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# Res Judica-duh! The Impermissible Expansion of Claim Preclusion Through Louisiana Code of Civil Procedure Article 425

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# Res Judica-*duh*! The Impermissible Expansion of Claim Preclusion Through Louisiana Code of Civil Procedure Article 425

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## INTRODUCTION

In July 2020, the Louisiana Fifth Circuit Court of Appeal held that a plaintiff who filed two separate lawsuits arising out of the same transaction or occurrence was precluded from litigating the second suit against a *different* group of defendants, not by the doctrine of res judicata, but by Louisiana Code of Civil Procedure article 425.[1] The Fifth Circuit's decision reflects a substantial departure from claim-preclusion law in Louisiana, which has historically only barred subsequent suits between the *same* parties.[2] This prerequisite to barring a claim has long been an essential feature of claim-preclusion devices in both civil law and common law traditions.[3] The Fifth Circuit's decision is one of the latest cases in a split among the Louisiana Circuit Courts of Appeal regarding whether article 425 bars subsequent suits arising out of the same transaction or occurrence but between different parties.[4] The issue driving this split is the manifestation of a question that has quietly persisted in Louisiana for decades: what is the true function of article 425 and how does it relate to the law of res judicata?

Louisiana's current res judicata law, governed by Louisiana Revised Statutes §§ 13:4231 and 13:4232, precludes a lawsuit when there is a valid and final judgment from another suit that involved the same parties and arose out of the same transaction or occurrence as the current suit.[5] Historically, Louisiana followed the narrow civil law doctrine of res

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1. *See* Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020).

2. *See* M. David Kurtz & Mark W. Frilot, *Res Judicata in Louisiana: A Synthesis of Competing Interests*, 53 LA. B.J. 445, 445 (2006).

3. M.W.K., *Res Judicata: The Requirement of Identity of Parties*, 91 U. PENN. L. REV. 467 (1943).

4. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445, 448 (La. Ct. App. 1st Cir. 2002); Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697, 700 (La. Ct. App. 3d Cir. 2008); Ward v. State, Dept. of Transp. & Dev., 2 So. 3d 1231, 1235 (La. Ct. App. 2d Cir. 2009); *Handy*, 298 So. 3d at 390; Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542, at *10 (La. Ct. App. 4th Cir. Oct. 14, 2021).

5. LA. REV. STAT. ANN. § 13:4231 (2021).

judicata.[6] But in 1990, the Louisiana Legislature expanded the doctrine of res judicata to be more akin to the common law model, and this version of res judicata is still in effect today.[7] Because these significant changes to res judicata would have far-reaching consequences across Louisiana's procedural law, the legislature also amended several Louisiana Code of Civil Procedure articles—including article 425—in the same act as the res judicata amendments, hereinafter referred to as "the 1990 Res Judicata Act" or "the Act."[8]

Before the 1990 Res Judicata Act, Louisiana Code of Civil Procedure article 425 governed the doctrine of "splitting a cause of action," which historically functioned as a distinct claim-preclusion device but became confused and intertwined with res judicata in the years leading up to the Act.[9] Today, article 425 provides, "A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation."[10] Notably, unlike the res judicata statutes, the language of this article does not limit its application to suits "between the same parties."[11] At first, courts consistently treated the new version of article 425 as synonymous with the doctrine of res judicata,[12] but the absence of this "between the same parties" language has led some courts to interpret article 425 differently.[13] The Second, Third, and Fourth circuits have held that article 425 is merely a reference to the requirements of res judicata, and thus a claim can never be precluded unless it is between the same parties as a prior claim.[14] In contrast, the First and Fifth circuits have found

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6. *See* Hope v. Madison, 193 So. 666, 668 (La. 1940) ("[T]he law and jurisprudence of this state with respect to the plea of res judicata is different from the so-called common law doctrine . . . .").

7. Act No. 521, 1990 La. Acts 1174.

8. *Id.*

9. John A. Dixon, Jr., Robert W. Booksh, Jr. & Paul L. Zimmering, *Res Judicata in Louisiana Since* Hope v. Madison, 51 TUL. L. REV. 611, 641 (1977); Peter Wilbert Arbour, *The Louisiana Concept of Res Judicata*, 34 LA. L. REV. 763, 779 (1973).

10. LA. CODE CIV. PROC. ANN. art. 425 (2021).

11. *Id.*; LA. REV. STAT. ANN. § 13:4231 (2021).

12. Wood v. May, 658 So. 2d 8, 9 (La. Ct. App. 4th Cir. 1995); Millet v. Crump, 704 So. 2d 305, 306 (La. Ct. App. 5th Cir. 1997); Fine v. Reg'l Transit Auth., 676 So. 2d 1134, 1136 (La. Ct. App. 4th Cir. 1996).

13. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445, 448 (La. Ct. App. 1st Cir. 2002); Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020).

14. Ward v. State Dept. of Transp. & Dev., 2 So. 3d 1231, 1234 (La. Ct. App. 2d Cir. 2009); Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697, 700 (La.

that article 425 operates as an independent claim-preclusion device and does not require the parties in each suit to be the same for a claim to be precluded.[15] Until this split is resolved, litigants in Louisiana will be uncertain of whether their claims and defenses are validly asserted or wrongfully precluded under article 425.

An independent statutory analysis and review of the legislative history of article 425 and the 1990 Res Judicata Act reveal that the Second, Third, and Fourth circuits correctly interpreted article 425 as a warning to litigants of the effects of res judicata, rather than as an independent claim-preclusion device. To resolve this circuit split, the Louisiana Legislature should repeal article 425 and redesignate §§ 13:4231 and 4232 as Code of Civil Procedure articles. Article 425's operation as a broad reference to §§ 13:4231 and 4232 without expressly referencing those statutes has understandably led to the interpretation that the legislature intended article 425 to continue to function as a distinct claim-preclusion device, as it did before the 1990 Res Judicata Act. Repealing article 425 resolves this ambiguity by eliminating the redundant representation of res judicata in the law. Further, because res judicata is an important, central precept of Louisiana's procedural law, it belongs in the Louisiana Code of Civil Procedure rather than in the Revised Statutes. Redesignating §§ 13:4231 and 4232 as Code of Civil Procedure articles maintains res judicata's position in the Code that would otherwise be lost by the mere repeal of article 425.

Part I of this Comment provides background information about Louisiana's history of res judicata, article 425, and the amendments to both in the 1990 Res Judicata Act. Part II examines the current circuit split regarding the interpretation of article 425 and its relationship to res judicata. Part III of this Comment resolves the circuit split through independent statutory analysis of article 425, including examination of the article's plain language and purpose, its legislative history, and its relationship to other Code of Civil Procedure provisions. Finally, Part III concludes by recommending the repeal of article 425 and redesignation of §§ 13:4231 and 4232 to resolve the circuit split.

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Ct. App. 3d Cir. 2008); Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542 (La. Ct. App. 4th Cir. Oct. 14, 2021).

15. *Westerman*, 834 So. 2d at 448; *Handy*, 298 So. 3d at 390.

## I. THE DEVELOPMENT OF THE COMPLEX RELATIONSHIP BETWEEN RES JUDICATA AND ARTICLE 425

When introduced, res judicata and article 425 governed entirely different concepts, but over time, courts and scholars gradually associated the two to such a degree that some began referring to article 425 as a "corollary" to res judicata.[16] The pervasiveness of this corollary view is evident in the treatment of article 425 in the 1990 Res Judicata Act, which ultimately led to the current circuit split.

### *A. Res Judicata: From Civil to Common Law*

Res judicata, which literally translates to "the thing adjudged,"[17] precludes the relitigation of matters already judicially decided.[18] Res judicata allows parties to determine with certainty their rights and obligations with regard to a particular incident and prevents the imposition of conflicting decisions.[19] It also promotes judicial efficiency and prevents harassment through repeated litigation of the same controversy.[20] Res judicata must balance these rationales with the fundamental purpose of the courts to hear and adjudicate all disputes without depriving anyone of their day in court.[21] Common law jurisdictions base their res judicata doctrine on the concept of extinguishing the cause of action.[22] Under this idea of extinguishment, once a judgment is final, all claims and issues that a party *might* have pled with regard to that cause of action merge into the judgment, barring the parties to the litigation from asserting those claims in any future action.[23]

The civil law tradition bases its narrower doctrine of res judicata on an irrebuttable presumption of the correctness of judgments.[24] In other words, because a court's judgment on fully litigated matters is presumably correct, a subsequent suit on the same matters could not, and should not,

16. Sutterfield v. Fireman's Fund Am. Ins. Co., 344 So. 2d 1159, 1161 (La. Ct. App. 4th Cir. 1977); Succession of Raziano, 538 So. 2d 1136, 1138 (La. Ct. App. 5th Cir. 1989).
17. R.G. Claitor's Realty v. Juban, 391 So. 2d 394, 397 (La. 1980).
18. Arbour, *supra* note 9, at 763.
19. Dixon et al., *supra* note 9, at 611.
20. Arbour, *supra* note 9, at 763.
21. *Id.* at 764.
22. *Id.*
23. *Id.*
24. *Id.*

reach a different result.[25] Because res judicata in the civil law is motivated by a desire to prevent contradictions, it only precludes litigation of a suit that is practically identical to a prior suit.[26] In contrast, the common law's goals of promoting judicial efficiency and minimizing harassment of defendants result in a much broader application of res judicata.[27] Louisiana's law of res judicata originated from the civil law tradition,[28] but the Louisiana Legislature expanded the law in 1990 to reflect common law res judicata principles.[29]

*1. Origins: Louisiana Civil Code Article 2286*

For most of Louisiana's history, Louisiana Civil Code article 2286, which has since been repealed, governed the doctrine of res judicata.[30] Originating from the Code Napoleon of 1804,[31] article 2286 provided:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.[32]

The restrictiveness of the word "only" in the first sentence of the article reflects its narrow civil law origins and strict basis in the correctness-of-judgment rationale.[33] Under this version of the article, res judicata barred a second action only when a prior action (1) sought the same relief, (2) was based on the same cause of action, and (3) was between the same parties.[34] These three elements were often referred to as the three "identities":

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25. McClendon v. State, Dep't of Transp. & Dev., 642 So. 2d 157, 159 (La. 1994).

26. Arbour, *supra* note 9, at 764.

27. *Id.*

28. Hope v. Madison, 193 So. 666, 668 (La. 1940).

29. Kurtz & Frilot, *supra* note 2, at 445.

30. Mitchell v. Bertolla, 340 So. 2d 287, 290–91 (La. 1976).

31. This article was codified into the Louisiana Civil Code of 1808 as article 252. *Id.* Later, in the Louisiana Civil Code of 1870, the legislature moved res judicata to article 2286, where it remained until it was repealed in 1984.

32. LA. CIV. CODE ANN. art. 2268 (1870).

33. Arbour, *supra* note 9, at 764.

34. Sutterfield v. Fireman's Fund Am. Ins. Co., 344 So. 2d 1159, 1161 (La. Ct. App. 4th Cir. 1977); Kurtz & Frilot, *supra* note 2, at 445.

identity of thing demanded, identity of cause of action, and identity of parties.[35]

When interpreting article 2286's identity-of-cause-of-action requirement in *Mitchell v. Bertolla*, the Louisiana Supreme Court found that the words "cause of action" in article 2286 were a mistranslation of the French source article and instead interpreted them to mean "cause."[36] The court defined "cause" as "the juridical or material fact which is the basis of the right claimed, or the defense pleaded"[37] and went on to explain that "cause" in Louisiana may be likened to the grounds on which the cause of action is based.[38] Thus, under the civil law res judicata regime in Louisiana, a plaintiff could repeatedly sue the same defendant for the same harm as long as he asserted a new legal theory of recovery or sought different relief.[39]

For example,[40] suppose A and B enter into a contract of lease. A, the lessor, later files suit against B, the lessee, seeking dissolution of the contract for B's alleged nonpayment of rent. The court rules in favor of B and dismisses A's action with prejudice. Thereafter, A files a second suit against B, again seeking dissolution of the contract, but instead argues that

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35. Marilyn C. Maloney, Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158, 165 (1974); Comment, *Litigation Preclusion in Louisiana:* Welch v. Crown Zellerbach Corporation *and the Death of Collateral Estoppel*, 53 TUL. L. REV. 875, 878 (1978).

36. Mitchell v. Bertolla, 340 So. 2d 287, 292 (La. 1976).

37. *Id.* at 291 (quoting 2 PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL 34 (11 ed. 1939)).

38. *Id.*

39. *See, e.g.*, Rivette v. Moreau, 336 So. 2d 864, 866 (La. 1976) (defense to probate of statutory will in prior suit based on testator's inability to read and write does not foreclose defense to probate of will in subsequent suit based on alleged revocation by testator); Scurlock Oil Co. v. Getty Oil Co., 294 So. 2d 810, 819 (La. 1974) (first suit seeking cancellation of assignee's oil lease on grounds that royalties were not paid, that ninety days had lapsed before production commenced anew and on two other grounds; subsequent suit seeking cancellation on ground that lease was sublease and not assignment and was extinguished when main lease was cancelled); Nicholson v. Holloway Planting Co., 284 So. 2d 898, 901 (La. 1973) (prior suit for injunction for obstruction of servitude of drain; subsequent suit for injunction for obstruction of servitude of drain and damages that accrued subsequent to first suit); Leadman v. First Nat'l Bank, 3 So. 2d 739, 741 (La. 1941) (in the first suit, minor plaintiff sought to recover money based on allegedly fraudulent scheme used by bank; in second suit, same plaintiff demanded return of money based on expenditure of his funds without court authorization).

40. This example is adapted and simplified from the facts of the *Mitchell* case.

the contract is null for fraud. B files a peremptory exception raising the objection of res judicata. Here, both suits are between A as lessor and B as lessee; therefore, the parties are the same. Additionally, the relief demanded in both suits is the same: dissolution of the contract. However, the cause in the first suit is the nonpayment of rent, and the cause in the second suit is fraud.[41] Thus, one of the three identities under article 2286 is not met, and res judicata does not preclude A from bringing the second suit. Although this result is contrary to Louisiana's current res judicata laws, the civil law correctness-of-judgment rationale supports this result. The court in the first suit did not rule on whether B committed fraud against A, so a judgment in the second suit would not contradict the correctness of the first judgment.

Under different circumstances, however, the correctness-of-judgment rationale is no longer adequately supported. Suppose C and D enter into a contract of sale, and C subsequently sues D, seeking dissolution of the contract for D's failure to perform. The court finds that D did not breach his duty to perform under the contract and rules in favor of D. Subsequently, C files a new suit against D in a different court, again alleging D's failure to perform, but this time seeking damages. The two actions are between the same parties and are based on the same cause: D's failure to perform. However, in this factual scenario, the thing demanded is different. In the first suit, C sought dissolution, but in the second, C sought damages. Again, the three identities are not met, and thus res judicata does not preclude the second suit. However, suppose the second court rules in favor of C, finding that D did breach his duty to perform under the contract. Now, the judgment of the first court, which found that D did not breach his duty, has been contradicted, and the correctness-of-judgment rationale no longer applies. Inconsistent and inequitable results like this frustrated litigants and confused attorneys and courts for years until the legislature expanded the doctrine of res judicata in 1990.

*2. Louisiana Revised Statutes § 13:4231 and the Shift to Common Law Res Judicata*

The 1984 Civil Code Revision, which significantly changed the structure of the Civil Code, redesignated article 2286 to its current location

41. Remember that cause is the juridical or material fact that is the basis of the right claimed. Here, A is claiming the right to dissolution of the contract. In the first suit, the basis of that claim is the fact that B did not pay rent. In the second suit, the basis of that claim is the fact that B fraudulently induced A to enter into the contract. Thus, the juridical and material facts, or grounds for recovery, are different.

at Louisiana Revised Statutes § 13:4231 but did not substantively change the law.[42] Six years later, the legislature passed the 1990 Res Judicata Act to expand the doctrine of res judicata to be more akin to the common law.[43] The Act implemented this shift through three changes: first, it completely rewrote the general rules of res judicata in § 13:4231; second, it enacted Louisiana Revised Statutes § 13:4232, which provided exceptions to the rules of § 13:4231; and finally, it amended several related articles in the Code of Civil Procedure, including article 425.[44]

Today, § 13:4231 provides that "a valid and final judgment is conclusive *between the same parties*, except on appeal or other direct review" such that "all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished . . . ."[45] Thus, generally, for Louisiana's current law of res judicata to preclude a lawsuit, there must be a valid and final judgment in a prior lawsuit that (1) involved the same parties as the subsequent suit and (2) arose out of the same transaction or occurrence as the subsequent suit.[46] The change shifted the focus of the inquiry from "cause" or "cause of action" to "transaction or occurrence"[47] and eliminated the requirement that the subsequent suit have the same demand for relief as the previous suit.[48]

By predicating the applicability of res judicata on the transaction or occurrence instead of the theory of recovery, the 1990 Res Judicata Act significantly broadened the law of res judicata to preclude far more suits than before.[49] For example, in the first hypothetical above, A was able to separately sue B under different theories of recovery because the two actions were not based on the same cause.[50] Under the new law, res judicata would bar A's second suit because both suits are based on the

42. Saul Litvinoff, Introduction, *The 1984 Revision of the Louisiana Civil Code's Articles on Obligations—A Student Symposium*, 45 LA. L. REV. 747, 747 (1985); LA. REV. STAT. ANN. § 13:4231 cmt. a (1984).

43. Act No. 521, 1990 La. Acts 1174; Kurtz & Frilot, *supra* note 2, at 445.

44. Act No. 521, 1990 La. Acts 1174. The amendments to § 13:4231 also added issue preclusion to the statute, but this change is not relevant to understanding the historical relationship between res judicata and article 425, which only speaks to claim preclusion. For a brief explanation of issue preclusion, see *infra* note 218.

45. LA. REV. STAT. ANN. § 13:4231 (2021) (emphasis added).

46. *Id.*

47. The comments describe the "same transaction or occurrence" inquiry as "comparatively easy to determine." *Id.* § 13:4231 cmt. a.

48. *Id.*

49. *Id.*

50. *See supra* hypothetical in text beginning at note 41.

same transaction or occurrence, the contract of lease.[51] The comments to the § 13:4231 amendment explain that the prior version of res judicata was "too narrow to fully implement the purpose of res judicata" and that this change promotes judicial efficiency and fairness, prevents needless relitigation of the same facts, and frees defendants from vexatious litigation.[52] This comment exemplifies the legislature's choice to shift Louisiana's res judicata away from the correctness-of-judgment rationale of the civil law toward the extinguishment rationale of the common law.

The legislature's significant expansion of res judicata necessitated the revision of related procedural provisions, which were also amended as part of the 1990 Res Judicata Act.[53] For example, article 891, which provides the requirements for the form of petitions, previously required petitions to set forth a "concise statement of *the object of the demand* and of the material facts upon which the *cause of action* is based."[54] The 1990 Res Judicata Act amended article 891 to require a "concise statement of *all causes of action* arising out of, and of the material facts of, *the transaction or occurrence* that is the subject matter of the litigation."[55] The Act amended several other Louisiana Code of Civil Procedure articles in a similar manner, simply updating language regarding "object of the demand" or "cause of action," based on pre-amendment res judicata law, to the new res judicata standard of "same transaction or occurrence."[56]

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51. See LA. REV. STAT. ANN. § 13:4231 cmt. a (2021), which uses the *Mitchell* case, on which this hypothetical is based, to demonstrate this expansion. Similarly, in the second hypothetical, C was able to separately sue D for dissolution of the contract in the first suit and damages in the second because the object of the demand had changed, but the new version of res judicata would bar C's second suit because both suits are based on the same transaction or occurrence, the contract of sale.

52. *Id.*

53. Act No. 521, 1990 La. Acts 1174.

54. LA. CODE CIV. PROC. ANN. art. 891 (1960) (emphasis added).

55. LA. CODE CIV. PROC. ANN. art. 891 (2021) (emphasis added) (The comment to the amendment states, "This Article is amended to reflect the changes made in the defense of res judicata.").

56. Article 531, which governs lis pendens, previously provided an exception by which a defendant may have a second suit dismissed when "two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object . . . ." LA. CODE CIV. PROC. ANN. art. 531 (1960). The current language allows a defendant to dismiss a second suit when "two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities . . . ." LA. CODE CIV. PROC. ANN. art. 531 (2021). For another example, see article 532.

Other amendments in the 1990 Res Judicata Act were more significant, such as those in Louisiana Code of Civil Procedure article 1061, which governs reconventional demands.[57] The previous version of article 1061 provided that a defendant *may* assert any causes of action he may have against the plaintiff in a reconventional demand.[58] Because of the permissive language of this version of the article, a defendant who was sued for his negligence in a car accident could seek damages for the plaintiff's negligence in a separate lawsuit instead of in a reconventional demand.[59] This result was consistent with the pre-1990 doctrine of res judicata because the demands (the plaintiff's damages and the defendant's damages) and the causes (the defendant's negligence and the plaintiff's negligence) were different.[60] The new res judicata law, however, would preclude this defendant from asserting his negligence claim in a separate lawsuit because it arose out of the same transaction or occurrence as the first lawsuit—the car accident.[61] Accordingly, the 1990 Res Judicata Act added a paragraph to article 1061, which now *requires* the defendant to assert all causes of action he may have against the plaintiff that arise out of the same transaction or occurrence that is the subject matter of the principal action.[62]

The Code of Civil Procedure article that underwent the most significant amendment in the 1990 Res Judicata Act is article 425.[63] However, the exact function of amended article 425 is still unclear, and this uncertainty has led to the current split among the Louisiana Circuit Courts of Appeal.[64]

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57. Act No. 521, 1990 La. Acts 1174.
58. LA. CODE CIV. PROC. ANN. art. 1061 (1960).
59. *See generally* LA. CIV. CODE ANN. art. 2268 (1870).
60. *See generally* LA. REV. STAT. ANN. § 13:4231 (1984).
61. *See generally* LA. REV. STAT. ANN. § 13:4231 (2021).
62. LA. CODE CIV. PROC. ANN. art. 1061 (2021).
63. *See generally* Act No. 521, 1990 La. Acts 1174.
64. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445, 448 (La. Ct. App. 1st Cir. 2002); Ward v. State Dep't of Transp. & Dev., 2 So. 3d 1231, 1234 (La. Ct. App. 2d Cir. 2009); Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697, 699 (La. Ct. App. 3d Cir. 2008); Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020); Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542, at *10 (La. Ct. App. 4th Cir. Oct. 14, 2021).

### *B. Article 425: Development Over Time*[65]

Courts and litigants have treated article 425 inconsistently since its enactment in 1960. In the years following its enactment courts most commonly interpreted article 425 as the doctrine of "splitting the cause of action"—an independent claim-preclusion device from res judicata.[66] Eventually, article 425 and res judicata became so intertwined that article 425 was treated as a "corollary" to res judicata.[67] Then, in the years following the 1990 amendments, courts consistently treated the amended version of article 425 as synonymous with res judicata.[68]

#### *1. Origins: A Catchall Claim-Preclusion Device*

When article 425 was enacted in 1960, it provided, "An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof" and further explained that an obligee who brought an action to enforce only a portion of the obligation waived his right to enforce the rest.[69] According to the Louisiana State Law Institute, the bases of this new provision were in articles 91(2) and 156 of the Louisiana Code of Practice of 1870 and in article 87(2) of the Code of Civil Procedure of Quebec.[70] Entitled "Division of cause of action, effect,"

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65. Because the Louisiana Code of Civil Procedure has never designated an official procedural device for raising an objection under article 425, litigants alleging a violation of article 425 often filed different types of exceptions. In the cases discussed in the following subsection, regardless of the particular procedural devices employed, each objecting party argued that his opponent split his cause of action under article 425.

66. Charles W. Darnall, Jr., *Louisiana Practice—Splitting Causes of Action*, 14 LA. L. REV. 905, 906 (1954).

67. Sutterfield v. Fireman's Fund Am. Ins. Co., 344 So. 2d 1159, 1161 (La. Ct. App. 4th Cir. 1977); Succession of Raziano, 538 So. 2d 1136, 1138 (La. Ct. App. 5th Cir. 1989).

68. Wood v. May, 658 So. 2d 8, 9 (La. Ct. App. 4th Cir. 1995), *rev'd on other grounds*, 663 So. 2d 739 (La. 1995); Millet v. Crump, 704 So. 2d 305 (La. Ct. App. 5th Cir. 1997); Fine v. Reg'l Transit Auth., 676 So. 2d 1134 (La. Ct. App. 4th Cir. 1996).

69. LA. CODE CIV. PROC. ANN. art. 425 (1960).

70. LA. STATE LAW INST., CODE OF PRACTICE REVISION, NO. 5 EXPOSE DES MOTIFS 13 (1954). Article 91(2) of the Louisiana Code of Practice stated, "But if one, in order to give jurisdiction to a judge, demand a sum below that which is really due to him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for that overplus." LA. CODE PRAC. art. 91 (repealed 1960). Article 156 of

article 425 was generally regarded as a codification of the jurisprudentially developed[71] claim-preclusion device, "splitting a cause of action."[72] Article 425 was most commonly used to prohibit plaintiffs from filing multiple suits against the same defendant for the same harm but seeking different relief.[73] Courts analyzing article 425 explained that the article was designed to minimize litigation and prevent harassment of defendants with a multiplicity of suits based upon the same claim.[74] Interestingly, these rationales reflect the common law res judicata more than the civil law res judicata.[75]

Although the Law Institute claimed the bases of article 425 were rooted in the Louisiana Code of Practice and Quebecois civil procedure, the comments to article 425 only mention the Quebecois code article and

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the Louisiana Code of Practice stated, "If one demands less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus." LA. CODE PRAC. art. 156 (repealed 1960). Article 87(2) of the Code of Civil Procedure of Quebec stated, "A creditor cannot divide his debt for the purpose of suing for the several portions of it by different actions." CODE CIV. PROC. QUEBEC art. 87 (repealed). However, prior to its codification in article 425, commentators noted that the doctrine against splitting a cause of action was only "approached obliquely" by Code of Practice articles 91(2) and 156. Darnall, *supra* note 66, at 907.

71. *See* Delahaye v. Pellerin, 2 Mart. (o.s.) 142 (Orleans 1812) (where possession of a slave was recovered in one suit, a subsequent suit for damages for wrongful detention of the slave was dismissed); McCaleb v. Est. of Fluker, 14 La. Ann. 316 (1859) (where the value of notes was recovered in one suit, a subsequent suit for attorney fees was dismissed); Stafford v. Stafford, 25 La. Ann. 223 (1873) (where a wife recovered paraphernal funds in one suit, a subsequent suit for additional paraphernal funds was dismissed); Pic v. Mente & Co., Inc., 9 So. 2d 532, 533 (La. 1942) (where two suits brought in city court for amounts purchased on one open account were held to constitute one indivisible cause of action).

72. *See* Darensbourg v. Columbia Cas. Co., 140 So. 2d 241, 244 (La. Ct. App. 4th Cir. 1962) ("splitting of a single cause of action, a procedure prohibited under our law both by the jurisprudence applicable to the instant case and, more recently, by Article 425 of the LSA-Code of Civil Procedure"); Carney v. Hartford Acc. & Indem. Co., 250 So. 2d 776 (La. Ct. App. 1st Cir. 1970) ("splitting of cause of action in contravention of LSA-C.C.P. art. 425"); Montgomery v. Am. Fire & Indem. Co., 366 So. 2d 201, 201–02 (La. Ct. App. 2d Cir. 1978) ("plaintiffs split their cause of action, which is prohibited by C.C.P. Article 425").

73. *See* discussion *infra* beginning at note 83.

74. *See, e.g.*, Reed v. Classified Parking Sys., 324 So. 2d 484, 488 (La. Ct. App. 2d Cir. 1975).

75. *See* discussion of the different rationales behind common law and civil law res judicata at *supra* notes 22–27.

its related jurisprudence.[76] Interpreted together, the three cases cited in connection with the Quebecois code article stand for the rule that a plaintiff cannot break his monetary demands into multiple suits so that the amount prayed for does not exceed the jurisdictional limit of the plaintiff's preferred court.[77] However, no reported decision applied article 425 in this way, likely because Louisiana Code of Civil Procedure article 5, enacted at the same time and cross-referenced in the comments to article 425, states this rule more directly.[78]

Consistent with one pre-1960 application of Louisiana Code of Practice article 156,[79] some courts initially applied article 425 as limiting the plaintiff's recovery to the amount prayed for in her demand.[80] In *Sylvester v. Sylvester*, Mrs. Sylvester demanded from her ex-husband 40 head of cattle that had been awarded to her in their community property settlement agreement, as well as the offspring of the 40 cattle.[81] After the Third Circuit Court of Appeal held that Mrs. Sylvester owned an undivided one-half interest in the offspring of all 200 cattle in the herd, the

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76. LA. CODE. CIV. PROC. ANN. art. 425 cmt. c (1960); State *ex. rel.* Dobson v. Newman, 21 So. 189 (La. 1897) (plaintiff filed 17 concurrent suits against defendant in the same court, each for a different $10 promissory note, because the total amount of $170 exceeded the jurisdictional limit of the court; the court held that the complaints stated one indivisible cause of action which could not be divided into a multiplicity of suits); Kearney v. Fenerty, 171 So. 57, 58 (La. 1936) (where two suits were brought in city court on fifteen twenty-five dollar rent notes containing an acceleration clause, the court held that nonpayment of the first note caused all fifteen to become a single matured obligation for which only one suit could be brought); Reynolds & Henry Const. Co. v. Mayor of Monroe, 17 So. 802, 802 (La. 1895) ("A party cannot sue the defendant on installments growing out of the same contract, when the whole amount was due when suit was first brought. He is presumed to have asked all that he was entitled to in the first demand.").

77. Cantrelle Fence & Supply Co. v. Allstate Ins. Co., 515 So. 2d 1074, 1077 (La. 1987).

78. *See* LA. CODE. CIV. PROC. ANN. art. 5 (2021).

79. *See* Brooks v. Wortman, 22 La. Ann. 491 (1870) (where plaintiff in reconvention in a petitory action secured judgment for the total amount of the reconventional demand and then on appeal asked that the amount be increased, the request was denied on the ground that plaintiff in reconvention, having failed to amend his petition, must lose the overplus under article 156).

80. *See* Sears, Roebuck & Co. v. Cannizzarro, 142 So. 2d 566 (La. Ct. App. 4th Cir. 1962) (where the Fourth Circuit held that article 425 did not limit plaintiff's recovery to $24.83, which was mistakenly demanded in the original petition due to a clerical error, because the plaintiff filed a timely amendment to the pleading to demand repayment of the full amount of $234.83).

81. Sylvester v. Sylvester, 146 So. 2d 154, 155 (La. 1962).

Louisiana Supreme Court explained that this judgment could not stand, as its decree in favor of Mrs. Sylvester was for a greater portion of the cattle's offspring than she demanded.[82] However, this use for article 425 was short-lived.

Article 425's primary application as a prohibition on dividing one's tort claims originated from the pre-1960 jurisprudence on splitting a cause of action.[83] In the 1953 case *Fortenberry v. Clay*, the plaintiff filed a suit to recover for property damage sustained in a car accident.[84] Prior to trial, the plaintiff filed a second suit against the same defendants to recover for personal injuries arising from the same accident.[85] After the conclusion of the first suit, the defendants filed an exception of no right of action in the second suit, arguing that the plaintiff had split his cause of action.[86] The trial court granted the exception and dismissed the second action.[87] The First Circuit Court of Appeal affirmed, holding that a single tort creates only one cause of action.[88] The court explained that this prohibition on splitting a cause of action was necessary because otherwise "there would be an undetermined number of suits between the same parties arising out of one wrongful action."[89]

In the 1975 case *Richard v. Travelers Insurance Co.*, the Third Circuit Court of Appeal cited *Fortenberry* and used article 425 to apply this same rule.[90] In *Richard*, the victim of a car accident filed two consecutive suits against the same defendant, the driver of the other car.[91] In the first action, the plaintiff sought recovery for the damages to his car, and in the second, for his wife's[92] medical expenses.[93] The defendant moved for summary judgment, arguing that the plaintiff had split his cause of action in

82. *Id.* at 157.

83. *See generally* Thigpen v. Guarisco, 197 So. 2d 904 (La. Ct. App. 1st Cir. 1967); Thompson v. Kivett & Reel, Inc., 25 So. 2d 124 (La. Ct. App. 1st Cir. 1946); Jackson v. U.S. Fid. & Guar. Co., 199 So. 419 (La. Ct. App. 2d Cir. 1940).

84. Fortenberry v. Clay, 68 So. 2d 133, 134 (La. Ct. App. 1st Cir. 1953).

85. *Id.*

86. *Id.* at 135.

87. *Id.*

88. *Id.*

89. *Id.*

90. Richard v. Travelers Ins. Co., 323 So. 2d 176, 178 (La. Ct. App. 3d Cir. 1975).

91. *Id.* at 177.

92. Under the law at that time, only the husband could sue for the claims belonging to the community. LA. CODE CIV. PROC. ANN. art. 686 (1976).

93. *Richard*, 323 So. 2d at 177.

contravention of article 425.[94] In granting the motion for summary judgment, the Third Circuit explained that the majority rule in Louisiana was that only one cause of action arose when one wrongful act caused multiple types of damages, so the defendant's tortious conduct in causing the car accident had only created one obligation to the community.[95] Thus, the court concluded that the plaintiff split his cause of action under article 425 when he only sought to recover for a portion of that obligation in the first suit, and as a result, had waived his right to enforce the remaining portion of the obligation.[96]

Besides these few cases, courts and practitioners rarely took advantage of article 425 in the years following its enactment. Between 1960 and 1980, article 425 was cited only 14 times by the Louisiana Courts of Appeal and only twice by the Louisiana Supreme Court.[97] The courts that did address arguments under article 425 often resolved the issue on other grounds.[98] For example, in *Honeycutt v. Town of Boyce*, the Louisiana Supreme Court held that article 425 did not preclude the plaintiff's second action because the plaintiff had reserved his rights against the defendant in the judgment of the previous suit.[99] In another case, *Reed v. Classified*

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94. *Id.* The defendant also filed an exception of res judicata, but the trial court and the Second Circuit both declined to address this argument. *Id.*

95. *Id.*

96. *Id.*; s*ee also* Harrison v. State Dep't of Highways, 375 So. 2d 169, 180 (La. Ct. App. 2d Cir. 1979) (article 425's "application to the tort obligation would be to prevent a suit for damages sustained from the laceration and scarring of the face and a later suit for a broken leg, when both injuries came out of the same accident.").

97. *See generally Harrison*, 375 So. 2d 169; Harris v. Bardwell, 373 So. 2d 777 (La. Ct. App. 2d Cir. 1979); Montgomery v. Am. Fire & Indem. Co., 366 So. 2d 201 (La. Ct. App. 2d Cir. 1978); Parish v. Bill Watson Ford, Inc., 354 So. 2d 727 (La. App. 4th Cir. 1978); Derbofen v. T.L. James & Co., Inc., 355 So. 2d 963 (La. Ct. App. 4th Cir. 1977); Sutterfield v. Fireman's Fund Am. Ins. Co., 344 So. 2d 1159 (La. Ct. App. 4th Cir. 1977); Honeycutt v. Town of Boyce, 327 So. 2d 154 (La. Ct. App. 3d Cir. 1976), *rev'd*, 341 So. 2d 327 (La. 1976); Reed v. Classified Parking Sys., 324 So. 2d 484, 488 (La. Ct. App. 2d Cir. 1975); *Richard*, 323 So. 2d 176; Bugg v. State Farm Mut. Auto. Ins. Co., 295 So. 2d 194 (La. Ct. App. 4th Cir. 1974); Carney v. Hartford Acc. & Indem. Co., 250 So. 2d 776 (La. Ct. App. 1st Cir. 1970); Sylvester v. Sylvester, 146 So. 2d 154 (La. 1962); Sears, Roebuck & Co. v. Cannizzarro, 142 So. 2d 566 (La. Ct. App. 4th Cir. 1962); Darensbourg v. Columbia Cas. Co., 140 So. 2d 241 (La. Ct. App. 4th Cir. 1962); Futch v. Fidelity & Cas. Co. of N.Y., 136 So. 2d 724 (La. Ct. App. 2d Cir.).

98. *Honeycutt*, 341 So. 2d 327; *Reed*, 324 So. 2d at 488; *Futch*, 136 So. 2d 724; *Carney*, 250 So. 2d 776.

99. *Honeycutt*, 341 So. 2d 327.

*Parking System*, the Second Circuit Court of Appeal held that article 425 did not preclude the second suit because the cause of action did not accrue until the conclusion of the prior suit.[100] The resulting lack of case law analyzing and interpreting article 425 stunted the article's development and laid the groundwork for the confusion causing the current circuit split.

*2. Article 425's Relationship to Res Judicata Prior to the 1990 Res Judicata Act*

In the years leading up to the 1990 Res Judicata Act, article 425 and res judicata became closely associated. Parties objecting under article 425 would almost always simultaneously file an exception of res judicata.[101] In this era of strict adherence to civil law claim preclusion, public policy favored allowing cases to proceed, so courts strictly analyzed and rarely granted motions under res judicata and article 425.[102]

To understand the interaction between these two doctrines prior to the 1990 amendments, it is important to keep in mind the basic rules of each. As previously mentioned, before the 1990 Res Judicata Act, res judicata precluded an action only when the three identities were met: (1) identity of cause of action, (2) identity of thing demanded, and (3) identity of parties.[103] Louisiana Code of Civil Procedure article 425, as enacted in 1960, prohibited an obligee from dividing an obligation due to him and provided that an obligee who brought an action demanding only a portion of the performance of an obligation had waived the right to enforce the remaining portion.[104]

Although few scholarly articles discuss article 425, at least one Louisiana Supreme Court justice characterized article 425 as an "exception" to the rules of res judicata, which would preclude a second action even when the strict identities requirements of res judicata were not met.[105] In his article discussing the law of res judicata, Justice John Dixon briefly explained that the article 425 "exception" applied in cases where, for example, a party injured in a car accident files suit against the other driver for his personal injuries and then sues the same defendant in a

100. *Reed*, 324 So. 2d at 488.

101. *Id.*; *Sutterfield*, 344 So. 2d 1159; Doyle v. State Farm Mut. Ins. Co., 414 So. 2d 763 (La. 1982); La. Bus. Coll. v. Crump, 474 So. 2d 1366 (La. Ct. App. 2d Cir. 1985); Preis v. Standard Coffee Serv. Co., 545 So. 2d 1010 (La. 1989).

102. *Reed*, 324 So. 2d at 488; *Sutterfield*, 344 So. 2d 1159; *Doyle*, 414 So. 2d 763; *Crump*, 474 So. 2d 1366; *but see Preis*, 545 So. 2d 1010.

103. Kurtz & Frilot, *supra* note 2, at 445.

104. LA. CODE CIV. PROC. ANN. art. 425 (1960).

105. Dixon et al., *supra* note 9, at 641.

subsequent action for the damage to his car.[106] In this case, although res judicata would not apply because there was no identity of the thing demanded, article 425 would preclude the second suit because both actions arose from the same obligation, the driver's tort obligation to repair the damages he caused to the plaintiff.[107]

The Louisiana Supreme Court offered a different interpretation when it conducted its first in-depth analysis of article 425.[108] In *Cantrelle Fence & Supply Co. v. Allstate Ins. Co.*, after obtaining a judgment against its uninsured motorist (UM) insurer, the insured plaintiff brought a separate suit against the UM insurer, seeking penalties and attorney fees pursuant to Louisiana Revised Statutes § 22:658 because the insurer had allegedly refused to pay the benefits due.[109] The UM insurer filed an "exception based on C.C.P. 425."[110] The Court, offering little explanation for its interpretation, applied the res judicata definition of "cause"[111] to the term "obligation" in article 425.[112] Using this "theory of recovery" definition of obligation, the Court concluded that the second suit involved an obligation arising out of the penalty statute, § 22:658, that was distinct from the obligation arising out of the contractual relationship under the insurance policy, and thus article 425 did not preclude the second suit.[113]

In *Cantrelle*, the Louisiana Supreme Court significantly blurred the lines between article 425 and res judicata.[114] Over time, as courts and litigants became frustrated with the strict requirements of civilian res judicata and began construing its requirements more liberally, article 425 and res judicata became more and more intertwined.[115]

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106. *Id.*; *see* Richard v. Travelers Ins. Co., 323 So. 2d 176 (La. Ct. App. 3d Cir. 1975).

107. S*ee Richard*, 323 So. 2d 176; Fortenberry v. Clay, 68 So. 2d 133, 134 (La. Ct. App. 1st Cir. 1953); *but see* Arbour, *supra* note 9, at 764.

108. Cantrelle Fence & Supply Co. v. Allstate Ins. Co., 515 So. 2d 1074, 1076 (La. 1987).

109. *Id.*

110. *Id.*

111. See *supra* text accompanying notes 36–38, where the Louisiana Supreme Court defined "cause" as "grounds" in *Mitchell v. Bertolla*, 340 So. 2d 287, 291–92 (La. 1976).

112. *Cantrelle*, 515 So. 2d at 1078.

113. *Id.* at 1079.

114. *See generally id.*

115. Sutterfield v. Fireman's Fund Am. Ins. Co., 344 So. 2d 1159 (La. Ct. App. 4th Cir. 1977); Succession of Raziano, 538 So. 2d 1136 (La. Ct. App. 5th Cir. 1989).

*3. Article 425 as Amended by the 1990 Res Judicata Act*

Although the amended res judicata statute was accompanied by extensive comments that explained the exact nature of the changes being made, neither the text nor the comments to the amended article 425 were particularly clear about the function of the article in light of the expansion of res judicata.[116] The amended version of article 425, now titled "Preclusion by judgment," provides, "A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation."[117] Notable to the particular issues facilitating the current circuit split, there is no language in the text of the article itself indicating an identity-of-parties requirement nor any reference to res judicata.[118] The comment accompanying the article explains that the amendment expands the article's scope "to reflect the changes made in the defense of res judicata and puts the parties on notice that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised."[119]

Before the 1990 amendments, article 425 primarily functioned as a flexible claim-preclusion device used in cases where res judicata did not apply and the court felt that allowing the claim to proceed would be inequitable.[120] However, once res judicata was expanded, it applied to those situations in which courts had traditionally used article 425.[121] For example, under current law, if a party injured in a car accident files suit against the other driver for his personal injuries and subsequently sues the same defendant in a separate action for the damage to his car, both actions undoubtedly arise from the same transaction or occurrence—the car accident—and are litigated between the same parties. Because res judicata precludes the second suit, courts are not forced to look elsewhere for justification to dismiss the action.[122]

After the 1990 Act and up until the 2002 *Westerman* decision, courts that referred to the new version of article 425 consistently treated the article as synonymous with res judicata, citing it along with § 13:4231 in

116. *See generally* LA. REV. STAT. ANN. § 13:4231 (2021); LA. CODE CIV. PROC. ANN. art. 425 (2021).

117. LA. CODE CIV. PROC. ANN. art. 425 (2021).

118. *Id.*

119. *Id.* art. 425 cmt. (emphasis added).

120. *See supra* Sections I.B.1–2.

121. Recall that modern res judicata bars a subsequent suit between the same parties arising out of the same transaction or occurrence. *See supra* Section I.A.2.

122. *See generally* LA. REV. STAT. ANN. § 13:4231 (2021); Richard v. Travelers Ins. Co., 323 So. 2d 176 (La. Ct. App. 3d Cir. 1975).

response to exceptions of res judicata.[123] In *Wood v. May*, the Fourth Circuit Court of Appeal explained that before the 1990 Res Judicata Act, article 425 *and* § 13:4231 allowed a plaintiff to file a second action for penalties and attorney fees after a judgment awarding damages against the same defendant, "based on the theory that the second suit is based on different causes of action; suit on one obligation did not preclude a later suit on the other."[124] The court went on to explain that under the amended provisions of article 425 *and* § 13:4231, "although plaintiff's claims for penalties and attorney's fees constitute separate causes of action, the plaintiff must assert all claims that arise out of the same transaction or occurrence in one action" because "[a]ny additional claim *will be barred by the principles of res judicata*."[125] Here, the court treated article 425 as a restatement of the rules of res judicata, without an effect independent of res judicata.[126]

Remnants of article 425's independence, however, continued to appear in some cases.[127] In *Medicus v. Scott*, the Second Circuit Court of Appeal affirmed the lower court's holding, granting the defendant's exception of res judicata.[128] Then, although the defendant had not raised article 425 as a defense, the court went on to state that the plaintiff's failure to raise a claim that arose from the transaction or occurrence amounted to a waiver of that claim under article 425.[129] Although the court worked through the article 425 analysis separately, it only used article 425 to support its holding on the exception of res judicata and did not hold that the plaintiff's claim was barred by *both* article 425 and res judicata.[130] The slight distinctions made in cases like *Medicus* left the door open for the defendant in *Westerman* to argue for the independence of article 425.[131]

123. *See* Millet v. Crump, 704 So. 2d 305 (La. Ct. App. 5th Cir. 1997); Fine v. Reg'l Transit Auth., 676 So. 2d 1134 (La. Ct. App. 4th Cir. 1996).

124. Wood v. May, 658 So. 2d 8, 9 (La. Ct. App. 4th Cir. 1995), *rev'd on other grounds*, 663 So. 2d 739 (La. 1995).

125. *Id.* (emphasis added).

126. *Id.*

127. *See* Ensenat v. Edgecombe, 707 So. 2d 1059 (La. Ct. App. 4th Cir. 1998).

128. Medicus v. Scott, 744 So. 2d 192, 196–97 (La. Ct. App. 2d Cir. 1999).

129. *Id.*

130. *Id.*

131. *See infra* Section II.A.

## II. THE RES JUDICATA REBELLION: A REVIEW OF THE KEY CASES IN THE CURRENT CIRCUIT SPLIT

Today, the Louisiana Circuit Courts of Appeal are split regarding their interpretations of article 425 and its relationship to res judicata.[132] The *Spires-Ward-Carollo* interpretation, adopted by the Second, Third, and Fourth circuits, holds that article 425 merely functions to warn litigants of the effects of res judicata and does not have any independent effect.[133] Under the *Handy-Westerman* interpretation, adopted by the First and Fifth circuits, article 425 is a distinct concept from res judicata that precludes a plaintiff from bringing multiple actions arising out of the same transaction or occurrence, regardless of whether the plaintiff is suing the same defendant.[134]

Note that in each of the cases discussed in the following Section, the defendant in the second suit raised an objection arguing that the plaintiff has violated article 425. The Louisiana Code of Civil Procedure does not provide an official procedural device specifically for asserting a violation of article 425, and as a result, defendants raising the same argument have filed different exceptions to do so.[135] Those exceptions are distinct from an exception raising the objection of res judicata; res judicata did not apply in any of the following cases, and most of the defendants did not even raise it as an issue because the parties to each suit were not the same.

### *A. The First Circuit Interprets Article 425 in* Westerman *and Finds No Identity of Parties Required*

In *Westerman v. State Farm Mutual Automobile Insurance Co.*, the Louisiana First Circuit Court of Appeal held that for a claimant to succeed

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132. Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697 (La. Ct. App. 3d Cir. 2008); Ward v. State Dep't of Transp. & Dev., 2 So. 3d 1231 (La. Ct. App. 2d Cir. 2009); Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445 (La. Ct. App. 1st Cir. 2002); Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020); Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542 (La. Ct. App. 4th Cir. Oct. 14, 2021).

133. *Spires*, 996 So. 2d 697; *Ward*, 2 So. 3d 1231; *Carollo*, 2021 WL 4785542.

134. *Westerman*, 834 So. 2d 445; *Handy*, 298 So. 3d 380.

135. In *Westerman*, the defendant filed a peremptory exception "raising an objection of preclusion by judgment" under article 425. 834 So. 2d at 446. In *Spires*, the defendant filed an "exception of preclusion by judgment." 996 So. 2d at 698. In *Ward*, the defendant filed a peremptory exception of no cause of action. 2 So. 3d at 1233. In *Handy* and *Carollo*, the defendants filed peremptory exceptions of no right of action under article 425. *Handy*, 298 So. 3d at 385; *Carollo*, 2021 WL 4785542, at *3.

on an objection under article 425, the only requirement is that the claim in the current lawsuit must arise out of the same transaction or occurrence as a previous lawsuit, regardless of whether the two lawsuits are between the same parties.[136] Following a car accident, the plaintiff in *Westerman* filed suit against the other driver, the owner of the other vehicle, and the vehicle owner's insurer, American Deposit Insurance Company (American Deposit).[137] After the court ruled in favor of the plaintiff, rendering a judgment for damages in the amount of $20,000, the parties reached a compromise whereby American Deposit paid its $10,000 policy limit, and the plaintiff dismissed her claim with prejudice.[138] Thereafter, the plaintiff filed a second suit against her UM insurer, State Farm Mutual Automobile Insurance Company (State Farm), seeking to recover for her accident damages that exceeded the American Deposit policy limits.[139]

State Farm filed a peremptory exception raising an "objection of preclusion by judgment" under article 425.[140] State Farm argued that the plaintiff's claim was barred because plaintiff did not assert it in her first suit, which arose out of the same transaction or occurrence as the UM claim, and that "[t]he interests of justice, the traditional notions of fair play, and judicial economy do not permit the same issues being re-litigated over and over so as to accommodate a plaintiff in multiple causes of action against different defendants."[141] The trial court granted State Farm's exception and dismissed the plaintiff's case with prejudice.[142] The plaintiff, relying on several pre-1990 cases, argued on appeal that the two suits were separate causes of action, one based in tort and the other in contract, that arose out of two different transactions or occurrences, the car accident and the contract of insurance.[143]

After analyzing case law from both before and after the 1990 Res Judicata Act, the First Circuit determined that the focus of the prior version of article 425 was to prevent plaintiffs from dividing a single obligation for the purpose of bringing separate actions.[144] However, because the 1990 Res Judicata Act "expand[ed] the scope" of article 425, the court reasoned

136. *Westerman*, 834 So. 2d at 448.
137. *Id.* at 445.
138. *Id.* at 445–46.
139. *Id.* at 446.
140. *Id.* State Farm had also filed several other exceptions, including the exception of res judicata, but the trial court did not address these exceptions and instead ruled only on the preclusion under article 425. *Id.*
141. *Id.*
142. *Id.* at 447.
143. *Id.*
144. *Id.* at 447–48.

that the new function of the article was to require litigants to assert separate causes of action that arise out of the same transaction or occurrence in the same action.[145] Thus, even though the plaintiff's claims were based on separate causes of action and asserted against different parties, they "clearly" arose from the same occurrence, the car accident.[146] Consequently, the plaintiff's failure to assert the UM claim in the first action amounted to a waiver of that claim.[147] The First Circuit accordingly affirmed the holding of the trial court granting State Farm's exception under article 425 and dismissed the plaintiff's second suit.[148]

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145. *Id.* at 448 (quoting LA. CODE CIV. PROC. ANN. art. 425 cmt. (2021)).

146. *Id.*

147. *Id.*

148. *Id.* Four years after it decided *Westerman*, the First Circuit issued another holding that debatably conflicts with *Westerman* in *Butler v. United States Auto. Ass'n Ins. Co.*, 928 So.2d 53 (La. Ct. App. 1st Cir. 2005). In *Butler*, the court cited two Third Circuit cases, discussed *infra* note 149, and stated that article 425 "is merely a reference to the principles of *res judicata*." *Id.* at 55 (first citing Walker v. Howell, 896 So. 2d 110, 112 (La. Ct. App. 3d Cir. 2004); and then citing Gaspard v. Allstate Ins. Co., 903 So. 2d 518 (La. Ct. App. 3d Cir. 2005)). However, instead of ruling that the plaintiff's case could proceed because the identity-of-parties requirement was not met, the court held that res judicata did not apply because, "unlike in *Westerman*," the judgment in the first suit specifically reserved the plaintiff's right against the defendant in the second suit, thereby satisfying the exception to the res judicata rules in § 13:4232(A)(3). *Id.* This holding is particularly perplexing given that the *Westerman* opinion never even noted whether the plaintiff in that case had reserved her right against the defendant in the second suit. *See generally Westerman*, 834 So. 2d 445. Unsurprisingly, subsequent cases disagree about the significance of *Butler*. In *Handy*, the Fifth Circuit stated:

> I do not read the *Butler* decision as a departure from *Westerman* except to the extent specifically stated in the opinion, i.e., *Butler* involved a reservation of rights and *Westerman* did not. The *Butler* opinion includes language from *Walker* and *Gaspard* equating Article 425 preclusion with res judicata, but the *Butler* court did not base its ruling that the second action could proceed on the fact that the parties to the two actions were not the same.

Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020). But in *Carollo*, the Fourth Circuit explained that the *Butler* opinion "clarified that Article 425 should be read in conjunction with the res judicata articles." Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542, at *9 (La. Ct. App. 4th Cir. Oct. 14, 2021). Because the First Circuit did not explicitly overrule *Westerman* in *Butler*, this Comment assumes that the First Circuit continues to follow the *Handy-Westerman* interpretation.

### *B. The Third Circuit Rejects the* Westerman *Analysis in* Spires

In *Spires v. State Farm Mutual Automobile Insurance Co*., the Louisiana Third Circuit Court of Appeal found that article 425 is "merely a reference to the principles of res judicata" and thus only applies to actions between the same parties.[149] After a car accident, the plaintiffs in *Spires* filed suit against the other driver and the other driver's liability insurer, seeking damages from the accident.[150] After settling with the liability insurer of the defendant-driver in that suit, the plaintiffs filed a second suit against their UM insurer, State Farm.[151] State Farm filed an "exception of preclusion by judgment," arguing that the plaintiffs had waived their cause of action against State Farm when they failed to assert it in the first lawsuit because article 425 required plaintiffs to assert all causes of action arising out of the transaction or occurrence, the car accident.[152] Relying on the First Circuit's earlier decision in *Westerman*, the trial court granted State Farm's exception and dismissed the case.[153] The plaintiffs appealed to the Third Circuit.[154]

Because the 1990 Res Judicata Act amended both article 425 and the res judicata statute, the Third Circuit reasoned that the two provisions must be read and interpreted *in pari materia*.[155] The court interpreted the article's lack of a penalty provision as evidence that article 425 is not an independent claim-preclusion device but instead merely functions as "a reference to the principles of res judicata."[156] Thus, the court analyzed State Farm's exception using the rules of res judicata and concluded that because State Farm was not the same party as the other driver or her

149. Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697, 700 (La. Ct. App. 3d Cir. 2008) (emphasis removed). It is worth noting that the Third Circuit had previously analyzed the article 425 issue in *Walker*, 896 So. 2d 110 and had directly ruled on the issue in *Gaspard*, 903 So. 2d 518. However, those decisions used the same reasoning and less analysis than *Spires*, so *Spires* is the only Third Circuit opinion discussed in full in this Comment.

150. *Id.*

151. *Id.*

152. *Id.* at 698.

153. *Id.* at 699.

154. *Id.*

155. *Id.* Laws on the same subject matter, or *in pari materia*, must be interpreted in reference to each other. LA. CIV. CODE ANN. art. 13 (2021).

156. *Spires*, 996 So. 2d at 700 (quoting Gaspard v. Allstate Ins. Co., 903 So. 2d 518, 520 (La. Ct. App. 3d Cir. 2005)).

insurer, res judicata did not apply.[157] The Third Circuit denied State Farm's exception and reversed the judgment of the trial court.[158]

### *C. The Second Circuit Affirms the* Spires *Interpretation in* Ward

Less than three months later, the Louisiana Second Circuit Court of Appeal addressed article 425's applicability to lawsuits arising out of the same transaction or occurrence but between different parties in *Ward v. State, Department of Transportation and Development*.[159] In *Ward*, the plaintiffs filed two lawsuits for the same damages arising from the same car accident.[160] The first suit involved a claim of improper road maintenance against the State Department of Transportation and Development (DOTD).[161] The next day, the plaintiffs filed the second suit, in which they named as defendants the other driver and the other driver's insurer, United Services Automobile Association (USAA).[162] USAA filed a third suit, seeking a concursus proceeding for all damages arising from the accident and naming the Wards, among others, as defendants.[163] DOTD, however, was not a party to this concursus proceeding.[164] After a consent judgment was entered in the concursus proceeding, the plaintiffs dismissed the second suit against the other driver.[165] Thereafter, DOTD filed an exception of no cause of action in the first suit, contending that under article 425, the judgments in the other two suits extinguished and precluded the plaintiffs' claims against DOTD.[166] The trial court sustained the exception and dismissed the claims against DOTD with prejudice, and the plaintiffs appealed.[167]

After reviewing *Spires* and related Third Circuit jurisprudence,[168] the Second Circuit reversed the trial court's judgment dismissing the suit against DOTD, finding that article 425 "operates in tandem" with the res

157. *Id.*
158. *Id.*
159. Ward v. State, Dep't of Transp. & Dev., 2 So. 3d 1231, 1233 (La. Ct. App. 2d Cir. 2009).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *See* cases cited note 149.

judicata statutes.[169] The court held that article 425 is merely a reference to res judicata, and as such, an exception of res judicata is the proper procedural vehicle to enforce article 425's mandate of asserting all claims arising out of the same transaction or occurrence in one lawsuit.[170] noting that DOTD would have been an improper party in the concursus proceeding in the prior suit.[171] Accordingly, the court analyzed DOTD's exception under the rules of res judicata and——found that the plaintiff's second lawsuit did not preclude plaintiff's initial action against DOTD, because the parties to the two lawsuits were not the same.[172]

### *D. The Fifth Circuit Revives the* Westerman *Analysis in* Handy

Eighteen years after the First Circuit decided *Westerman*, the Louisiana Fifth Circuit Court of Appeal rejected the *Spires-Ward* interpretation and held that although article 425 and res judicata are related, article 425 is a distinct claim-preclusion device that only requires that the causes of action in two suits arise from the same transaction or occurrence to preclude a second lawsuit.[173] In *Handy v. Parish of Jefferson*, the plaintiff filed two actions concurrently, one against over 30 asbestos manufacturers and sellers in the Orleans Parish Civil District Court and the other against Jefferson Parish in the 24th Judicial District Court.[174] Both lawsuits sought to recover damages caused by the plaintiff's alleged occupational exposure to asbestos.[175] Following the conclusion of the Orleans lawsuit, Jefferson Parish filed a peremptory exception raising the objection of no right of action under article 425.[176] The trial court applied the *Spires-Ward* interpretation and analyzed this exception using

169. *Ward*, 2 So. 3d at 1234.

170. *Id.*

171. *Id.* at 1235. A concursus proceeding is one in which two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding. LA. CODE CIV. PROC. ANN. art. 4651 (2021). In this concursus proceeding, it would have been improper to third-party DOTD, who was not a potential claimant to the money from the USAA insurance policy. *Ward*, 2 So. 3d at 1235.

172. *Id.*

173. Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020).

174. *Id.* Louisiana Revised Statutes § 13:5104 requires suits against a political subdivision of the state to be filed in the judicial district where the political subdivision is located. LA. REV. STAT. ANN. § 13:5104 (2021).

175. *Handy*, 298 So. 3d at 383.

176. *Id.* at 385.

the rules of res judicata embodied in § 13:4232. Although the two actions arose out of the same transaction or occurrence, the court denied the Parish's exception because the two suits were not between the same parties.[177] The Parish appealed to the Fifth Circuit.[178]

On appeal, the Parish argued that the plain language of article 425 does not require two suits to be between the same parties to preclude the second suit and thus, that the trial court erred in reading this requirement into the article.[179] The Parish also claimed that allowing the plaintiffs to proceed against the Parish as the lone defendant in a separate lawsuit would be unduly burdensome, as doing so would require the Parish to independently establish the potential fault of dozens of non-parties.[180] In response, the plaintiffs argued that the trial court was correct in reading article 425 *in pari materia* with the res judicata statutes and that because article 425 does not contain a penalty provision, its application should "yield to the interests of justice."[181] The plaintiffs contended that the Parish's reliance on the First Circuit's *Westerman* analysis was misplaced, as most courts had "'essentially' abandoned" the First Circuit's interpretation.[182]

Relying on the plain language of article 425, the Fifth Circuit found that interpreting article 425 as distinct from res judicata is consistent with the article's language and the article's purposes of maximizing judicial economy; minimizing conflicting judgments; and preventing harassment, delay, and unnecessary expense to a defendant.[183] The court cited the First Circuit's *Westerman* analysis in approval of construing article 425 "in conjunction with" the principles of res judicata without treating the two as identical.[184] Relying on the civil law rule that "it is not the function of a court to create legislation, but rather to interpret it," the Fifth Circuit rejected the *Spires-Ward* analysis as essentially rewriting article 425.[185]

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177. *Id.* at 383.
178. *Id.*
179. *Id.*
180. *Id.* at 383–84.
181. *Id.* at 384 (citing Breaux v. Avondale Indus., Inc., 842 So. 2d 1115, 1117 (La. Ct. App. 4th Cir. 2003)).
182. *Id.*
183. *Id.* at 390.
184. *Id.* ("the fact that different provisions of law are related does not necessarily mean that they are synonymous or identical in scope").
185. *Id.* at 391 (first citing Tullier v. Tullier, 464 So. 2d 278, 282 (La. 1985); and then citing Rada v. Adm'r, Div. of Emp. Sec., 319 So. 2d 460, 463 (La. Ct. App. 4th Cir. 1975)) ("If the wording of a statute is not ambiguous but the legislature erred in expressing its intention, any such error should be corrected by the legislature.").

Thus, the court granted the exception of no right of action, and dismissed plaintiffs' suit.[186] The Fifth Circuit's holding has sparked new litigation in which defendants raise article 425 as a shield to suits against plaintiffs who split their claims.[187]

### *E. The Fourth Circuit Agrees with the Second and Third Circuits in* Carollo

In *Carollo v. Department of Transportation and Development*, the family of decedents killed in a car accident filed suit against the driver of the other vehicle, the other driver's employer, and the employer's insurer in state court.[188] The defendants had the suit removed to federal court based on diversity jurisdiction.[189] The plaintiffs filed a motion for leave to file a supplemental and amended petition to add DOTD as a defendant, but the magistrate denied the motion, and the federal district court affirmed.[190] Thereafter, the parties reached a settlement agreement in which the plaintiffs reserved their rights against all other parties.[191]

The next day, the plaintiffs filed a petition in the state district court, naming DOTD as the only defendant.[192] DOTD filed an exception of no right of action "based on preclusion of judgment, pursuant to La. C.C.P. art. 425,"[193] contending that the plaintiffs violated article 425 by filing a separate suit against DOTD that arose out of the same transaction and occurrence as alleged in the federal suit.[194] DOTD argued that "this case presents the very situation in which the preclusion by judgment doctrine should apply."[195] Interestingly, instead of arguing that article 425 was not a separate preclusion device from res judicata, the plaintiffs argued that article 425 "was not absolute and 'will yield to the interest of justice.'" According to the plaintiffs, therefore, article 425 did not preclude their suit against DOTD because the plaintiffs were not aware of DOTD's alleged liability before filing the first suit; DOTD was not amenable to the

186. *Id.* at 384.
187. Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542 (La. Ct. App. 4th Cir. Oct. 14, 2021); Saed v, Harvey, No. 21-399, 2022 WL 709824 (La. Ct. App. 5th Cir. Mar. 9, 2022).
188. *Carollo*, 2021 WL 4785542, at *1.
189. *Id.*
190. *Id.* at *3.
191. *Id.*
192. *Id.*
193. *Id.* at *1.
194. *Id.* at *3.
195. *Id.* at *5.

jurisdiction of the federal court, where the plaintiffs were forced to litigate; and the plaintiffs had reserved their rights against DOTD in the prior settlement agreement.[196] The district court rejected the plaintiffs' arguments and granted DOTD's exception, citing the "extreme prejudice" that would result against DOTD if the suit were allowed to proceed, as DOTD "would be required to independently establish the potential fault of the now dismissed defendants from the Federal Litigation."[197] The plaintiffs appealed to the Fourth Circuit, again arguing that article 425 should yield to the interest of justice under the circumstances.[198]

At the beginning of its analysis, the Fourth Circuit noted that it had been faced with an argument that article 425 was its own preclusion device that did not require identify of parties in *Breaux v. Avondale Industries, Inc*.[199] However, in deciding that case, the court "did not discuss that the *res judicata* element of identity between the parties was not met; instead, this Court cited [the] 'in the interest of justice' exception to *res judicata*," which is located in § 13:4232(A)(1) and the related comments.[200] The Fourth Circuit further noted in *Carollo* that both parties had agreed that "the exceptions to res judicata may be applied to the mandate of article 425."[201]

After reviewing other relevant caselaw, the Fourth Circuit, "persuaded by the [T]hird [C]ircuit's approach" in *Spires*, ruled that "all the elements of *res judicata* must be met to preclude a claim or action under La. C.C.P.

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196. *Id.* at *4. In support of their contention that there is an "in the interest of justice" exception to article 425, the plaintiffs cited *Craig v. Adams Interiors, Inc.*, 785 So. 2d 997 (La. Ct. App. 2d Cir. 2001), a case in which the Second Circuit treated article 425 and res judicata as synonymous and denied an exception of res judicata "pursuant to [article] 425" in the interests of justice.

197. *Carollo*, 2021 WL 4785542, at *4.

198. *Id.* at *5. The plaintiffs also argued at the district court and at the Fourth Circuit that their claim against DOTD had not prescribed because prescription against DOTD was interrupted by the filing of the first suit. *Id.* at *4, *5 n.3. However, the district court did not rule on the issue, and as a result the issue was not properly before the Fourth Circuit. *Id.*

199. *Id.* at *7 (citing Breaux v. Avondale Indus., Inc., 842 So. 2d 1115 (La. Ct. App. 4th Cir. 2003)).

200. *Id*. "A judgment does not bar another action by the plaintiff: (1) When exceptional circumstances justify relief from the res judicata effect of the judgment." LA. REV. STAT. ANN. § 13:4232(A)(1) (2021). The comments to the statute note that the discretion granted by this exception to res judicata "is necessary to allow the court to balance the principle of res judicata with the interests of justice." *Id.* § 13:4232(A)(1) cmt. a.

201. *Carollo*, 2021 WL 4785542, at *7.

art. 425."[202] The Fourth Circuit explained that to rule that article 425 should be strictly construed as its own claim-preclusion device that only requires one of the res judicata elements—that the claim arose out of the same transaction or occurrence—would "result in abrogating the *res judicata* statutes and its supporting jurisprudence."[203] Applying its holding to the case at hand, the court reversed the holding of the district court, thereby denying DOTD's exception of no right of action and allowing plaintiffs' case to proceed.[204]

The current circuit split mirrors the confusion surrounding article 425 before the 1990 amendments. Yet again, courts have started to look to article 425 as a catchall claim-preclusion device to use when faced with a claim to which res judicata does not apply but that the court believes would be unjust to allow to proceed.[205] Indeed, there are several valid policy arguments that support adoption of the *Handy-Westerman* rule. Allowing plaintiffs to sue joint tortfeasors separately is inconsistent with the judicial-efficiency, protection-of-defendants, and correctness-of-judgments rationales of res judicata and claim preclusion in general.[206] Reestablishing the same underlying facts and legal questions arising from the same transaction or occurrence wastes judicial resources; requiring defendants to litigate separately rather than presenting a unified defense can be burdensome; and allowing plaintiffs a second opportunity to litigate the same claims, just against a different party, could result in inconsistent judgments.[207] This last point is especially compelling given Louisiana's pure comparative-fault regime; two different juries could allocate fault differently among the defendants and award different amounts of damages, especially in cases involving damages that are difficult to quantify, such as emotional distress.[208] Perhaps as courts and litigants become frustrated with the shortcomings of our modern version of res judicata in cases like *Handy*, the legislature will consider expanding the

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202. *Id.* at *10.

203. *Id.*

204. *Id.* at *11.

205. Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020); Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445 (La. Ct. App. 1st Cir. 2002).

206. M.W.K., *supra* note 3, at 471.

207. *Id.*

208. *See generally id.* (explaining that "the same logical difficulty exists in the joint wrong-doer cases, for the second defendant, who is being sued for a wrong identical to that of the first defendant, will be found guilty of a wrong already declared non-existent. Technically, of course, his wrong has not been tried before, but the identical facts that will establish his guilt have been . . . .").

scope of res judicata by eliminating the identity-of-parties requirement. However, as discussed below, the implementation of a claim-preclusion device without an identity-of-parties requirement was not the intent of the legislature when it amended article 425 in the 1990 Res Judicata Act.[209]

## III. RESOLVING THE CIRCUIT SPLIT: A LEGISLATIVE SOLUTION

A proper statutory interpretation reveals that the Second, Third, and Fourth circuits in the *Spires-Ward-Corollo* line of cases correctly interpreted the legislature's intent for the amended article 425 to function as a reference to res judicata, without any independent enforcement effect. However, as the First and Fifth circuits concluded, article 425's plain language contains no indication of such relationship, and this inconsistency has understandably led these two circuit courts to interpret article 425 as an independent claim-preclusion device. The unnecessary duplication in the law is the root of the problem that has led to the current circuit split. Thus, in order to resolve the inconsistency between the plain language and intent and to avoid future confusion, the legislature should repeal article 425 and move the res judicata statutes—§§ 13:4231 and 4232—into the Louisiana Code of Civil Procedure.

### *A. Statutory Interpretation*

Beginning by looking to the plain language,[210] article 425 paragraph A states the article's general rule, while paragraph B provides an exception to this rule.[211] Similarly, § 13:4231 states the general rule of res judicata, while § 13:4232 provides a number of exceptions to this rule.[212] In analyzing the plain language of article 425 and the res judicata statutes, it makes sense to first compare the general rule in article 425(A) to the general rule in § 13:4231, and then the exception in article 425(B) to the exceptions in § 13:4232.

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209. *See infra* Section III.A. For a further discussion of the practical implications of a rule requiring plaintiffs to sue joint tortfeasors in the same suit, see Comment, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697 (1955).

210. LA. CIV. CODE ANN. art. 9 (2021) ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.").

211. LA. CODE CIV. PROC. ANN. art. 425 (2021).

212. LA. REV. STAT. ANN. § 13:4232 (2021).

Article 425(A) does not explicitly state an identity-of-parties requirement or contain a reference to res judicata.[213] In fact, the only analogous language in § 13:4231 and article 425(A) is the "transaction or occurrence" phrase, which is a common standard in civil procedure articles.[214] Outside of this phrase, the two laws are significantly different.[215] While § 13:4231 differentiates between its effects on plaintiffs and defendants, article 425's language refers to parties generally without specifying different rules for each.[216] Additionally, § 13:4231 is written in terms of the preclusive effects of a lawsuit after a final judgment, but article 425 is written as a rule for parties to follow during litigation.[217] Further, the res judicata statute incorporates a form of issue preclusion, but there is no language to support any rule of issue preclusion in article 425.[218]

The exceptions to each rule contain further inconsistencies in the plain language of article 425 and res judicata. Paragraph A of § 13:4232 lists three of the four exceptions to the general rule of res judicata,[219] and paragraph B provides the fourth and final exception, which involves specific provisions relating to actions for divorce.[220] In contrast, the only exception listed in article 425 is in paragraph B, which lists the same specific exceptions relating to actions for divorce, using almost identical language, as those listed in paragraph B of § 13:4232.[221] If the legislature intended article 425 to merely reference all of the rules, requirements, and exceptions of the res judicata statutes, there would be no need to list this divorce exception in article 425 because it is already included in the res judicata statutes. However, it is important to note that both paragraph B of

213. LA. CODE CIV. PROC. ANN. art. 425 (2021).

214. *See, e.g.*, LA. CODE CIV. PROC. ANN. arts. 891, 531, and 532 (2021).

215. *See generally* Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020).

216. LA. REV. STAT. ANN. § 13:4231(1)–(2) (2021); LA. CODE CIV. PROC. ANN. art. 425 (2021).

217. LA. REV. STAT. ANN. § 13:4231 (2021); LA. CODE CIV. PROC. ANN. art. 425 (2021).

218. LA. REV. STAT. ANN. § 13:4231(3) (2021); LA. CODE CIV. PROC. ANN. art. 425 (2021). Issue preclusion under § 13:4231 prevents litigants from relitigating specific issues that have been determined in a previous action between the same parties arising out of a *separate* transaction or occurrence.

219. LA. REV. STAT. ANN. § 13:4232(A) (2021). The exceptions are (1) when exceptional circumstances justify relief from the effect of res judicata; (2) when the judgment dismissed the first action without prejudice; or (3) when the judgment reserved the right of the plaintiff to bring another action.

220. *Id.* § 13:4232(B).

221. LA. CODE CIV. PROC. ANN. art. 425(B) (2021).

§ 13:4232 and paragraph B of article 425 were added a year after the 1990 Res Judicata Act as part of an act addressing procedural problems with actions for divorce, so the legislature's focus at that point was likely not on preserving the framework of res judicata.[222]

It is illogical that two rules that are so substantively inconsistent could be synonymous.[223] If article 425 is meant to act as a broad codal reference to the specific statutory rules of res judicata, the language of the two laws should not conflict, yet significant distinctions exist between the two.[224] From a strict textualist standpoint, therefore, the First and Fifth circuits correctly interpreted article 425 as a distinct claim-preclusion device from res judicata. A strict textual analysis of this sort, however, adheres to the letter of the law without properly considering the legislative intent.[225]

When the legislature passed the 1990 Res Judicata Act, it included comments on each article and statute that was part of the Act.[226] The comment accompanying the amendment to article 425 essentially repeats the exact language of the article and offers virtually no guidance on whether article 425 is merely a reference to res judicata or an independent preclusion device.[227] The first half of the comment simply states, "This amendment expands the scope of this Article to reflect the changes made in the defense of res judicata . . . ."[228] Although the Second, Third, and Fourth circuits relied on this comment's mention of res judicata as support for their interpretation that article 425 is merely a reference to res judicata,[229] the comments to three other code articles amended as part of the 1990 Res Judicata Act use the same or very similar language.[230] And these articles, which govern lis pendens and the form of petitions, are

222. *See generally* Act No. 367, §§ 2–3, 1991 La. Acts 1304.

223. *See generally* Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020).

224. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445 (La. Ct. App. 1st Cir. 2002); *Handy*, 298 So. 3d 380.

225. *See generally* Ward v. State, Dep't of Transp. & Dev., 2 So. 3d 1231 (La. Ct. App. 2d Cir. 2009).

226. Act No. 521, 1990 La. Acts 1174.

227. LA. CODE CIV. PROC. ANN. art. 425 cmt. (1990).

228. *Id.*

229. Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697 (La. Ct. App. 3d Cir. 2008); *Ward*, 2 So. 3d 1231; Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542, at *10 (La. Ct. App. 4th Cir. Oct. 14, 2021).

230. LA. CODE CIV. PROC. ANN. art. 891 cmt. (1990) ("to reflect the changes made in the defense of res judicata"); *id.* art. 531 cmt. ("to conform to the changes made in the defense of res judicata"); *id.* art. 532 cmt. ("to conform to the changes made in the defense of res judicata").

clearly not mere references to res judicata.[231] The amendments to these articles simply updated the language to apply the new res judicata standard of same "transaction or occurrence" instead of "cause of action."[232]

The First and Fifth circuits focused solely on the first half of the comment, concluding that the amendment to article 425 simply expanded its scope from "an obligation" to a "transaction or occurrence," just as the other articles expanded from "cause of action" to "transaction or occurrence."[233] However, the First and Fifth circuits failed to address the other changes made to article 425 by the 1990 Res Judicata Act and the second half of article 425's comment.

As explained by the Second, Third, and Fourth circuits in the *Spires-Ward-Carollo* line of cases, article 425 does not contain a penalty provision or a mechanism for enforcement of its rule.[234] This lack of a penalty provision is significant because the 1960 version of article 425 did contain a penalty, providing that an obligor who split his cause of action waived his right to enforce the remaining portion.[235] The fact that the legislature chose to remove this language suggests that the legislature did not intend the amended version of article 425 to have its own enforcement power.[236] In further support of their position, the Second and Third circuits looked to the second half of the comment accompanying the amendment to article 425, which explains that article 425 puts parties "*on notice* that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised."[237] Reading the lack of penalty provision with the "on notice" language in the comment, the Second, Third, and Fourth circuits concluded that article 425 has no force independent of res judicata and is merely a warning or reference to res judicata.[238] However, as discussed above, this interpretation is inconsistent

231. *See generally supra* Section I.A.2.

232. *See generally supra* Section I.A.2.

233. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445 (La. Ct. App. 1st Cir. 2002); Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020).

234. Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697, 700 (La. Ct. App. 3d Cir. 2008); Ward v. State, Dep't of Transp. & Dev., 2 So. 3d 1231, 1234 (La. Ct. App. 2d Cir. 2009); Carollo v. Dep't of Transp. & Dev., No. 2021-0114, 2021 WL 4785542, at *6 (La. Ct. App. 4th Cir. Oct. 14, 2021).

235. LA. CODE CIV. PROC. ANN. art. 425 (1960).

236. *Spires*, 996 So. 2d at 700.

237. LA. CODE CIV. PROC. ANN. art. 425 cmt. (1990) (emphasis added).

238. *See Spires*, 996 So. 2d at 700. *Ward*, 2 So. 3d at 1235; *Carollo*, 2021 WL 4785542, at *10.

with the plain language, so further evidence of the legislative intent is necessary to overcome this plain-language analysis.

Interpreting article 425 as an independent claim-preclusion device that does not require identity of parties, as suggested by the First and Fifth circuits, would render the laws on res judicata obsolete.[239] It would be illogical for the legislature to amend res judicata to require (1) same transaction or occurrence and (2) identity of parties, and then in the same act expand the scope of article 425 to require only (1) same transaction or occurrence. If this interpretation prevails, defendants will almost always choose to raise an objection based on article 425 rather than res judicata.[240]

Reading article 425 *in pari materia* with other Code of Civil Procedure articles also gives insight into the legislature's intent. Article 463, which governs cumulation of actions with multiple plaintiffs or defendants, states that "[t]wo or more parties *may* be joined in the same suit, either as plaintiffs or as defendants . . . ."[241] A permissive rule on joining defendants in the same suit would be inconsistent with an interpretation of article 425 that requires all claims arising out of the transaction or occurrence, even those against nonparties, to also be asserted in one suit. Moreover, article 643 provides that "one or more solidary obligors may be sued to enforce a solidary obligation, without the necessity of joining all others in the action."[242] If solidary obligors (who are each liable for the whole of an obligation) need not be joined in the same action, then, *a fortiori ratione*, joint and divisible obligors (who are each only liable for their own portion of the obligation) certainly need not be joined in one action.[243] This analysis undermines the First and Fifth circuits' interpretation, but it does not directly support the opposing interpretation of the Second, Third, and Fourth circuits.

When the proposal for the 1990 Res Judicata Act was presented to the Louisiana House of Representatives, the House assigned the bill to the Civil Law and Procedure Committee for review.[244] At the committee's meeting, Professor Howard L'Enfant, representing the Louisiana State Law Institute, described the main purpose of Senate Bill No. 639 as changing the law so that "res judicata focus[es] on the underlying transaction or occurrence" instead of the underlying cause.[245] He further

239. *See Carollo*, 2021 WL 4785542, at *10.
240. *See id.*
241. LA. CODE CIV. PROC. ANN. art. 463 (2021) (emphasis added).
242. *Id.* art. 643.
243. LA. CIV. CODE ANN. art. 2324 (2021).
244. Minutes of Meeting, Civ. L. & Proc. Comm. 11 (June 18, 1990) (on file with the Louisiana Senate Docket).
245. *Id.*

explained that "the provisions in R.S. 13:4231 and R.S. 13:4232 are the fundamental changes [to] the law" in the act.[246] Through these statements, Professor L'Enfant was clear that the primary purpose of this act was to reform the law on res judicata.[247] Even more relevant, when questioned about the effect of article 425, Professor L'Enfant described the article as an "admonition"[248] and stated that the effect of article 425 "will come from R.S. 13:4231 and 13:4232."[249] He explained that article 425 "*warns* litigants that *res judicata* will bar their claims so they must assert all causes of action."[250] Professor L'Enfant's explanation confirms the *Spires-Ward-Corollo* interpretation that article 425 serves only as a warning of the effects of res judicata, with its force coming from the res judicata statutes. However, as discussed above, the plain language of the article does not represent this intention. Because the plain language of the article conflicts with the intent of the legislature, a legislative solution is necessary to correct the discrepancy.

### *B. A Simple Legislative Solution*

Two Louisiana Circuit Courts of Appeal have interpreted article 425 to be a distinct claim-preclusion device that does not require the parties in each suit to be the same for a claim to be precluded.[251] This *Handy-Westerman* interpretation fundamentally diverges from claim-preclusion law in Louisiana by allowing defendants to avail themselves of a judgment to which they were not a party. As stated by the Fifth Circuit in *Handy*, "it is not the function of a court to create legislation, but rather to interpret it."[252] To resolve this ambiguity, the legislature should repeal article 425 and move the res judicata statutes to the Louisiana Code of Civil Procedure.

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246. *Id.*

247. *Id.*

248. *Id.* at 12. *See* Merriam-Webster, *Admonition*, MERRIAM-WEBSTER DICTIONARY (2020) ("gentle or friendly reproof;" "counsel or warning against fault or oversight").

249. Minutes of Meeting, *supra* note 244, at 12.

250. *Id.* (emphasis added).

251. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445 (La. Ct. App. 1st Cir. 2002); Handy v. Par. of Jefferson, 298 So. 3d 380 (La. Ct. App. 5th Cir. 2020).

252. *Handy*, 298 So. 3d at 391 (first citing Tullier v. Tullier, 464 So. 2d 278, 282 (La. 1985); and then citing Rada v. Adm'r, Div. of Emp't Sec., 319 So. 2d 460, 463 (La. Ct. App. 4th Cir. 1975)) ("If the wording of a statute is not ambiguous but the legislature erred in expressing its intention, any such error should be corrected by the legislature.").

The First and Fifth circuits have interpreted article 425 to be a distinct claim-preclusion device because, simply stated, it appears to be one.[253] The text of the article looks very different from that of the res judicata statute § 13:4231, does not require the causes of action to be between the parties to the litigation, and makes no reference to res judicata.[254] In addition to the discrepancies in the plain language, article 425 historically acted as a distinct claim-preclusion device that had different requirements from res judicata.[255] Since the expanded law of res judicata now precludes actions that were previously only precluded by article 425,[256] the article no longer serves its original purpose, and the confusion can be resolved by repealing article 425.

However, res judicata is a highly important concept in Louisiana's civil procedure law, and as such, it should be included in the Code of Civil Procedure.[257] The res judicata statutes do not belong in their current location in Revised Statutes Title 13: Courts and Judicial Procedure, Chapter 23: Judgments.[258] The statutes in Title 13 are highly specific rules, mostly regarding the minute mechanics of civil procedure.[259] For example, the statutes in Part I of Chapter 23 govern payment of court costs and fees and the procedures for judges to follow when court is not in session or if a judge dies while presiding over a case.[260] Res judicata is a general principle that governs litigants' rights to bring their claims and to be free from vexatious litigation.[261] It is such an important, universal concept that it is specifically named as a peremptory exception to defeat a cause of action in Louisiana Code of Civil Procedure article 927.[262] Yet the general rules governing res judicata itself are the only part of the res judicata framework that is not in the Code of Civil Procedure.[263] The current designation of the rules governing res judicata is illogical and inconsistent with the nature of res judicata, the Code of Civil Procedure, and the Revised Statutes.

253. *Westerman*, 834 So. 2d 445; *Handy*, 298 So. 3d 380.
254. *See supra* Section III.A.1.
255. *See supra* Section I.B.
256. *See supra* Section I.B.3.
257. Kurtz & Frilot, *supra* note 2, at 445.
258. LA. REV. STAT. ANN. § 13:4231 (2021).
259. *See generally id.* tit. 13.
260. *See generally id.* §§ 13:4201–4211.
261. *Id.* § 13:4231.
262. LA. CODE CIV. PROC. ANN. art. 927 (2021).
263. *See generally* Act No. 521, 1990 La. Acts 1174; Kurtz & Frilot, *supra* note 2, at 445.

Article 425 is located in the Code of Civil Procedure in Book I: Courts, Actions, and Parties; Title II: Actions; Chapter 1: General Dispositions.[264] The other chapters in Title II govern cumulation of actions, lis pendens, abandonment of action, and class and derivative actions.[265] Cumulation governs the rules on bringing separate causes of action and separate parties into the same litigation.[266] Lis pendens allows a defendant to have a case dismissed or stayed if the plaintiff has instituted two actions arising out of the same transaction or occurrence against him that are pending at the same time.[267] Additionally, the chapter on general dispositions includes articles on prematurity, heritability of actions, and other central principles affecting the rights of parties in regard to bringing actions.[268] The rules on res judicata logically belong in this title because res judicata is also a central principle that affects parties' rights in bringing and defending against causes of action.[269]

Because the duplication of the rules on res judicata causes confusion among Louisiana Circuit Courts of Appeal, the legislature should repeal article 425. However, because res judicata is an important principle of civil procedure, it needs to be represented in the Code of Civil Procedure. Thus, the legislature should repeal §§ 13:4231 and 4232, which provide the rules of res judicata, and redesignate them as two articles in their own chapter, entitled "Res Judicata," in Book I, Title II of the Code of Civil Procedure, which is where article 425 is currently located. The legislature should enact the two statutes as two separate articles, exactly as they currently appear in the revised statutes. While §§ 13:4231 and 4232 could be combined into one article if necessary, their rules are clearer when separated. Further, res judicata, similar to lis pendens, is a significant procedural mechanism that has important implications for the rights of parties and as such, is deserving of its own chapter.[270] This repeal-and-replace solution is simple but highly effective. Eliminating article 425 also eliminates any confusion about its function, thereby preventing courts or litigants in the future from precluding suits that are not between the same parties as a prior suit. Moving the res judicata statutes to the Code of Civil Procedure maintains the presence of res judicata in the code—where it belongs—that would otherwise be lost by the mere repeal of article 425.

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264. LA. CODE CIV. PROC. ANN. art. 425 (2021).
265. *Id.* at bk. I, tit. II.
266. *Id.* arts. 461–465.
267. *Id.* arts. 531–532.
268. *Id*. at bk. I, tit. II, ch. 1.
269. Kurtz & Frilot, *supra* note 2, at 445.
270. *Id.*

## CONCLUSION

The current split between the Louisiana Circuit Courts of Appeal will breed confusion and uncertainty until it is resolved by the legislature. Under the *Spires-Ward-Corollo* interpretation, the Second, Third, and Fourth circuits have held that article 425 is merely a reference to the requirements of res judicata.[271] In contrast, the First and Fifth circuits under the *Handy-Westerman* interpretation have found that article 425 operates as an independent claim-preclusion device that does not contain the "between the same parties" requirement found in res judicata.[272] An independent statutory analysis and thorough review of the legislative history of article 425, along with the other articles amended as part of the 1990 Res Judicata Act, reveal that the Second, Third, and Fourth circuits correctly interpreted and applied article 425 as a warning to litigants of the effects of res judicata. To resolve this circuit split, the Louisiana Legislature should repeal article 425 and create a new chapter in the Code of Civil Procedure, to which the legislature should move §§ 13:4231 and 4232.

271. Ward v. State, Dep't of Transp. & Dev., 2 So. 3d 1231 (La. Ct. App. 2d Cir. 2009); Spires v. State Farm Mut. Auto. Ins. Co., 996 So. 2d 697 (La. Ct. App. 3d Cir. 2008); Carollo v. Dep't of Transp. & Dev., 2021-0114, 2021 WL 4785542 (La. Ct. App. 4th Cir. Oct. 14, 2021).

272. Westerman v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 445, 448 (La. Ct. App. 1st Cir. 2002); Handy v. Par. of Jefferson, 298 So. 3d 380, 390 (La. Ct. App. 5th Cir. 2020).