiff will be barred from litigating again;⁸⁵ if the partnership loses, only her joint partnership property will be bound. If the plaintiff wants to bind the partner's individual property as well as the partnership property, he must shoulder the burden of litigating all the issues of liability again.

A collateral estoppel system forces the unserved partner to balance the risk that representation by the other partners alone will make an unfavorable verdict more likely against the desirability of binding only her joint partnership property by declining to appear or assume control in the first suit. Making this evaluation also requires the unserved partner to estimate the probability that a judgment in the first suit will exceed the partnership assets and that the plaintiff will eventually serve her in a suit to bind her individual property anyway. The state should force the unserved partner to this balancing, not only in the hope of shortening the litigation, but also to promote a full and fair litigation of the issues in the first action.

Assuring that the unserved partner has notice of the suit may be a problem in certain situations, however. If notice does not reach the unserved partner, the policy analysis based on informed choice fails. Equally important, to bind a person to the outcome of a suit of which she had no notice raises serious due process problems.⁸⁶ A partner is

82. This analysis assumes that there is no reason other than economics, such as a psychological reason, that the unserved partner will want to present a fuller defense than the served partner. For instance, the unserved partner might have a personal grudge against the plaintiff and therefore might want to press her claim to a greater extent than her copartner, even beyond the point dictated by economic considerations. A court is not likely, however, to permit relitigation for such a reason. Yet other types of interpersonal conflict might cause more substantial representation problems. See note 92 *infra*.

83. See note 87 *infra* and accompanying text.

84. A partner's right to equal participation derives from his coownership and equal right to conduct and manage the partnership business. UNIFORM PARTNERSHIP ACT § 6 and Commissioner's note; *id.* § 18(e); CRANE & BROMBERG, *supra* note 1, § 14, at 69-72.

85. See text accompanying notes 54-67 *supra*.

86. See text accompanying notes 111-120 *infra*.

statutorily on notice of any matter relating to the partnership business that has been communicated to a copartner.⁸⁷ This statutory presumption should usually extend to the notice that a suit is pending against the partnership given when a partner is served with process. This presumption may be less strong, however, when applied to a dormant partner not actively participating in the management of the business,⁸⁸ or a partner who has terminated his association with the partnership.⁸⁹

In the case of a dormant partner, no exception should be made to the notice presumption. It would be quite difficult for the plaintiff to show that the served partners gave notice to the dormant partner. Requiring the plaintiff to give notice would frustrate the central purpose of the common name statutes. In addition, retaining the notice presumption will promote responsibility in business undertakings by encouraging a dormant partner to keep apprised of partnership affairs even if she does not actively participate in the business.⁹⁰

In the case of a terminated partner, however, the partner should be allowed to overcome the presumption by showing that the continuing partners did not know his residence and could not have given him notice

87. UNIFORM PARTNERSHIP ACT §§ 12 (notice to any partner deemed notice to the partnership), 20 (partners under a duty to render information on demand); CRANE & BROMBERG, *supra* note 1, § 56.

88. A distinction must be drawn between a dormant partner and a silent partner. A silent partner participates in the management of the business but is not publicly known to be a partner. Since she does participate in the business, no exception to the notice presumption should be made for the silent partner.

89. This situation could only occur if the other partners have continued the business so that the new partnership can be sued in the partnership name, but the terminated partner would still be liable on the old partnership obligation. UNIFORM PARTNERSHIP ACT § 36(1). If the partnership is not continued after a partner withdraws, dissolution does not terminate the partnership until all the affairs are wound up. *Id.* § 30. If the partnership was sued at that time, the normal rule as to notice should apply. If the partnership has, in fact, been totally terminated before the suit is brought, no partnership remains to be sued; only the individual former partners can be sued.

90. It might be argued that forcing a dormant partner to keep informed at the risk of being bound by a determination of liability will adversely affect incentive to invest capital. It also seems plausible that a dormant partner should not be strictly held to the absolute constructive notice of partnership activities mandated by Section 15 of the Partnership Act. If he has made a reasonable effort to inform himself but his partners have not kept him fully apprised of partnership affairs, including the pendency of the suit, it might seem unfair to bind him.

A policy of encouraging responsible business behavior should outweigh any need to encourage blind investment, however. A reasonableness standard would encourage dormant partners to make sure they are not fully informed, and would encourage active partners to withhold information to protect the dormant partners. The active partners would incur no penalty by withholding information, and the dormant partners would get a chance to relitigate the liability issue. A plaintiff would be hard-pressed to prove the existence of such collusive behavior. Thus, the "bright line" created by the Uniform Partnership Act should be maintained, even at the cost of some slight loss of investment capital.

of the suit. While requiring the plaintiff to prove the dormant partner did have notice places too great a burden on the person bringing the suit, it would be equally unfair to require a terminated partner to keep the continuing partners constantly informed of his residence to assure that he would receive notice of a suit and could make an informed decision whether to appear to litigate the partnership liability. It might even violate due process to bind the unserved partner by the issues adjudicated if he did not have notice and an opportunity to appear.⁹¹ Res judicata is a flexible doctrine and will not be applied where it is not just to do so.⁹²

On the whole, then, an examination of the public policy underlying res judicata doctrine in the context of partnership liability strongly favors a statute of the Nebraska type.⁹³ Even a minor modification of the California and New York statutes could achieve the desired result.⁹⁴ In spite of the policy reasons favoring the Nebraska result, however, in some states in which the majority rule governs, the courts have suggested that allowing collateral estoppel effect to the previous

91. See *Hall v. Lanning*, 91 U.S. 160 (1875) (full faith and credit may not be given to a judgment of a sister state in which a terminated partner was not served in order to bind him to his individual liability). This argument might only prevail, however, if the partner could show she was not adequately represented by her former copartners in the determination of the partnership liability. See text accompanying notes 111-112 *infra*. Inadequate representation is unlikely. See text accompanying notes 80-81 *supra*.

92. The new draft of the Restatement of Judgments incorporates this flexibility. See RESTATEMENT (SECOND), *supra* note 37, app. §§ 68.1 (especially 68.1(e)(iii)), 88. This flexibility should permit a court to grant relief to an unserved partner if the partners are on unfriendly terms and this animosity has prevented adequate representation. For example, the partnership might be undergoing dissolution on unfriendly terms. If the animosity was great enough, a partner might even be willing to take a loss in the suit to ensure that his copartner also suffers a loss. Another possibility is that the plaintiff might be friendly with several partners and engage in collusion with them to establish the partnership liability in order to recover from the other partners individually. In each of these cases, the doctrine of collateral estoppel should be flexibly construed to prevent unfair results.

93. The effect of adopting the minority rule upon other state interests will probably be slight. Partners' decisions as to the state in which they locate their business should not be affected. In contrast to corporations, which are often incorporated in a state far from that in which their business is conducted, the vast majority of partners reside in the state where the partnership is located. Partners are thus usually subject to service of process. With modern discovery practices, even a dormant partner can easily be discovered and joined once suit has been filed. See FED. R. CIV. P. 26-37. Many important concerns—state taxation, business development costs, business climate—influence a partnership's decision where to locate more than whether a finding of partnership liability in a suit against the partnership will be binding on a previously unserved partner in a suit to establish her personal liability.

94. It could simply be provided that "all issues of partnership liability determined in a previous suit on the same claim shall be binding, but a partner may present any personal defenses, or any defenses subsequently arising, in the litigation of the subsequent suit.

judgment would deny the previously unserved partner due process of law.⁹⁵ These courts start from the premise that since the partner was not served in the previous suit, a valid personal judgment could not have been rendered against her⁹⁶ because she was not afforded notice or an opportunity to appear and defend.⁹⁷ They reason that since the judgment in the previous suit cannot bind the partner personally, the determination of partnership liability in the first suit cannot be held conclusive against her in the later suit to enforce her individual liability through the partnership.

Despite this analysis, however, the statutes which follow the minority rule on collateral estoppel should be able to withstand a due process attack.⁹⁸ Even the most restrictive statutes permit a personal judgment

95. See, e.g., *Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806 (1911); *Dillard v. McKnight*, 34 Cal. 2d 209, 209 P.2d 387 (1949); *Emmons v. Hirschberger*, 69 N.Y.S. 401 (1947). *Contra*, *F.R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 A. 938 (1906).

96. *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Ratchford v. Covington County Stock Co.*, 172 Ala. at 464, 55 So. at 807. Usually the statutes so provide. See, e.g., CAL. CIV. PROC. CODE § 410.10, Judicial Council commentary (West 1973); N.Y. CIV. PRAC. LAW § 1502, commentary (McKinney 1976).

97. *Ratchford v. Covington County Stock Co.*, 172 Ala. at 465, 55 So. at 807; *Dillard v. McKnight*, 34 Cal. 2d at 216, 209 P.2d at 392; *Emmons v. Hirschberger*, 69 N.Y.S.2d 401. This analysis presumes that the partner did not make a personal appearance or control the defense in the prior suit; otherwise she would be bound by traditional principles of res judicata. See note 39 *supra* and accompanying text.

98. None of the previously cited cases, or any others that have been found, have definitely decided the issue. In *Dillard*, for instance, only one partner was served in the previous suit; the service was not on behalf of the partnership. The court noted that if the determination of liability in the previous suit was held binding against the copartner, partners would have to discover at their peril every lawsuit against their copartners that conceivably related to the partnership business. The court concluded that such a result would offend due process. 34 Cal. 2d at 214-15, 209 P.2d at 391-2. The present situation is distinguishable in that the *partnership* has been sued in the previous suit and the *partnership* liability has been litigated, not just the liability of the partner.

In *Ratchford* and *Emmons*, the holdings were mere dicta; state statutes reached the same result by fiat, and the courts' analyses of possible due process arguments were gratuitous.

The Supreme Court has only peripherally considered the issue in the context of full faith and credit arguments, in *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850) and *Hall v. Lanning*, 91 U.S. 160 (1875). In those cases, however, personal judgments had been rendered against nonresident, unserved partner defendants who had not personally appeared in the previous suit. The Court held that because the original court had no jurisdiction over the unserved partners, courts of other states were not obligated to give full faith and credit to those judgments, and that to do so would deny the partners due process of law. In fact, in *Hall*, the partnership had been dissolved prior to suit, so it was likely the unserved partners did not even have contact with their copartners in the original forum state.

Finally, the court in *Detrio v. United States*, 264 F.2d 658 (5th Cir. 1959) spoke in due process language when it voided a judgment of a contract renegotiation board against an individual partner where he was not served with process or notified of the board's action. In that case, however, the partner had left the partnership and did not

against an unserved partner to the extent of his interest in the partnership property.⁹⁹ The theory behind this result is that any partner has the power to dispose of partnership property to pay partnership debts, and that the court through its jurisdiction over the served partner may therefore compel him to do so.¹⁰⁰ But the judgment must also rest on a recognition that due process has been afforded both the partnership and the unserved, absent partner in determining that partnership debt or liability.¹⁰¹ Otherwise, binding the unserved partners even to the extent of their joint property would violate due process. If it satisfies due process to bind the partner by the judgment of partnership liability in the first suit to the extent of the joint property, then it should be constitutional to bind her by that finding in the later suit to establish her individual liability.¹⁰²

The statutory scheme creates no danger that a partner's due process rights will be violated by an execution against his personal property without his having been afforded at least one due process adjudication of his personal liability.¹⁰³ The first judgment will bind only the ostensible partner's joint partnership property. If the unserved party is not in fact a partner, he will have no joint partnership property and the judgment will not immediately affect him,¹⁰⁴ whether or not he was

learn of the suit through the notice mailed to the partnership. The court held that due process was violated because the partner did not have an opportunity to appear and contest the claim against him. It indicated that such a partner must be personally served with process or notified of the pendency of the action.

99. The judgment is not quasi-in-rem or in rem because there has been no attachment of property to gain jurisdiction. CRANE & BROMBERG, *supra* note 1, § 59, at 345-46. *Contra*, Ratchford v. Covington County Stock Co., 172 Ala. at 464, 55 So. at 807.

100. CRANE & BROMBERG, *supra* note 1, § 59, at 346 & n.16.

101. The constitutionality of this result was specifically upheld on due process grounds in *Sugg v. Thornton*, 132 U.S. 524 (1889). The holding may not be applicable to all situations, however, because the Texas statute at issue also required notice to be mailed to the partner over whom jurisdiction could not be obtained.

102. *See Bernhard v. Bank of America*, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942).

103. The danger in binding a person's individual property by the first adjudication in which she did not participate is that she might not have been a partner subject to liability; she might not have been a partner at the time the obligation was incurred, or she might not have been a partner at all. Permitting the judgment to bind her individual property immediately would not allow her the opportunity to present any of her personal defenses—a violation of due process of law. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940). *See also* CRANE & BROMBERG, *supra* note 1, § 59, at 345. Merely giving the prior determination of the partnership liability collateral estoppel effect in a later suit against an ostensible partner does not raise these problems.

104. The only situation in which this would not be true is in the case of a present partner who was not a partner at the time the obligation was incurred. Then he would have joint property with his copartners but should not be held liable even to the extent of that property. This situation raises only the problem of the due process accorded him in the first trial where his joint property was affected, however. If he was an active

named as a party to the suit. If a second suit is brought, the ostensible partner will still have a chance to present personal defenses concerning his relationship to the partnership.

Due process does not always require that a person be served with process in order that the results of litigation can be held *res judicata* against her. An exception is regularly made for privies to the parties—persons who, by acquiring an interest in the subject matter affected by the judgment through or under one of the parties are bound by a previous judgment.¹⁰⁵ It has been held that partners are not in close enough privity for the results of litigation against one partner to be held *res judicata* against other partners.¹⁰⁶ This holding need not imply, however, that partners are not in privity with the partnership.¹⁰⁷ If a partnership and its partners are in privity, a finding of liability in a suit against the partnership could be held binding in a later suit on the partner's individual liability. When a corporation's liability is found, for instance, the shareholders are collaterally estopped by that finding because they are in privity with the corporation.¹⁰⁸ Reasoning by analogy, at least one court has held that partners should be similarly concluded by a finding of partnership liability.¹⁰⁹

partner, then he should have had notice of the pendency of the suit and could have contested his joinder in the first suit.

105. Classic examples of privity are when the interest in the subject matter of the litigation was acquired by inheritance, succession, or purchase. *E.g.*, MOORE, *supra* note 6, ¶ 0.411[1], at 1255.

106. *E.g.*, *McLelland v. Ridgeway*, 12 Ala. 482 (1847); *Dillard v. McKnight*, 34 Cal. 2d 209, 209 P.2d 387 (1949); *see Vestal, Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 62 (1964).

107. An objection might be made that at this point the argument begins to sound as if the partnership is being treated as an entity distinct and separate from the partners, a theory many states and the Uniform Partnership Act have not accepted. It is accepted, however, that the partnership may be treated as an entity for certain specific purposes, one of which is suit in the firm name. CRANE & BROMBERG, *supra* note 1, § 3. *See* text accompanying note 48 *supra*.

108. Estoppel operates against shareholders where their corporate rights, privileges, and liabilities, including assessments because of corporate indebtedness, are involved. *E.g.*, *Selig v. Hamilton*, 234 U.S. 652 (1914) (stockholders liable to amount of their stock holdings under Minnesota law; stockholders estopped on issue of corporate liability and amount of assessment determined in previous sequestration and assessment proceedings against corporation; constitutionality affirmed); 1 A. FREEMAN, *supra* note 77, §§ 513-514, at 1104-08; MOORE, *supra* note 6, ¶ 0.411[10], at 1656-57. *But see Vestal, supra* note 106, at 61-62.

109. *F.R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 11, 63 A. 938, 940 (1906). The court reasoned that by becoming members of a partnership, the partners, like shareholders of a corporation, contracted subject to the terms of the statute that determined how their liability should be established. *See CRANE & BROMBERG, supra* note 1, § 3, at 29. In some sense, the relation of the partners to the partnership is akin to the classic cases of privity, in that partners are concurrent owners of "the subject matter of the litigation", the partnership itself. MOORE, *supra* note 6, ¶ 0.411[1], at 1255. *See* notes 119 and 121 *supra*.

Finally, the modern conception of procedural due process is less concerned with formal doctrines like privity than with the fairness of holding a person bound by a finding in a previous suit.¹¹⁰ The United States Supreme Court has ruled that it is only necessary that "the [state] procedure fairly insures the protection of the interests of the absent parties who are to be bound by it."¹¹¹ The Court has suggested that the presence of three elements in a state's procedure might be crucial: adequate representation, notice, and opportunity to be heard.¹¹²

Since a suit against a partnership is similar to a small-scale defendant class action, the due process tests established by Rule 23 of the Federal Rules of Civil Procedure provide a useful analytical framework. Rule 23 requires that there be questions of law and fact common to all class members,¹¹³ that the claims and defenses of the representatives be typical of those held by the class,¹¹⁴ and that the named representatives adequately represent the class.¹¹⁵ The questions of law and fact necessary to establish partnership liability and the defenses the partnership may assert to preclude liability are the same regardless of which partner represents the partnership.¹¹⁶ Under most circumstances, the served partners will be adequate representatives of the partnership, and thus of the unserved partners, since they usually will have a stake in the litigation similar to the unserved partners.¹¹⁷ Thus the elements necessary to satisfy due process requirements in the class action context are all present here as well.

110. The limited usefulness of privity as a concept in res judicata law has long been recognized. *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 855-65 (1952). It has been argued that a finding of "privity" is often less a recognition of a formal legal relationship than a conclusion based on the court's intuition that the contacts between the person to be bound and the former party are close enough to allow invocation of res judicata. *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950); MOORE, *supra* note 6, ¶ 0.411[1], at 1254.

Recently, collateral estoppel has been extended to nonparties in certain cases. The privity rule has again been roundly criticized. Comment, *Nonparties and Preclusion by Judgement: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098 (1968) (adequate representation); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974) (vicarious day in court). A complete discussion of the merits of the privity rule is beyond the scope of this comment. However, whether a privity concept is used, or whether "adequate representation" or a "vicarious day in court" is the standard, the partnership context should be within the applicable zone of issue preclusion.

111. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

112. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950); *Hansberry v. Lee*, 311 U.S. at 40, 42-43.

113. FED. R. CIV. P. 23 (a)(2).

114. *Id.* R. 23 (a)(3).

115. *Id.* R. 23 (a)(4).

116. Only litigation of the issue of the liability of the partnership, not the individual defenses of the partner, is being precluded.

117. See text accompanying notes 79-80 *supra*.

Even if the analogy to class actions is not accepted, the criteria of adequate representation, notice, and opportunity to hear and defend should be satisfied. Representation has already been discussed. The nonparticipating partners, though not served with process, are statutorily on notice of the pendency of suits against the partnership.¹¹⁸ Each partner has joint control over all elements of the partnership business;¹¹⁹ therefore, each has an opportunity to be heard and to exercise joint control over the proceedings in which the partnership liability is originally established.¹²⁰ Since the three crucial criteria are all met, the collateral estoppel procedure supported here complies with due process of law.

CONCLUSION

Suing partnerships is no longer the treacherous procedural tangle it was at common law. The ability to satisfy judgments when the partnership's joint property is insufficient is enhanced now that partners not joined in the suit against the partnership can be subjected to subsequent suit.¹²¹ In most states, however, the plaintiff who wants to bring a second suit to satisfy the first judgment must relitigate the issues of partnership liability.

Most of the relevant state statutes were passed when views of res judicata and due process centered on formalisms like mutuality of estoppel and privity.¹²² Modern developments in res judicata and due process have focused attention on the competing public policies that underly the doctrines: judicial economy and fairness to individual litigants. Viewed against the more flexible modern standards, the use of collateral estoppel in the partnership setting is both necessary and appropriate. A reevaluation and revision of those statutes that deny collateral estoppel in this context and of those cases that have construed statutes to do so should be undertaken.

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118. UNIFORM PARTNERSHIP ACT § 12; CRANE & BROMBERG, *supra* note 1, § 56, at 322. See text accompanying notes 87-92 *supra*.

119. See note 84 *supra*.

120. The partner's right to participate in the determination of the partnership liability distinguishes this case from the more common determination of the liability of one joint obligor, such as a joint tortfeasor. Since an unserved joint tortfeasor normally does *not* have a right to participate in litigation absent some independent ground for intervention, it may be a denial of due process to hold issues determined in the first action collaterally estopped in a later suit against the other joint tortfeasor. See *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 131 (1912) ("opposed to the first principles of justice").

121. See text accompanying notes 41-53 *supra*.

122. See note 68 *supra*.

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