

The Use of Virtual Representation and Collateral Estoppel in FTCA Toxic Tort Claims

after *Taylor v. Sturgell*

Dan Bajger\*

Navigating through the collateral estoppel rules in various jurisdictions can be a complex process.<sup>1</sup> When it comes to toxic tort cases brought under the Federal Tort Claims Act (FTCA), it is especially challenging to decide whether state or federal collateral estoppel standards should apply.<sup>2</sup> As a consequence, one's ability to invoke a collateral estoppel argument under the FTCA may change with the jurisdiction.<sup>3</sup> Although the Supreme Court recently decided *Taylor v. Sturgell*<sup>4</sup>, the collateral estoppel landscape still persists in a thorny state.

Nonetheless, *Taylor* definitively settled the status of virtual representation, a principle that precludes relitigating any issue that was previously tried by a person sharing an identity of interests with a nonparty.<sup>5</sup> Because virtual representation applies to any nonparty as long as his or her interests were similar to a litigant in a previous case, the doctrine creates due process concerns.<sup>6</sup> The Supreme Court curtailed the concept of virtual representation in *Taylor* because of this encroachment upon due process. Collateral estoppel, by contrast, largely avoids infringing upon due process because the theory only extends to litigants who were parties to the prior judgment.

In addition to addressing virtual representation, the *Taylor* opinion also contained seemingly contradictory language that left the issue of using collateral estoppel in FTCA claims cloaked in uncertainty. More specifically, *Taylor* permits the use of state laws of preclusion in federal court if the court is sitting in diversity jurisdiction.<sup>7</sup> But the opinion also states that the preclusive effect of a federal court's judgment is determined by federal common law.<sup>8</sup>

Consequently, the prospect of using state laws of collateral estoppel in one circuit and federal common law rules in another circuit continues. This dilemma stems, in part, from *Taylor's* reference to *Richards v. Jefferson County*. The *Richards* case brings the notion of due process with respect to nonparty preclusion to the forefront, creating basic federal parameters that state courts must satisfy.<sup>9</sup> In addition to these due process and conflict of laws concerns, the fact that *Taylor* never explicitly mentions the FTCA only serves to further muddy the water.

This article will begin by examining the collateral estoppel doctrine and addressing the relevant portions of the FTCA. Next, it will explain important aspects of the *Taylor* decision, beginning with virtual representation and then collateral estoppel. A subsequent discussion of whether state or federal collateral estoppel standards apply to toxic tort cases brought against the Government pursuant to the FTCA will occur. The current circuit split and the federal and state approaches to solving this dilemma will also be examined. The article will conclude by assessing the current status of collateral estoppel and conveying what the United States must prove in order to use collateral estoppel against a nonparty in an FTCA toxic tort action.

### **I. Varying Definitions of Collateral Estoppel under Existing State and Federal Law**

Collateral estoppel protects litigants from the burden of having to relitigate an identical issue with the same party or his or her privy.<sup>10</sup> Once a court “finally decides an issue of fact or law, collateral estoppel prevents that issue from being relitigated in another court in later litigation.”<sup>11</sup> In effect, the theory of collateral estoppel rests on the principle that the earlier decision regarding a particular issue was reliable,<sup>12</sup> and if retried, the outcome of the case should be the same.<sup>13</sup> In terms of policy considerations, collateral estoppel protects scarce judicial resources and promotes judicial economy.<sup>14</sup> However, “there are a number of instances in which the policies against relitigation of an issue may be overcome.”<sup>15</sup>

Two types of collateral estoppel exist: offensive and defensive.<sup>16</sup> Offensive collateral estoppel occurs when a plaintiff attempts to prevent a defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with another party.<sup>17</sup> “Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.”<sup>18</sup>

Federal courts generally subscribe to a definition of collateral estoppel or issue preclusion that bars subsequent litigation of factual issues even if those issues pertain to different claims in the successive litigation.<sup>19</sup> For example, under the most common federal approach, three necessary criteria must be met for collateral estoppel to apply: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action.<sup>20</sup> In addition to these three widely accepted requirements, some federal courts add a fourth element, stating that a valid and binding judgment must be rendered on the essential issue that was previously litigated.<sup>21</sup>

State courts, however, often apply a variety of different collateral estoppel standards that may be easier to satisfy than the federal rule.<sup>22</sup> This makes the decision of using state or federal laws of issue preclusion particularly important to a Government defendant in a toxic tort FTCA case, as the selection of either state or federal rules of collateral estoppel can be determinative of whether a claim is in fact precluded. For instance, in Texas, collateral estoppel may only be invoked when (i) the issue was essential to the judgment in a prior suit, (ii) “the issue sought to be litigated in the second action was fully and fairly litigated during the first action; (iii) the issue was essential to the judgment in the first action; and (iv) the parties were cast as adversaries.”<sup>23</sup> Conversely, in Michigan, for collateral estoppel to apply, only three elements must be satisfied:

(1) “a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must mutuality of estoppel.”<sup>24</sup> Thus, because different rules prevail in different states, the decision of whether to apply state or federal rules of preclusion is particularly important in an FTCA action.

## **II. The Ambiguities Created When Applying State or Federal Rules of Collateral Estoppel in an FTCA Action**

The FTCA provides that, under certain circumstances, the United States may be held liable for torts committed “in accordance with the law of the place where the [tortious] act or omission occurred.”<sup>25</sup> In an action under the FTCA that possesses subject matter jurisdiction, a court must also apply the law the state court would use in an analogous tort action (including federal law).<sup>26</sup> In other words, the FTCA not only directs that state law supply the rule of decision, but it also “requires application of the whole law of the state where the act or omission occurred.”<sup>27</sup> The circuits are split as to whether the “whole law” includes the state or federal rules governing collateral estoppel.<sup>28</sup>

In effect, for the FTCA to impose liability, the Federal Government must be liable in tort in the same manner and to the same extent that state law imposes liability on a private individual under like circumstances.<sup>29</sup> The FTCA constitutes a limited waiver of sovereign immunity, allowing federal courts to exercise jurisdiction over claims brought against the United States for property damage, personal injury, or death caused by the negligent or wrongful acts committed by federal employees while acting within the scope of their employment.<sup>30</sup> Exceptions to this limited waiver of immunity exist. The waiver does not apply to “[a]ny claim based upon an act or omission of an employee of the Government ... based upon the exercise or performance or the

failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government.”<sup>31</sup> A tort action cannot be brought against the Government until the plaintiff has exhausted his or her administrative remedies by presenting a legally sufficient claim to the “appropriate federal agency.”<sup>32</sup> In the end, the language in the FTCA that suggests applying the “whole law of the State where the act or omission occurred” stymies any simple solution to the problem of employing state or federal collateral estoppel rules in FTCA toxic tort actions.<sup>33</sup>

### **III. An Analysis of *Taylor v. Sturgell***

#### **A. Herrick and Taylor’s Nearly Identical Path Toward Litigation**

Greg Herrick was an airplane enthusiast and the owner of a rare 1930’s era airplane, the F-45, that he was in the process of restoring.<sup>34</sup> Herrick filed a Freedom of Information Act (FOIA) request, asking the Federal Aviation Administration (FAA) for copies of technical information pertaining to the F-45.<sup>35</sup> The FAA denied Herrick’s request, explaining that the information he sought was privileged as commercial “trade secrets.”<sup>36</sup> Herrick subsequently filed an administrative appeal.<sup>37</sup> His claim was denied and he filed suit against the FAA in the U.S. District Court for the District of Wyoming.<sup>38</sup>

Herrick based his FOIA argument on a 1955 letter from the airplane’s manufacturer, the Fairchild Corporation, which authorized the Civil Aeronautics Authority to lend any documents in its files to the public “for use in making repairs or replacement parts” for the aircraft.<sup>39</sup> The District Court found for the FAA, and the U.S. Court of Appeals for the Tenth Circuit affirmed.<sup>40</sup>

Nearly a month later, Brent Taylor, a friend of Herrick who was represented by the same attorney, filed another FOIA request seeking identical technical information from the FAA.<sup>41</sup> The FAA failed to respond, forcing Taylor to file suit in federal court in the District of Columbia

where he made the same arguments that Herrick had used in the preceding suit.<sup>42</sup> Fairchild intervened as a defendant in this action, and the district court in D.C. “concluded that Taylor’s suit was barred by claim preclusion.”<sup>43</sup> As a result, the court “granted summary judgment to Fairchild and the FAA,” acknowledging that Taylor was not a party to Herrick’s previous suit.<sup>44</sup> “Relying on the Eighth Circuit’s decision in *Tyus v. Schoemehl*...[the district court] held that a nonparty may be bound by a judgment if she was virtually represented by a party.”<sup>45</sup> The Court of Appeals for the D.C. Circuit affirmed this judgment, and the Supreme Court granted certiorari.<sup>46</sup>

### **B. A Clear Definition of Virtual Representation after Taylor**

The Supreme Court in *Taylor* shaped the contours of the elusive concept known as virtual representation.<sup>47</sup> The virtual representation doctrine is defined as the principle “that a judgment may bind a person who is not a party to the litigation if one of the parties is so closely aligned with the nonparty’s interests that the nonparty has been adequately represented by the party in court.”<sup>48</sup> Prior to *Taylor*, this doctrine had evolved in different circuits to comprise a set of amorphous multifactor balancing tests that resulted in “a broad, case-by-case inquiry.”<sup>49</sup> Nevertheless, virtual representation was never formally recognized as one of the six exceptions to the longstanding notion that everyone should have his or her own day in court.<sup>50</sup> The *Taylor* opinion, however, settled this issue conclusively.<sup>51</sup>

### **C. Imposing Limits on the Doctrine of Virtual Representation**

In *Taylor*, Justice Ginsburg, writing for a unanimous Court, imposed limitations on the doctrine of virtual representation.<sup>52</sup> She concluded that only six exceptions to the rule against nonparty preclusion exist.<sup>53</sup>

These exceptions are: (1) a person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his or her agreement; (2) nonparty preclusion may be justified based on a variety of pre-existing substantive legal relationships (i.e. bailor, bailee, assignor, assignee, etc.); (3) in limited circumstances, a nonparty can be bound by a judgment because he or she was adequately represented by someone with the same interests who was a party to the suit (i.e. class action suits and suits brought by trustees, guardians, and other fiduciaries); (4) a nonparty can be bound if he or she assumed control over the litigation during which that judgment was rendered; (5) a party bound by a judgment may not avoid its force by relitigating through a proxy; and (6) in certain circumstances a special statutory scheme may expressly foreclose successive litigation by non-litigants (i.e. bankruptcy, probate, or suits that may only be brought on behalf of the public at large).<sup>54</sup>

Justice Ginsburg's unanimous opinion held that virtual representation is a unique exception to the ban on nonparty claim preclusion that reaches well past the six exceptions delineated in the Court's precedent.<sup>55</sup> Chief among that precedent was *Richards v. Jefferson County*. In that case, the Supreme Court reversed an Alabama Supreme Court decision that barred a group of taxpayers from challenging a tax that had been upheld in a prior suit involving different taxpayers from the same district.<sup>56</sup> The Court held that claim preclusion under these circumstances violated due process.<sup>57</sup> The decision was based on the lack of either special procedures to ensure protection of nonparty interests or an understanding that "the first suit was brought in a representative capacity."<sup>58</sup>

In *Taylor*, the Supreme Court built on the foundation laid by *Richards*, holding that the meaning of adequate representation must include: (1) an alignment of interests between the party and nonparty; and (2) either an understanding that the party is acting as a representative for the

nonparty or, alternatively, court protection of the nonparty's interests.<sup>59</sup> In dictum, the Court also noted that adequate representation may require that notice of the suit be given to a nonparty before binding him or her to the judgment.<sup>60</sup>

*Taylor*, in part, stands for the proposition that virtual representation should rarely be applied and should be used only under certain exceptions to the general rule, none of which the Court found applicable in the case. As such, the dismissal of Herrick's first claim based on a FOIA request did not prevent Taylor, based on the concept of virtual representation, from bringing nearly the same claim with Herrick's attorney. The Supreme Court essentially reasoned that the virtual representation doctrine had been exploited. Furthermore, the notion that the outcome of a suit filed by one unrelated party in one circuit is dispositive of the outcome of a second suit by another person in a different circuit contravened Supreme Court precedent.<sup>61</sup> An expansive view of virtual representation, for Justice Ginsburg, equated to a litigant's loss of legal rights without having an opportunity to be heard. The Court also disregarded the myriad of different balancing tests employed by various circuits, reasoning that these tests only served to complicate the task of the district courts and produced wide-ranging, time-consuming, and expensive discovery.<sup>62</sup>

#### **D. The Requirements for Invoking a Collateral Estoppel Argument**

##### **According to *Taylor***

Besides merely addressing virtual representation, *Taylor* contains language that affects the use of collateral estoppel by a Government defendant in an FTCA toxic tort case. More specifically, *Taylor* affirms the notion that "the preclusive effect of a federal court judgment is determined by federal common law," and the federal law of preclusion remains subject to the due process limitations prescribed in *Richards*.<sup>63</sup> However, the opinion also states that in diversity

cases, federal law incorporates the rules of “preclusion applied by the state in which the rendering court sits.”<sup>64</sup> Thus, these ostensibly contradictory notions in *Taylor* further complicate the question of using state or federal rules of collateral estoppel in FTCA toxic tort claims.

#### **IV. A Collateral Estoppel Circuit Split**

##### **A. The Federal Framework for Invoking Collateral Estoppel under the FTCA**

In terms of non-FTCA actions, “there is authority for the proposition that the applicability of collateral estoppel in a diversity action in a federal court is governed by federal law, and not by state law.”<sup>65</sup> However, the Fifth Circuit Court of Appeals, in *Johnson v. United States*, dealt with FTCA actions specifically, concluding that federal collateral estoppel rules apply to other federal court judgments in FTCA claims.<sup>66</sup> In *Johnson*, the judgment turned on the decision whether to use state or federal rules of preclusion because the state rules required mutuality whereas the federal rules did not.<sup>67</sup>

The facts in *Johnson* generate a complicated choice of law question. Jimmy Ray Johnson, the husband of one of the plaintiffs in this case, was a Sergeant in the Army demonstrating erratic behavior.<sup>68</sup> He was sent to a psychologist on the army base where he resided, and after a short stay, he was released from the clinic.<sup>69</sup> Immediately after his release, Johnson assaulted and murdered his sister-in-law, shot and wounded his wife, and then killed himself.<sup>70</sup> The sister-in-law brought a successful wrongful death action against the United States for negligently releasing Sergeant Johnson from the base without warning.<sup>71</sup> Sergeant Johnson’s widow subsequently filed suit in the District Court for the Middle District of Florida. She also filed a motion for summary judgment, asserting the collateral estoppel effects of the sister-in-law’s wrongful death action.<sup>72</sup> The district court decided against Mrs. Johnson’s motion and her claim.<sup>73</sup> She appealed, alleging that the district court erred by failing to apply federal standards

of preclusion that would have rendered the United States collaterally estopped on the issue of negligence.<sup>74</sup> The United States, by contrast, argued that under the FTCA, the court was required to apply the collateral estoppel rules of Georgia, and Georgia, unlike the federal courts, has retained the requirement of mutuality in applying principles of res judicata and collateral estoppel.<sup>75</sup> Thus, if state rules were chosen, the United States' argument would prevail. Conversely, if federal standards were applied, Mrs. Johnson would be successful.

The court of appeals decided that federal standards of preclusion should be used, reasoning that "Congress never intended state court rules to determine the internal relationships among the federal courts—particularly with regard to the effect one federal court is to give to the judgment of another."<sup>76</sup> "The *Johnson* analysis [is based] on a distinction between substantive rules, which would be part of a State's 'whole law' made applicable in an FTCA action, and procedural rules, which derive from the court hearing the case."<sup>77</sup> As in many other contexts, the substance versus procedure distinction is tenuous under the FTCA.<sup>78</sup> Still, the U.S. District Court for the District of Columbia ultimately applied the *Johnson* analysis in *Bazuaye v. United States*.<sup>79</sup>

In *Bazuaye*, an arrestee filed suit under the FTCA, seeking money damages for negligence and intentional interference with his rights when a postal inspector seized \$11,000 of his bail money.<sup>80</sup> After obtaining the funds, the Postal Service started administrative forfeiture proceedings wherein Bazuaye chose not to contest the matter in a timely fashion.<sup>81</sup> The Postal Service therefore declared that the \$11,000 was forfeited to the United States.<sup>82</sup> Bazuaye subsequently filed an FTCA action in the United States District Court for the District of Columbia.<sup>83</sup> The Government argued that Bazuaye, by virtue of the final administrative decision, was collaterally estopped from raising the issue again in district court.<sup>84</sup> The district

court did not accept this argument, holding that Bazuaye was not collaterally estopped from bringing his FTCA claim.<sup>85</sup>

In *Donohue ex rel. Estate of Donohue v. U.S.*, the District Court for the Southern District of Ohio employed similar reasoning. The plaintiff in the case, the mother of Steven B. Donohue and administratrix of his estate, brought a medical negligence and wrongful death claim on her son's behalf pursuant to the FTCA.<sup>86</sup> The defendant moved to dismiss the complaint on collateral estoppel grounds.<sup>87</sup>

Donohue, who was an inmate in various federal prisons from 1990 until his death in 2003, died of sepsis complicating bacterial endocarditis.<sup>88</sup> The plaintiff in this case claimed that the "Federal Bureau of Prisons and the U.S. Marshals Service's gross neglect and deliberate disregard of Donohue's medical condition" caused his death.<sup>89</sup> Specifically, the plaintiff alleged that Donohue was exposed to bird droppings, asbestos, and tuberculosis infested food during his incarceration.<sup>90</sup> As a result of these circumstances, Donohue claimed that he contracted histoplasmosis and other pulmonary afflictions.<sup>91</sup> The histoplasmosis claim was adjudicated on the merits during the prior lawsuit that Steven Donohue brought himself, but, his mother, the administratrix of his estate, brought the pulmonary affliction claim "on behalf of all next of kin, including Donohue's two surviving brothers."<sup>92</sup>

The Government argued that a federal court must apply state tort law in determining the Government's liability under the FTCA, and the district court agreed.<sup>93</sup> However, the court refused to extend this principle to the realm of issue preclusion, holding that federal laws of preclusion applied.<sup>94</sup> As a matter of strategy, the Government sought to use state laws of preclusion because state standards were less stringent.<sup>95</sup> The district court nevertheless held that the majority of jurisdictions would apply federal rules of collateral estoppel under the facts of

this case.<sup>96</sup> The district court judge distinguished the holdings of three other cases that applied state rules of preclusion on the grounds that those decisions were not binding on the court.<sup>97</sup> The district court also held that many of the jurisdictions applying state laws of issue preclusion were merely predicting state law without precedent.<sup>98</sup> Ultimately, the court decided that the application of state collateral estoppel rules would not “materially” alter the decision in this case.<sup>99</sup>

In conclusion, if federal rules of preclusion are more favorable to a litigant in an FTCA toxic tort action, then he or she should cite *Johnson*. The court in *Johnson* stated that federal rules are used to interpret the statute of limitations and the discretionary function<sup>100</sup> of the FTCA even though “state law governs general liability under the FTCA.” Thus, by parity of reasoning, federal rules of preclusion should also be used. The *Johnson* court clearly presented the most persuasive argument for using federal standards of collateral estoppel.

### **B. Asserting a Collateral Estoppel Claim Under a State Law Approach**

The majority of circuits hold that state law should govern the application of collateral estoppel in FTCA claims.<sup>101</sup> When a conflict between state and federal rules of collateral estoppel exists, one possible option is to resolve the dilemma in the light of the FTCA itself. The primary purpose of the FTCA was “to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.”<sup>102</sup> In deciding cases under the FTCA, the federal courts generally apply state law, since the Act directs the federal courts to decide liability “in accordance with the law of the place where the act or omission occurred.”<sup>103</sup> The reference in § 1346(b) of the FTCA to “[t]he ‘law of the place’ means the ‘whole law’ of the state where the incident took place.”<sup>104</sup> Utilizing the state’s “whole law” requires the application of the law a

state court would use in like circumstances involving a private defendant.<sup>105</sup> Thus, if the state would look to a state statute when applying rules of collateral estoppel, then the same statute would be applied to a Government defendant in an FTCA action.<sup>106</sup>

For example, in *Richards v. United States*, the Supreme Court held that the FTCA's reference to "law of the place" incorporates all laws of the state, including the state's choice-of-law provisions.<sup>107</sup> The opinion also reasons that there is language in the FTCA implying that state law should govern the Act generally, given the "interstitial" nature of federal law.<sup>108</sup> Moreover, under the traditional rule of *lex loci delicti commissi*, when the defendant's act or omission occurs in one jurisdiction and the harm to the plaintiff occurs in another, the law of the latter is applied.<sup>109</sup> The court in *Bowen v. United States* relied on this principle.

In *Bowen*, "an action under the FTCA, the plaintiff, an airplane pilot, allege[d] that air traffic controllers negligently failed to warn" him about an icy runway, leading ultimately to a crash.<sup>110</sup> The *Bowen* Court, citing *Richards*, also held that the whole law of the state where the act or omission occurred should be applied.<sup>111</sup> Thus, state law was used to measure the preclusive effect of prior federal administrative decision.<sup>112</sup> This holding was detrimental to the plaintiff in this case, as the state rules of collateral estoppel in Indiana were more rigorous than federal standards. More specifically, collateral estoppel under the law of Indiana requires a suit, an adversary proceeding, a decision on the merits rendered by a court of competent jurisdiction, identity of parties, identity of subject matter or issues, capacity of parties, and mutuality of estoppel.<sup>113</sup> This is one of the nation's most stringent collateral estoppel standards.

Nevertheless, the Ninth and First Circuits followed the *Bowen* approach in *Filice v. United States* and *D'Ambra v. United States*, respectively.<sup>114</sup> In these cases, the decision to use state law was not dispositive because either state or federal law did not conflict or state law was

unclear.<sup>115</sup> In *D'Ambra*, “despite deciding that state law applied, the courts found no controlling state court decisions to apply on the matter of res judicata and collateral estoppel and ‘predicted’ state law by citing leading federal cases.”<sup>116</sup>

In addition, dictum in *Miree v. DeKalb County*, suggests that the Supreme Court believes that state law governs in aviation tort claims brought under the FTCA.<sup>117</sup> The Court’s discussion regarding one of the arguments made in *Miree* has ramifications in the toxic tort arena. The argument in *Miree* was that federal common law, rather than Georgia law, should control the issue of whether a contract between the FAA and a county gave third-party beneficiary rights to the public, because the United States “has a substantial interest in regulating aircraft travel and promoting air travel safety.”<sup>118</sup> A similar argument could be made for large toxic tort claims where the Government is a defendant. The Court, however, rejected this reasoning, stating that the federal interest in regulating aircraft travel was insufficient to call into play the rule that federal law controls when the United States has an exceptional interest in national uniformity of the law.<sup>119</sup>

The Petitioners in *DeKalb*—the survivors of deceased aircraft passengers, the assignee of an aircraft owner, and a burn victim—sought to impose liability on the respondent, DeKalb County, as third-party beneficiaries of contracts between DeKalb County and the FAA.<sup>120</sup> The contract required DeKalb County to regulate the use of land adjacent to the airport.<sup>121</sup> The County elected to build a garbage dump on this land, and birds that congregated near the dump flew into the propellers of a Lear Jet, causing the plane to crash shortly after takeoff.<sup>122</sup> The United States Court of Appeals for the Fifth Circuit, sitting en banc, affirmed the dismissal of the petitioners’ complaint against DeKalb County, holding that principles of federal common law were applicable to the resolution of the petitioner’s breach-of-contract claim.<sup>123</sup> The Supreme

Court granted certiorari to consider whether federal or state law should have been applied to that claim, concluding that state laws should govern.<sup>124</sup>

Moreover, the Sixth Circuit also chose state laws of collateral estoppel in an FTCA tort action. In *Falk v. United States*, a wrongful death case brought under the FTCA, the first defendant hit the decedent's car from behind, causing him to be thrown from his vehicle and out into the rain.<sup>125</sup> The decedent went back into his car and was subsequently struck by another truck owned by the United States.<sup>126</sup> Both crashes resulted in the defendant getting wet and cold, and the defendant's widow argued that the weather proximately led to his contraction of pneumonia, which caused his death.<sup>127</sup> The widow unsuccessfully sued the first driver in state court, and then filed suit against the driver of the truck owned by the United States in federal court.<sup>128</sup>

The Court of Appeals held that collateral estoppel did not bar the widow's second claim, reasoning that the parties were not the same, the cause of death as alleged in the state court and federal court were not identical, and the cause of death as alleged in federal court was not litigated in state court.<sup>129</sup> Ultimately, state laws of preclusion—not federal laws—were used in *Falk*. The court, however, neglected to discuss its rationale for this decision. Moreover, this case dealt with a prior state judgment instead of a prior federal judgment.<sup>130</sup> This distinction proved to be paramount for the *Donohue* court when it held that federal laws of preclusion apply to FTCA toxic tort actions.<sup>131</sup> Nevertheless, in the end, convincing arguments can be made for the use of state law of preclusion in FTCA toxic tort actions.

### **C. The Significance of Applying State or Federal Rules of Collateral Estoppel**

Traditionally, collateral estoppel applied only where there was mutuality of parties; however, the landmark case *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.* rejected this

line of reasoning.<sup>132</sup> Thereafter, many courts have followed this rationale and abandoned mutuality as a requirement for collateral estoppel in most circumstances.<sup>133</sup> Although the modern trend is to shift away from the mutuality requirement, several jurisdictions reject this change.<sup>134</sup> Consequently, “where state law requires mutuality, it will be a matter of significance in a Federal Tort Claims Act suit whether federal law...or the law of the state where the act or omission occurred” applies.<sup>135</sup>

Some states also prescribe balancing tests that are either more or less demanding than the federal standard; this disparity causes Government defendants to argue either for state or federal standards of collateral estoppel depending on the particular case. The rules of estoppel in federal court also vary with the circuit. For instance, in the Ninth Circuit, collateral estoppel applies only where:

(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.<sup>136</sup>

In the Tenth Circuit, the first three requirements are the same. But there is an additional element; the party against whom the doctrine is raised must have had a full and fair opportunity to litigate the issue in the prior action.<sup>137</sup> Therefore, deciding which rules to use in a jurisdiction can be exceedingly important in a costly and complex mass tort case with thousands of plaintiffs.<sup>138</sup>

#### **D. Due Process Establishes Limitations on Collateral Estoppel**

In *Taylor*, the Supreme Court, citing *Richards v. Jefferson County*, held that the federal common law of preclusion is subject to due process limitations.<sup>139</sup> *Richards* primarily addresses the constitutionality of Alabama’s rules regarding adequate representation and claim preclusion. More specifically, the case sets the due process baseline for state rules pertaining to collateral

estoppel.<sup>140</sup> In *Richards*, the plaintiffs, who were privately employed in Jefferson County, filed a class action suit in state court claiming that the county's occupation tax violated the Federal and Alabama Constitutions.<sup>141</sup> The Alabama trial court found that their state claims were barred by a prior adjudication, *Bedingfield v. Jefferson County*.<sup>142</sup> Birmingham's acting finance director, and the city itself, brought the *Bedingfield* action, where the court adjudicated a tax dispute.<sup>143</sup> However, the court found that the plaintiffs' claims had not been decided in that case.<sup>144</sup> On appeal, the county argued that the federal claims were also barred.<sup>145</sup> The Alabama Supreme Court agreed, concluding that the claim was precluded because *Richards* and the other plaintiffs were adequately represented in the *Bedingfield* action.<sup>146</sup>

Writing for a unanimous court, Justice Stevens reversed, holding that the plaintiff and others had failed to receive adequate notice or sufficient representation in the *Bedingfield* litigation.<sup>147</sup> Thus, as a matter of federal due process, the prior litigation did not bar the plaintiffs in *Richards* from challenging an allegedly unconstitutional deprivation of their property.<sup>148</sup> Justice Stevens also noted that "state courts are free to develop their own rules for protecting against the relitigation of common issues... [but] extreme applications of...[claim preclusion] may be inconsistent with a federal right that is fundamental in character."<sup>149</sup>

#### **V. States Must Adhere to the Supreme Court's Minimum Due Process Standards**

The fundamental right of due process delineated by the Supreme Court in *Richards* and referenced in *Taylor* establishes the requirements that all state courts must meet. In effect, the *Richards* case states that irrespective of particular substantive state law, parties must still be accorded due process of law.<sup>150</sup> State courts cannot unconstitutionally deprive litigants of their own day in court.<sup>151</sup>

In terms of virtual representation claims, the Court in *Taylor* outlined the discrete and rarely applicable exceptions to the fundamental rule that a litigant is not bound by a judgment to which he or she was not a party.<sup>152</sup> In fact, according to *Taylor*, the adequate representation exception, in order to comport with due process, requires that the preceding case include either special procedures to ensure protection of nonparty interests or an understanding that the first suit was brought in a representative capacity. This was also the same holding in *Richards*.

The only difference in *Taylor* is that Justice Ginsberg sought to clarify the *Richards* holding, because many circuits were misinterpreting it. As a result, she emphasized that representation is “adequate for purposes of nonparty preclusion only if—at a minimum—one of these two circumstances is present” (i.e. special procedures to protect a nonparty or an understanding of representative capacity).<sup>153</sup> The emphasis of the “at a minimum” language reinforces the notion that the federal rules regarding collateral estoppel represent minimum due process requirements that must be met by all other courts.<sup>154</sup> For states, additional due process protection is allowed, but anything less than the federal standard is prohibited.

*Richards*, however, does not preclude using state laws of collateral estoppel in federal court. Moreover, when read in conjunction with *Taylor*, it becomes clear that there are strict prerequisites that must be met in order to succeed on a virtual representation claim.

## **VI. Either State or Federal Collateral Estoppel Standards Apply to FTCA**

### **Cases**

*Taylor* clearly asserts that the preclusive effect of a federal court judgment is determined by federal common law.<sup>155</sup> But *Taylor* never mentions the FTCA specifically and further maintains that state law regarding nonparty preclusion can apply in federal court if the court is sitting in diversity jurisdiction.<sup>156</sup> One could argue that jurisdiction for an FTCA claim has

nothing to do with diversity, as the federal court system is the exclusive forum for tort actions under the FTCA.<sup>157</sup> Then, following this line of reasoning, only the federal rules should apply, as the diversity comment in *Taylor* references non-FTCA claims. This lends credence to the Fifth Circuit's position in *Johnson*; namely, that federal laws of preclusion should be applied in federal court.<sup>158</sup>

However, the opposing argument is that *Taylor* never explicitly mentions the FTCA. In fact, the opinion even permits state laws of preclusion to be used in a federal court that has diversity jurisdiction. The possibility of a federal court using state laws of preclusion in an FTCA claim therefore remains open. This argument bolsters the Sixth Circuit's position that state rules of preclusion should be used in FTCA actions.

In the end, these conflicting points of view both garner support in disparate circuits, rendering collateral estoppel under the FTCA in a state of vacillation.

## **VII. Conclusion**

The Government can still use collateral estoppel against a nonparty if one of the six exceptions outlined in *Taylor* applies.<sup>159</sup> It also remains possible for the Government to use virtual representation as a means of establishing claim preclusion, albeit under limited circumstances. For a virtual representation argument to prevail, the nonparty's interests needed to be adequately represented in the prior case. This requirement is satisfied by: (1) an aligning of interests between the party and nonparty; (2) an understanding that the party is acting as a representative for the nonparty; or (3) court protection of the nonparty's interests.<sup>160</sup> Adequate representation may also require notice of the suit to the nonparty before binding him to the judgment. However, notice alone is not enough to satisfy this requirement.<sup>161</sup>

Additionally, any application of collateral estoppel must comport with due process. To meet this standard, the preceding case must include either special procedures to ensure the protection of nonparty interests or an understanding “that the first suit was brought in a representative capacity.”<sup>162</sup> Clearly, nonparties must always be afforded due process of law.

After *Taylor*, it is still possible to use either state or federal principles of collateral estoppel in toxic tort cases brought under the FTCA. The rules of preclusion will vary with the jurisdiction, and valid arguments can be made for applying either state or federal standards. Nevertheless, no definitive answer regarding which is the proper choice exists. Because the Supreme Court elected not to grant certiorari in *Johnson v. United States*, the issue will probably not be resolved in the near future. Litigants must simply tailor their arguments to meet the requirements of disparate jurisdictions.

In those jurisdictions lacking precedent regarding the state versus federal choice, litigants should obviously argue for the laws that are most favorable to their claims. When arguing for the use of state laws of preclusion, litigants can state that the majority of jurisdictions employ the state approach. By contrast, when arguing for federal laws of preclusion, litigants can cite the *Johnson* case, as it offers a persuasive argument that has been accepted in a majority of the most current cases. Ultimately, a court’s choice of preclusion laws can be exceedingly important in an FTCA toxic tort case—especially when a state’s preclusion laws are more demanding than federal standards.

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\*Daniel Bajger is a third year law student at the Catholic University Columbus School of Law where he serves as the Production Editor of the Journal of Contemporary Health Law and Policy.

<sup>1</sup> See *Montana v. United States*, 440 U.S. 147, 153-154, (1979) (arguing that by “preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,” issue preclusion protects

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against “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”)

<sup>2</sup> A toxic tort is defined as a “civil wrong arising from exposure to a toxic substance, such as asbestos, radiation, or hazardous waste.” See BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>3</sup> *Johnson v. United States*, 576 F.2d 606, 612 (5<sup>th</sup> Cir. 1978) cert. denied 451 U.S. 1018 (1981) (holding that federal collateral estoppels rules apply to other federal court judgments in FTCA claims); but cf. *Donohue ex rel. Estate of Donohue v. U.S.*, No. 2006 WL 2990387, 4 (S.D. Ohio 2006) (concluding that state laws of collateral estoppels apply FTCA actions).

<sup>4</sup> 128 S.Ct. 2161 (2008)

<sup>5</sup> 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4457 (2d ed. 2008).

<sup>6</sup> U.S. CONST. amend. XIV (providing that no state shall “deprive any person of life, liberty, or property, without due process of law”); *id.* amend. V (stating that no person shall be “deprived of life, liberty, or property, without due process of law”); see Edward Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339 (1987) (stating that “by 1868, due process had come to connote a certain core procedural fairness when the [G]overnment moved against a citizen's life, liberty, or property.”)

<sup>7</sup> *Johnson v. United States*, 576 F. 2d 606, 612 (5th Cir. 1978) cert. denied 451 U.S. 1018 (1981).

<sup>8</sup> *Johnson*, 576 F. 2d at 610.

<sup>9</sup> Those basic federal parameters were also addressed in *Hansberry v. Lee*. In that case, the Supreme Court stated:

“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution...prescribes; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.” *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

<sup>10</sup> *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979); see also Michael Dore, *The Future of Collateral Estoppel in Toxic Tort Litigation*, 2 L. OF TOXIC TORTS § 17:9 (2008) (stating that “collateral estoppel is a judge-made doctrine designed to facilitate the reasonable resolution of disputes between parties”); and *Bazuaye v. United States*, 576 F.2d 19, 25 (D.C.D.C. 1999) (concluding that collateral estoppel or issue preclusion bars subsequent litigation of factual issues even if those issues pertain to different claims in the subsequent litigation).

<sup>11</sup> 9 GEOFFREY C. HAZARD ET AL., PLEADING AND PROCEDURE STATE AND FEDERAL 1158 (2005); see also *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (holding that when “an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”)

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<sup>12</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 29, Comment f (1982); *see also First Nat. Bank of Cincinnati v. Berkshire Life Ins. Co.*, 199 N.E.2d 863, 865 (Ohio 1964) (stating that “the reasons generally given for keeping a party, [after receiving a judgment,] from relitigating an issue determined against him by that judgment are (1) that public policy requires an end to litigation, and (2) that the public is interested in protection of a person from being twice vexed for the same cause”); *and 2 Freeman on Judgments* 1318 § 626 (5th ed. 1925).

<sup>13</sup> *See Parklane Hosiery Co., Inc.*, 439 U.S. at 328; *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir.1982).

<sup>14</sup> *See* Eli J. Richardson, *Taking Issue With Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 46 (1995) (positing that “the general objective of collateral estoppel” is to reduce litigation); *see also* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63 (1988) (arguing that the nation has seen “a dramatic growth in litigation, particularly in mass tort cases, [and] duplicative lawsuits now threaten to jam the nation’s judicial machinery”).

<sup>15</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 249 (1980).

<sup>16</sup> *See Parklane Hosiery Co., Inc.*, 439 U.S. at 330, n.14 (mandating that offensive collateral estoppel not be used in mass tort litigation).

<sup>17</sup> *Id.* at 326.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 328.

<sup>20</sup> *Walker v. Kerr-McGee Chemical Corp.*, 793 F.Supp. 688, 694 (N.D. Miss.1992); *see also Stovall v. Price Waterhouse Co.*, 652 F.2d 537, 540 (5th Cir.1981). Although the federal standard is used in the District Court of Mississippi, the state court of Mississippi applies a different standard. That standard states that collateral estoppel operates to bar litigation of an issue where four elements are satisfied: (1) the plaintiff is seeking to relitigate a specific issue; (2) the issue has already been litigated in a prior lawsuit; (3) the issue was actually determined in the prior lawsuit; and (4) the determination of the issue was essential to the judgment in the prior lawsuit. *See Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So.2d 749, 751 (Miss.1982).

<sup>21</sup> *See Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 51 (1st Cir.1997).

<sup>22</sup> *See Bazuaye*, 576 F.2d at 28 (stating that over time the requirements for collateral estoppel “have been liberalized to varying degrees in the States and in the federal courts.”)

<sup>23</sup> *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). With regards to the adversary requirement in collateral estoppel, the issue of what constitutes an adversary has been examined in great depth. Just being on opposite sides of an issue does not satisfy the requirement. Litigants are considered adversaries only if their interests clash, and a claim for relief by one party exists against the other. *See* 3 JOHN J. COUND ET AL., CIVIL PROCEDURE, 1073 (1981).

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<sup>24</sup> *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 683-84 (Mich. 2004); *see also Storey v. Meijer, Inc.*, 431 Mich. 368, 373 n. 3, (1988).

<sup>25</sup> 28 U.S.C. § 1346(b); *see also Johnson*, 576 F. 2d at 610 (maintaining that “state and federal applications of [issue preclusion] may differ, however,...whether state or federal principles apply here must be resolved in the light of the Federal Tort Claims Act itself.”)

<sup>26</sup> *See Caban v. United States*, 728 F. 2d 68, 72 (2nd Cir. 1984); *Richards v. United States*, 369 U.S. 1, 11-13 (1962).

<sup>27</sup> *Id.* (asserting that state-law choice-of-law rules apply in FTCA actions).

<sup>28</sup> *See Johnson*, 576 F. 2d at 612 (holding that federal collateral estoppel rules apply to other federal court judgments in FTCA claims); *but cf. Donohue ex rel. Estate of Donohue v. U.S.*, No. 2006 WL 2990387, 4 (S.D.Ohio 2006) (concluding that state laws of collateral estoppel apply FTCA actions).

<sup>29</sup> *Huffman v. U.S.*, 82 F. 3d 703, 705 (6th Cir.1996).

<sup>30</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 4 (S.D.Ohio 2006) (citing 28 U.S.C. § 1346(b)); *see also In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 361-62 (3d Cir. 2001) (holding that the FTCA does not create a substantive cause of action against the Federal Government).

<sup>31</sup> 28 U.S.C. § 2680.

<sup>32</sup> 28 U.S.C. § 2675(a).

<sup>33</sup> *But cf. Johnson*, 576 F. 2d at 612 (stating that “it is evident that the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States.”) *Johnson* ultimately held that federal laws of preclusion applied to an action brought under the FTCA. *Id.*

<sup>34</sup> *Taylor* 128 S.Ct. at 2167.

<sup>35</sup> *Id.* The certification materials were of considerable value to Herrick's project because planes restored to the original specifications are certified as airworthy without the need to obtain costly engineering analyses or otherwise demonstrate airworthiness to the FAA. *See Herrick v. Garvey*, 200 F. Supp. 2d 1321, 1327 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002).

<sup>36</sup> *Taylor*, 128 S.Ct. at 2168.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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<sup>41</sup> *Taylor*, 128 S.Ct. at 2168.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2169.

<sup>44</sup> *Id.* The Fairchild Corporation nevertheless argued that, because Taylor and Herrick were both working together to restore the plane and had hired the same attorney, it was clear that they were relitigating the identical issue. *Id.*

<sup>45</sup> *Taylor*, 128 S.Ct. at 2169.

<sup>46</sup> *Id.* at 2170.

<sup>47</sup> In terms of virtual representation, the Restatement observes that a nonparty may be bound not only by express or implied agreement, but also through conduct inducing reliance by others. See RESTATEMENT (SECOND) OF JUDGMENTS § 62; see also 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4453 (2d ed. 2008).

<sup>48</sup> BLACK'S LAW DICTIONARY (8th ed. 2004); see also 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4457 (2d ed. 2008) (concluding that “the broadest form of... [virtual representation] would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty;” however, the actual use of virtual representation has not pushed the boundaries of nonparty preclusion quite this far).

<sup>49</sup> *Taylor*, 128 S.Ct. at 2169.

<sup>50</sup> *Id.* at 2171.

<sup>51</sup> Prior to *Taylor*, however, a feeling of general skepticism regarding the amorphous nature of virtual representation developed. See *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970–974 (7th cir. 1998). As the Seventh Circuit noted in *Ahng v. Allsteel, Inc.*, a case in which the court refused to preclude later litigation because of virtual representation, “the doctrine of ‘virtual representation’ recognizes, in effect, a common-law kind of class action. It applies only when there is a practical identity of interests between the former litigant and the present one.” *Id.* at 972 (quoting *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir.1996)). This was the inherent weakness of the doctrine, according to the Seventh Circuit.

<sup>52</sup> *Taylor*, 128 S.Ct. at 2161.

<sup>53</sup> *Id.* at 2172-73.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2173; see also Ryan J. Strasser, *Supreme Court Year in Review*, 55-AUG FED. LAW. 47 (2008) (stating that allowing an expansive doctrine of virtual representation creates a de facto class-action in which some parties with the right to intervene do not receive notice).

<sup>56</sup> *Taylor*, 128 S.Ct. at 2174 (citing *Richards v. Jefferson County*, 517 U.S.793 (1996)).

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; see also Ryan J. Strasser, *Supreme Court Year in Review*, 55-AUG FED. LAW. 47 (2008) (asserting that “a loss of legal rights without an opportunity to be heard violates the Due Process Clause.”)

<sup>59</sup> *Taylor*, 128 S.Ct. at 2176.

<sup>60</sup> *Id.* at 2174.

<sup>61</sup> See *Hansberry v. Lee*, 311 U.S. at 40 (1940) (maintaining that “it is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”)

<sup>62</sup> *Taylor*, 128 S.Ct. at 2174 (stating that an “amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance.”)

<sup>63</sup> *Id.* at 2171.

<sup>64</sup> *Id.*; see also *Sentiek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 487, 508 (2001).

<sup>65</sup> 19 A.L.R. Fed. 709 §3(b) (1974).

<sup>66</sup> *Johnson*, 576 F. 2d at 612; see also *In re Bendectin Prods. Liab. Litig.*, 732 F. Supp. 744 (E.D. Mich. 1990) (demonstrating a stringent federal standard for invoking collateral estoppel wherein the court held that a nonparty to the prior action is collaterally estopped only if (1) he had a direct financial or proprietary interest in the prior litigation, and (2) he assumed control over the prior litigation); and 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4448 (1982) (arguing that the “privity label...[is] losing [its] former capacity to deter functional analysis.”)

<sup>67</sup> *Johnson*, 576 F. 2d at 610. Because the *Johnson* case involved a situation in which the state rules of collateral estoppel, and particularly mutuality requirements, differed from the federal practice, the court distinguished it from other cases that used state rules. *Id.* Those other cases were: *Filice v. United States*, 271 F.2d 782, 783 (9th Cir. 1959), *cert. denied*, 362 U.S. 924, 80 S.Ct. 677, 4 L.Ed.2d 742 (1960); *D'Ambra v. United States*, 396 F.Supp. 1180 (D.R.I.1973) *aff'd* 518 F.2d 275 (1st Cir.1975); *State of Maryland v. Capital Airlines, Inc.*, 267 F.Supp. 298 (D.Md.1967); *Bagge v. United States*, 242 F.Supp. 809 (N.D.Cal.1965); *Falk v. United States*, 375 F.2d 561 (6th Cir. 1967).

<sup>68</sup> *Johnson*, 576 F. 2d at 08.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 609. Prior to the murder, Sergeant Johnson was arrested for sexually assaulting his sister-in-law. *Id.* Johnson’s wife also reported that Sergeant Johnson was harshly disciplining his children and making threats of serious violence to her and others, along with threats of suicide. *Id.* at 608.

<sup>71</sup> *Id.* The psychiatrist at the army base clinic released Sergeant Johnson, knowing that he was not taking his medication. *Johnson*, 576 F. 2d at 609.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* The essential issue in *Johnson* is whether a federal court, in considering the effect of the judgment of another federal court, should apply federal or Georgia rules of collateral estoppel in an action under the FTCA. *Id.* The offensive use of collateral estoppel in this case was particularly troubling in an FTCA context because each individual must establish that his claims have jurisdiction under the FTCA.

<sup>75</sup> *Id.*

<sup>76</sup> *Johnson*, 576 F. 2d at 610.

<sup>77</sup> *Bazuaye*, 576 F.2d at 27. See also Comment, *A Problem—Application of the Law of the Place under the Federal Tort Claims Act*, 58 IOWA L. REV. 713, 714 (1973) (concluding that under the FTCA, “matters of substance shall be governed by the law of the place where the act or omission occurred and matters of procedure by the Federal Rules,” but the decision regarding whether “a particular question is one of substance or of procedure is governed by federal conflict of laws rules.”)

<sup>79</sup> *Bazuaye*, 576 F.2d at 28 (holding that “the *Johnson* court's procedural view of preclusion doctrine is correct.”)

<sup>80</sup> See *id.* at 21 (stating that it is undisputed that a Postal Inspector obtained the \$11,000 from a bail bondsman to whom *Bazuaye* had entrusted it).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 22. On a separate note, because *Bazuaye* never challenged the forfeiture in the administrative proceeding, the funds were declared administratively forfeited. *Id.*

<sup>84</sup> See *id.* at 23 (stating that “although the [G]overnment has not phrased their argument in terms of issue preclusion or collateral estoppel, that is how the argument functions.”)

<sup>85</sup> *Bazuaye*, 576 F.2d at 20. Nevertheless, *Bazuaye* did not prevail in the suit, as “forfeiture law operate[s] to establish as a fact that *Bazuaye* had no right to possess the money at the time of the seizure.” *Id.*

<sup>86</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 1 (S.D.Ohio 2006).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The United States argued that the Court apply the laws of Ohio, Kentucky, and West Virginia (states where *Donohue* was incarcerated from 2000-2003) “in determining whether...collateral estoppel bar[s] [the] Plaintiff from bringing the instant suit.” *Id.* at 3. The United States argued that most federal judicial circuits apply state rules of collateral estoppel in an action brought under the FTCA, even where the prior judgment was that of a federal court. *Id.*

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<sup>90</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 1 (S.D. Ohio 2006)

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* (stating that Steven Donohue was the only potential beneficiary of any damages in the first action, yet the second action was brought by the administratrix of his estate on behalf of many other family members).

<sup>93</sup> *Id.* *See also Huffman v. U.S.*, 82 F.3d 703, 705 (6th Cir.1996) (noting that the FTCA dictates that the Federal Government be liable in tort in the same manner and to the same extent that state law imposes liability on a private individual in similar circumstances).

<sup>94</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 2 (S.D. Ohio 2006). Although the doctrine of issue preclusion is usually raised as an affirmative defense pursuant to Fed.R.Civ.P. 8(c), the Sixth Circuit has established that preclusion can also be raised by a motion. *Westwood Chemical Co., Inc. v. Kulick*, 656 F.2d 12247, 1227 (6th Cir. 1981). A court in the Sixth Circuit can also consider a defendant's collateral estoppel defense under the parameters of Fed.R.Civ.P. 12(b)(6) (the failure to state a claim upon which relief can be granted).

<sup>95</sup> *See Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 1 (S.D. Ohio 2006). In *Donohue*, the United States attempted to apply the laws of Ohio, Kentucky, and West Virginia but ultimately failed. *Id.* The United States chose these states because their collateral estoppel rules are not as rigorous as the federal definition. For instance, Ohio only has three requirements for collateral estoppel, determining whether the issue “(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) [whether] the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994).

<sup>96</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 1 (S.D. Ohio 2006).

<sup>97</sup> *See id.* (stating that the three cases the United States cited to bolster their argument that federal rules of collateral estoppel be asserted to prevent relitigation in a subsequent suit under the FTCA were not “binding on this Court”). The sources that the United States cited were *D'Ambra*, 396 F.Supp. at 1180, *Gliedman v. Capital Airlines, Inc.*, 267 F.Supp. 298 (D.C.Md.1967), and *Filice*, 271 F.2d at 782. *Id.*

<sup>98</sup> *See Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 1 (S.D. Ohio 2006) (concluding that “in two of these cases, *D'Ambra* and *Capital Airlines*, despite deciding that state law applied, the courts found no controlling state court decisions to apply on the matter of res judicata and collateral estoppel and ‘predicted’ state law by citing leading federal cases.”)

<sup>99</sup> *Id.* The court believed that the application of state law “on the preclusion matter would [not] alter the Court's analysis or outcome, ... [as] the analysis of Ohio, Kentucky, and West Virginia law pertaining to res judicata and collateral estoppel reveal[s] that these state laws do not materially differ from the federal law.” *Id.*

<sup>100</sup> *Johnson*, 576 F. 2d at 612. “Recovery under the [FTCA] is subject to the limitations inherent in the language of the Tort Claims Act itself, as well as the explicit limitations of 28 U.S.C. § 2401-16, 2671-

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80.” *Id.* In interpreting these limitations, a court may be required to apply federal law. *Id.* See 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3658 (2d ed. 2008). For example, many courts hold that federal law governs the interpretation of 28 U.S.C. § 2401, regarding the tolling of the statute of limitations in an FTCA action. See *Mendiola v. United States*, 401 F.2d 695 (5th Cir. 1968). Similarly, “the Supreme Court looked only to the legislative history and statutory language under 28 U.S.C. § 2680 in determining the scope of the discretionary function exception to Tort Claims Act liability.” *Johnson*, 576 F. 2d at 612. Furthermore, in *Laird v. Nelms*, the Court ruled that the statutory language is “a uniform federal limitation on the types of acts . . . for which the United States has consented to be sued.” *Laird v. Nelms*, 406 U.S. 797, 799 (1972); see also *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968). In the end, state laws could should not be used in a discretionary function or statute of limitations context because they are federal jurisdictional questions, and preclusion cannot be cast as a jurisdictional issue under the FTCA.

<sup>101</sup> *Bazuaye v. United States*, 576 F.2d at 26 (concluding that *Bowen v. United States*, 570 F.2d 1311, 1319 (7th Cir.1978), *Filice*, 271 F.2d at 783, and *D'Ambra*, 396 F.Supp. at 1181 all applied state law to measure the preclusive effect of prior federal decision.

<sup>102</sup> *Richards*, 369 U.S. at 6.

<sup>103</sup> 28 U.S.C. § 1346(b).

<sup>104</sup> *Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1963) (quoting *Richards*, 369 U.S. at 11).

<sup>105</sup> *Southern Pacific Transportation Co. v. United States*, 462 F.Supp. 1193, 1213 (E.D.Cal.1978).

<sup>106</sup> See, e.g. *Lambertson*, 528 F.2d at 444.

<sup>107</sup> *Richards*, 369 U.S. at 11.

<sup>108</sup> *Id.* at 6-7.

<sup>109</sup> See R. Weintraub, *Commentary on the Conflict of Laws*, 200 (1971).

<sup>110</sup> *Bowen*, 570 F.2d at 1313.

<sup>111</sup> *Id.* (citing *Richards*, 369 U.S. at 8-10). The main issue in *Bowen* was whether a determination in a license suspension proceeding by the National Transportation Safety Board that the plaintiff “violated Federal Aviation Rules by flying an aircraft without deicing equipment into known icing conditions establishes contributory negligence by collateral estoppel and precludes recovery.” *Id.* To determine this issue the court had to decide whether state or federal law controls. *Id.* The court held that Indiana law controls; consequently, the District Court's summary judgment for the United States based on collateral estoppel was correct. *Id.*

<sup>112</sup> *Id.* at 1319.

<sup>113</sup> *Id.* at 1320.

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<sup>114</sup> *Filice*, 271 F.2d at 783; *D'Ambra*, 396 F.Supp. at 1181; *see also Gliedman*, 267 F.Supp. at 298 (holding that state laws of preclusion applied in FTCA cases); *but c.f. Johnson*, 576 F. 2d at 610 (stating that “because none of these opinions discussed the rationale for applying state collateral estoppel doctrine, we cannot view them as standing for the proposition that state doctrine controls the collateral estoppel effect given by one federal court to the judgments of another, where the state doctrine in question continues to apply a mutuality rule that has been substantially modified in the federal courts.”)

<sup>115</sup> *Bazuaye*, 576 F.2d at 26.

<sup>116</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 4 (S.D.Ohio 2006).

<sup>117</sup> *Bowen*, 570 F.2d at 1316 (citing *Miree v. DeKalb*, 433 U.S. 25, 29 n. 4 (1977)).

<sup>118</sup> *Miree*, 433 U.S. at 30.

<sup>119</sup> *Bowen*, 570 F.2d at 1316 (citing *Miree*, at 433 U.S. 29 n. 4 (1977)).

<sup>120</sup> *Miree*, 433 U.S at 26.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 27

<sup>123</sup> *Id.* at 26. Because the only basis of federal jurisdiction alleged for the petitioners' claim against the respondent was diversity of citizenship, the case would unquestionably be governed by Georgia law but for the fact that the United States is a party to the contracts in question, entered into pursuant to a federal statute. *Id.* at 27.

<sup>124</sup> *Id.*

<sup>125</sup> *Falk*, 375 F.2d at 562.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* As a result of both of these collisions, the decedent was thrown about in his car, the door was knocked open, and the decedent was drenched in the rain. *Id.* At the trial court in the first case, the judge found no causal connection between the accident and the decedent's fatal case of pneumonia. *Id.* at 563.

<sup>128</sup> *Id.* In diversity cases where the action is first brought in a federal court, however, the reasoning is different. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *rehearing denied*, 514 F.2d 1072, *cert. denied*, 423 U.S. 908 (1975) (stating that if a case is sitting in diversity jurisdiction, as in federal-question jurisdiction, the federal doctrine of preclusion “governs the question of whether a federal court is bound by the prior judgment of another federal court”).

<sup>129</sup> *Falk*, 375 F.2d at 564.

<sup>130</sup> *Id.*

<sup>131</sup> *Donohue ex rel. Estate of Donohue*, No. 2006 WL 2990387, 4 (S.D.Ohio 2006).

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<sup>132</sup> 49 A.L.R. Fed. 326 (1980) (citing *Bernhard v. Bank of America Nat. Trust & Savings Ass'n.*, 19 Cal.2d 807 (1942)). In *Bernhard*, the defendant, lacking mutuality of estoppel, asserted the plea of res judicata against the plaintiff. *Bernhard*, 19 Cal.2d at 814. Justice Traynor, writing for a unanimous California Supreme Court, held that the affirmative defense of res judicata is available against a plaintiff from a prior proceeding, despite the plaintiff's "formal change in capacity." *Id.* The court reasoned that the "plaintiff...brought the present action in the capacity of administratrix of the estate, [and] in this capacity she represents the very same persons and interests that were represented in the earlier hearing on the executor's account." In the preceding case, "the plaintiff and the other legatees who objected to the executor's account represented the estate of the decedent." *Id.* at 814. If the mutuality requirement was not abolished, this mere title change is enough to bar the defendant's res judicata claim against the plaintiff. *Id.* In the end, in terms of applying collateral estoppel, the important question to be asked, according to *Bernhard*, is whether the party being estopped has had his or her day in court. Due process concerns are therefore firmly embedded in the opinion.

<sup>133</sup> 31 A.L.R.3d 1044 (1970). Some contend that *Bernhard* was decided incorrectly, and that the mutuality requirement must remain intact. See Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of Am. Is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not*, 12 REV. LITIG. 391, 431 (1993) (arguing that the *Bernhard* "holding was not necessary to decide the case [and that] the same result would have been reached under well-established doctrine; [moreover, *Bernhard* also] confuses terminology and improperly uses authority.")

<sup>134</sup> See John C. McCoid, *A Single Package for Multiparty Disputes*, in *Perspectives on Civil Procedure* 245 (1987) (explaining that "mutuality restricts estoppel" and that the *Bernhard* case has been the most influential in advocating for the elimination of mutuality).

<sup>135</sup> 49 A.L.R. Fed. 326 (1980); see also *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 n.13 (5th Cir. 1982) (stating that the injustice of applying collateral estoppel in mass tort cases is especially obvious). In the mass toxic tort arena, collateral estoppel engenders a host of equitable concerns for litigants. See MANUAL FOR COMPLEX LITIGATION § 21.63 (arguing that "because complex cases often involve numerous parties and issues, a fair and efficient trial structure is needed;" accordingly, the parties in the lawsuit may elect to hold a "trial of one or more test cases, with appropriate provision being made concerning the estoppel effect of a judgment.")

<sup>136</sup> *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000); but cf. *Blohm v. Bradley*, 821 F.Supp. 1451 (S.D.Ala.,1993) (holding that an additional element for collateral estoppel requires that the party against whom the earlier decision is asserted has had a full and fair opportunity to litigate the issue in the earlier proceeding).

<sup>137</sup> *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir.2000); cf. *Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 51 (1st Cir.1997) (stating that a party seeking to invoke the doctrine of collateral estoppel must establish: "(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) *the determination of the issue must have been essential to the judgment*" (emphasis added)).

<sup>138</sup> For example, in the recent Vioxx mass tort litigation, where studies showed that Vioxx increased the risk of heart attacks, 15,000 cases were filed against Merck and, "as in many mass tort cases, they were

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consolidated in various forums.” See Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2379 (2008) (citing *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 452 (E.D. La. 2006)). Over 7,000 cases were removed to or filed in federal court and aggregated in the United States District Court for the Eastern District of Louisiana. *Id.* Another 8,000 cases were also filed in New Jersey, California, and Texas. *Id.* Deciding which rules of preclusion to use in a case like this can be challenging.

<sup>139</sup> *Taylor*, 128 S.Ct. at 2172.

<sup>140</sup> *Richards*, 517 U.S. at 797; see also Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty’s Claim*, 68 TUL. L. REV. 1303, 1305 (1994) (concluding that “at a minimum, due process requires notice and the opportunity for meaningful participation in any suit that deprives a person of his property interest in the lawsuit.”)

<sup>141</sup> *Richards*, 517 U.S. at 795.

<sup>142</sup> *Id.*; see also Michael Dore, *The Future of Collateral Estoppel in Toxic Torts Litigation*, 2 L. OF TOXIC TORTS § 17:9 (2008) (stating that “it should be noted that courts have been less concerned with applying collateral estoppel principles to prevent plaintiffs from presenting toxic tort claims which have already been resolved against them in other forums such as workers compensation tribunals.”)

<sup>143</sup> *Richards*, 517 U.S. at 795.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 796.

<sup>147</sup> *Id.* Binding a nonparty to a judgment he or she was not a part of can violate due process for numerous reasons. See Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1486 (1978) (concluding that “the lack of any participation by the nonparty in the litigation of the issue in the first action may have deprived him of the chance to pursue particular arguments, employ particular strategy, choose the attorney whom he thinks will best represent him, and otherwise to shape the course of the litigation.”)

<sup>148</sup> *Richards*, 517 U.S. at 796.

<sup>149</sup> *Id.* at 797; but c.f. Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1486 (1978) (stating that the objection to permitting estoppel against a prior party is unpersuasive for two reasons: “first, the litigant has had a chance to come before the court to present his case, and any failure to make such an effort was by his own choice; second, estoppel is commonly not permitted against a prior party, at the instance of a nonparty, unless the issue was “fully and fairly litigated” in the first action.”)

<sup>150</sup> *Richards*, 517 U.S. at 797.

<sup>151</sup> *Id.* at 798. See U.S. CONST. amend. V (stating that no person shall be “deprived of life, liberty, or property, without due process of law.”)

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<sup>152</sup> *Taylor*, 128 S.Ct. at 2175. This notion perhaps originates with Justice Brandeis when, in 1934, he stated that “the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger.” See *Chase National Bank v. Norwalk*, 291, U.S. 431 (1934); see also John C. McCoid, *A Single Package for Multiparty Disputes*, in *Perspectives on Civil Procedure* 245 (1987) (stating that the Justice Brandeis’ “cryptic statement” left a lot more unexplained than explained in terms of nonparty preclusion).

<sup>153</sup> *Taylor*, 128 S.Ct. at 2175.

<sup>154</sup> When examining aspects of fairness in collateral estoppel, Professor George begins by tracing issue preclusion back to the venerable principle of stare decisis. Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, in *Perspectives on Civil Procedure* 271 (1987). He also argues that the purpose of stare decisis is to establish legal norms which control analogous fact patterns. *Id.* Similarly, collateral estoppel enables litigants to possess a “detailed definition of settled areas of law, so that citizens have notice of, and can claim reliance on these settled areas.” *Id.* Fundamental similarities between the concept of stare decisis and collateral estoppel exist. Reliance on judicial results and fairness are two principles that form the bedrock of both doctrines.

<sup>155</sup> *Taylor*, 128 S.Ct. at 2171.

<sup>156</sup> *Id.*

<sup>157</sup> 28 U.S.C. § 1346(a)(2).

<sup>158</sup> *Johnson*, 576 F. 2d at 613.

<sup>159</sup> *Taylor*, 128 S.Ct. at 2172-3; see also Richard J. Lippes, *Toxic Torts: A Plaintiff's Perspective*, in *Toxic Tort Litigation* 27 (Richard J. Lippes & Barbara Wrubel ed., 1992) (stating that when multiple cases arise from the same incident, and where the defendant is the same in each case, a motion can be made for collateral estoppel after the issues are fully developed in a trial and a verdict rendered).

<sup>160</sup> *Taylor*, 128 S.Ct. at 2176.

<sup>161</sup> *Id.* at 2174.

<sup>162</sup> *Richards*, 517 U.S. at 793; cf. 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4405 (2d ed. 2008) (concluding that a “party asserting preclusion must carry the burden of establishing all necessary elements.”)