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# A PROPOSED MINIMUM THRESHOLD ANALYSIS FOR THE IMPOSITION OF STATE DOOR-CLOSING STATUTES

## INTRODUCTION

“Door-closing” statutes bar a corporate plaintiff from pursuing an action based on an intrastate claim in a state’s courts if the corporation has been conducting intrastate business in that state without having qualified to do so.<sup>1</sup> Their purpose is to encourage foreign corporations to qualify to conduct intrastate business<sup>2</sup> and to pay the state taxes

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1. As of 1981, all fifty states, as well as the District of Columbia, had statutes that precluded a foreign corporation from bringing an action in their courts under these circumstances. Corp. Guide (P-H) ¶ 7103, 7106 (1981); *see, e.g.*, Fla. Stat. Ann. § 607.354(1) (West 1977); Ky. Rev. Stat. Ann. § 271A.610 (Baldwin 1981); N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963); Model Bus. Corp. Act § 117 (1960). *See generally* Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 Colum. L. Rev. 117 (1963) [hereinafter cited as *Qualification Statutes*]. Door-closing statutes are raised as a defense to a suit by a foreign corporation. *See* *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 24 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 277 (1961). These statutes generally do not restrict the right of an unqualified corporation to defend lawsuits. *E.g.*, Ill. Ann. Stat. ch. 32, § 157.125 (Smith-Hurd 1954 & Supp. 1982-1983); N.J. Stat. Ann. § 14A:13-11(2) (West 1969); Va. Code § 13.1-119 (1978 & Supp. 1982); *see* Model Bus. Corp. Act § 117 (1960). *But see* Nev. Rev. Stat. § 80.210(1) (1979) (unqualified foreign corporation barred from defending action in state court); Wis. Stat. Ann. § 180.847(1) (West 1957 & Supp. 1982-1983) (same). Both the Nevada and the Wisconsin statutes, however, have been liberally construed to permit unqualified foreign corporations to defend suits in state courts. *See* *Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 507, 501 P.2d 639, 642 (1972) (plaintiff estopped from asserting Nevada’s door-closing statute to prevent unqualified foreign corporation from asserting a defense); *Bazan v. Kux Mach. Co.*, 52 Wis. 2d 325, 341, 190 N.W.2d 521, 529 (1971) (Wisconsin’s door-closing statute construed to prevent only an affirmative recovery). An unqualified foreign corporation is generally permitted to assert a counterclaim if it arises out of the same transaction as the claim that it is defending. *See* *Environmental Coatings, Inc. v. Baltimore Paint & Chem. Co.*, 617 F.2d 110, 112 (5th Cir. 1980) (*per curiam*); *Aberle Hosiery Co. v. American Arbitration Ass’n*, 337 F. Supp. 90, 92 (E.D. Pa.), *appeal dismissed per curiam*, 461 F.2d 1005 (3d Cir. 1972); *National Bank v. J.B.L. & K. of Alaska, Inc.*, 546 P.2d 579, 589 (Alaska 1976). In many jurisdictions, the bar to filing suit may be removed by qualifying to do business at any time before filing. *See, e.g.*, Fla. Stat. Ann. § 607.354 (West 1977); Ill. Ann. Stat. ch. 32, § 157.125 (Smith-Hurd 1954 & Supp. 1982-1983); N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963). *But see* Ala. Code § 10-2A-247 (1980) (contract made by unqualified foreign corporation is void at the action of such corporation); Ark. Stat. Ann. § 64-1202 (1980) (same); Miss. Code Ann. § 79-3-247 (1972) (same); Vt. Stat. Ann. tit. 11, § 2120a (1973) (foreign corporation’s claim barred if corporation was unqualified at time of contract).

2. Qualifying to do business typically includes appointing an agent for the service of process and registering with the secretary of state so that taxes may be assessed and collected. *See, e.g.*, Fla. Stat. Ann. § 607.317(1)(j) (West 1977) (tax assessment); *id.* § 607.327(1)(e) (service of process); Miss. Code Ann. § 79-3-219(1) (1972) (tax assessment); *id.* § 79-3-229 (service of process); N.Y. Bus. Corp. Law § 1304(a)(6) (McKinney Supp. 1982-1983) (service of process); *id.* § 1304(a)(8) (tax assessment).

levied on that intrastate business.<sup>3</sup> Access to court cannot be barred, however, if a plaintiff is litigating an interstate claim, such as a suit to enforce a contract for interstate or foreign commerce.<sup>4</sup> Such a bar would impose an unreasonable burden on interstate commerce and therefore violate the commerce clause.<sup>5</sup>

Application of these statutes does not run afoul of the commerce clause, however, if the plaintiff is engaged in intrastate commerce, and the claim emanates from this intrastate business<sup>6</sup> rather than from interstate or foreign commerce.<sup>7</sup> Thus, a corporation engaged in intrastate business cannot "escape state regulation merely because it is also engaged in interstate commerce."<sup>8</sup> For example, if an Indiana

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3. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting); Comment, *Foreign Corporations—State Boundaries for National Business*, 59 Yale L.J. 737, 746 (1950). Door-closing statutes serve as penalties to foreign corporations that do not comply with statutory qualification procedures. See, e.g., Fla. Stat. Ann. § 607.354 (West 1977); Miss. Code Ann. § 79-3-247 (1972); N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963). The procedures ensure that the states will be able to assess and collect taxes on the intrastate business conducted by foreign corporations. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting). States are permitted to so regulate intrastate business. See *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210-12 (1944); *Railway Express Agency v. Virginia*, 282 U.S. 440, 443-44 (1931).

4. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 34 (1974); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 201-02 (1914); *Diversacon Indus. v. National Bank of Commerce*, 629 F.2d 1030, 1033 (5th Cir. 1980); *Silver v. Woolf*, 538 F. Supp. 881, 886 (D. Conn.), *aff'd*, 694 F.2d 8 (2d Cir. 1982).

5. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 34 (1974) (state's "refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause"); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921) ("A corporation of one State may go into another . . . for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause."); *Jerold Panas & Partners, Inc. v. Portland Soc'y of Art*, 535 F. Supp. 650, 652 n.1 (D. Me. 1982) (state statute that burdens interstate commerce of a foreign corporation is unconstitutional under the commerce clause); *Uncle Ben's Inc. v. Crowell*, 482 F. Supp. 1149, 1153-54 (E.D. Ark. 1980) (same).

6. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 277-79 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210-12 (1944); *Railway Express Agency v. Virginia*, 282 U.S. 440, 443-44 (1931). When these criteria are met, then the application of a door-closing statute is constitutional because it is merely a mechanism for enforcing the corporation's tax obligations. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting).

7. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33-34 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 201-02 (1914); *Diversacon Indus. v. National Bank of Commerce*, 629 F.2d 1030, 1033 (5th Cir. 1980); *Silver v. Woolf*, 538 F. Supp. 881, 886 (D. Conn.), *aff'd*, 694 F.2d 8 (2d Cir. 1982).

8. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961); see *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 209-10 (1944); *Railway Express Agency v. Virginia*, 282 U.S. 440, 443-44 (1931).

corporation conducting both interstate and intrastate business in New Jersey ships its products to New Jersey and later sells them intrastate to New Jersey customers through its own New Jersey salesmen, New Jersey's door-closing statute may bar a claim arising out of the intrastate sale.<sup>9</sup> It may not, however, bar a claim arising out of the initial interstate shipment from Indiana.<sup>10</sup>

State law currently determines what threshold of activity is required to justify the imposition of a state's door-closing statute.<sup>11</sup> The threshold varies depending upon the statute involved and the way that a court construes it.<sup>12</sup> In some states, the threshold is rather low; minimal contacts are deemed sufficiently intrastate in nature to invoke those states' door-closing statutes.<sup>13</sup> This raises the issue whether interstate contacts are being used to preclude a corporation from

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9. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278-79 (1961). The Court noted that the plaintiff was "suing upon a contract entirely separable from any particular interstate sale and the power of the State [was] not limited." *Id.* at 282-83.

10. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 32-34 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291-92 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 201-02 (1914).

11. The threshold inquiry usually takes the form of defining how much activity within the state is equal to transacting business within the meaning of the state statutes. *See, e.g., S. & L. Painting Contractors, Inc. v. Vickers*, 267 Ark. 109, 110-11, 589 S.W.2d 196, 196-97 (1979); *Integrated Container Servs. v. Overstreet*, 375 So. 2d 1146, 1149-50 (Fla. Dist. Ct. App. 1979); *Aeropesca Ltd. v. Butler Aviation Int'l, Inc.*, 44 Md. App. 610, 618-19, 411 A.2d 1055, 1060-61 (1980). Federal courts sitting in diversity also follow such state law. *See infra* notes 47-50 and accompanying text. A state may not, however, determine that a foreign corporation is conducting business within the state for the purpose of applying its door-closing statute if the corporation is conducting only interstate business in the state. *Alленberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 283-84 (1961).

12. *Compare Sar Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283, 1285 (5th Cir. 1976) ("[S]everal Alabama cases have held that the mere acceptance of a contract sued on in Alabama is sufficient to require the plaintiff to meet the qualification requirements of the statutes.") *and Uncle Ben's Inc. v. Crowell*, 482 F. Supp. 1149, 1152-53 (E.D. Ark. 1980) (holding, under Arkansas law, the mere presence of two employees within the state, even in the absence of an office and a telephone, was considered sufficient contact to trigger the statute) *with United Merchants & Mfrs. v. David & Dash, Inc.*, 439 F. Supp. 1078, 1089 (D. Md. 1977) (maintenance of an office and a business telephone were not sufficient contacts to justify imposition of Maryland's door-closing statute) *and Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65, 66 (S.D.N.Y. 1969) (under New York law, a continuity of intrastate business purpose and activity is required to trigger New York's door-closing statute). For examples of state court determinations, see *supra* note 11.

13. *See, e.g., Sar Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283, 1285 (5th Cir. 1976) (under Alabama law, the mere acceptance of a contract deemed sufficient contact); *McCullum Aviation, Inc. v. Cim Assocs.*, 438 F. Supp. 245, 250 (S.D. Fla. 1977) (under Florida law, any intrastate contact deemed sufficient contact); *S. & L. Painting Contractors, Inc. v. Vickers*, 267 Ark. 109, 110-11, 589 S.W.2d 196, 196-97 (1979) (in Arkansas, an intrastate contract made by an unqualified foreign corporation deemed to be void *ab initio*).

access to a state forum, thus impermissibly burdening interstate commerce. To ensure that these statutes will not be applied unconstitutionally, and that corporations may accurately predict their rights and obligations, a uniform minimum standard should be adopted. This Note suggests that the minimum contacts analysis used to determine whether a state may subject a defendant to its jurisdiction<sup>14</sup> is appropriate to determine what threshold must be crossed before a corporation is deemed engaged in intrastate commerce for the purpose of applying state door-closing statutes.

Part I of this Note discusses the Supreme Court's guidelines for determining when a state may tax interstate commerce. It further discusses the fact that the Court has declined to provide similar guidelines regarding the threshold of contacts that must be met before a state may constitutionally apply a door-closing statute on the ground that a corporation is engaged in intrastate commerce. Part II analyzes the need for a uniform minimum threshold that can be applied by all courts. Finally, Part III of this Note suggests that the prevailing minimum contacts analysis for personal jurisdiction should be adopted for this purpose.

#### I. UNREASONABLE STATE TAXATION OF FOREIGN CORPORATIONS

The Supreme Court has provided guidance on the relationship that a state must have with a corporation before it may impose a tax on that corporation's income from interstate commerce conducted within the state. In *Complete Auto Transit, Inc. v. Brady*,<sup>15</sup> the Supreme Court unanimously held that a state may not tax the interstate commerce conducted by a foreign corporation unless the corporation has a

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14. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court stated that in order for a state to subject a defendant to *in personam* jurisdiction, the defendant must have certain minimum contacts with the state. *Id.* at 316. The Court refined the test in *Hanson v. Denckla*, 357 U.S. 235 (1958), holding that a defendant is subject to a state's jurisdiction only if it "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* at 253. The purposefulness of a defendant's activities in the forum state has been, and continues to be, a dominant inquiry in the Court's *in personam* jurisdictional analysis. Chronologically, these cases include: *Shaffer v. Heitner*, 433 U.S. 186, 215-16 (1977) (extension of "purposeful availment" standard to *quasi in rem* action); *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) ("A father who agrees . . . to allow [his children] to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."); (citing *Shaffer*); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("[Petitioners] avail themselves of none of the privileges and benefits of Oklahoma law."); cf. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 n.10 (1982) (reiterating need for minimum contacts analysis and citing "individual[s] liberty interest" as justification for restraint on forum's sovereign power resulting from deployment of the analysis).

15. 430 U.S. 274 (1977).

substantial nexus with the state and the tax is fairly related to the services provided the state.<sup>16</sup> The Court added, in *Commonwealth Edison v. Montana*,<sup>17</sup> that "when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under . . . the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce."<sup>18</sup>

The standards set forth in *Complete Auto Transit* and its progeny do not, however, serve as a satisfactory threshold of contact that state courts should be required to find before invoking their door-closing statutes. *Complete Auto Transit* involved state sales taxes related to the use of state facilities by foreign corporations engaging in interstate commerce.<sup>19</sup> Such taxes may be imposed in accordance with the corporation's use of state services because "interstate commerce may be made to pay its way."<sup>20</sup> Conversely, door-closing statutes enforce state franchise taxes levied on a foreign corporation engaging in intrastate business activities.<sup>21</sup> Such franchise taxes are gauged not according to the corporation's use of state services but rather are based upon the amount of corporate assets present in the state.<sup>22</sup>

When a state court invokes a door-closing statute because it has determined that the foreign corporation has conducted sufficient activity to constitute intrastate business for the purpose of applying its statute, it has in effect determined that the foreign corporation should be liable for taxes because of its conduct in the state.<sup>23</sup> Such a determination will impose an impermissible burden on interstate commerce, however, if interstate activities are unjustifiably labeled as intrastate to bring a corporation within a state's power to tax.<sup>24</sup>

For example, a determination by a Mississippi court that a Tennessee corporation has engaged in intrastate business and was thus subject to Mississippi's door-closing statute would place an impermissible bur-

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16. *Id.* at 279, 287-89.

17. 453 U.S. 609 (1981).

18. *Id.* at 629.

19. 430 U.S. at 275-79.

20. *Id.* at 281.

21. See *supra* notes 1-3 and accompanying text.

22. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting); see, e.g., Fla. Stat. Ann. § 607.367(2)-(4) (West 1977); Miss. Code Ann. § 27-13-7(1) (Supp. 1982); N.Y. Tax Law § 209(1) (McKinney Supp. 1982-1983).

23. By invoking a door-closing statute, a state court is imposing a statutory penalty because a foreign corporation has been doing business within the terms of the statute but has not qualified to do so. See, e.g., Fla. Stat. Ann. § 607.354(1) (West 1977); Miss. Code Ann. § 79-3-247 (1972); N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963). The statutes are designed to encourage foreign corporations to meet the tax liability resulting from their intrastate transactions. See *supra* notes 1-3 and accompanying text.

24. See *supra* notes 3-7 and accompanying text.

den on interstate commerce if, in fact, the corporation did not have sufficient contacts with Mississippi to justify the imposition of a tax on the revenues generated by the corporation's business.<sup>25</sup> Such was the situation in *Allenberg Cotton Co. v. Pittman*,<sup>26</sup> in which the Supreme Court held that the appellant foreign corporation did not have the intrastate contacts required for Mississippi to bar it from state court.<sup>27</sup> The Court expressly declined to decide whether the corporation had the proper nexus with state services to render its interstate contacts liable to a local tax on those services.<sup>28</sup> The foreign corporation's contacts with Mississippi were simply deemed to be "interstate," and the Court refused to enforce the door-closing statute.<sup>29</sup> Rather than establishing a minimum intrastate contacts threshold at which state taxation of intrastate business revenue, as enforced by door-closing statutes, was constitutionally permissible, the Court declined to address the issue.<sup>30</sup> Thus, the need for a minimum threshold at which to judge intrastate contacts for the purpose of applying state door-closing statutes remains.

## II. THE NEED FOR A UNIFORM MINIMUM THRESHOLD

State law presently determines the threshold of contacts that is sufficient to trigger a state's door-closing statute.<sup>31</sup> Because courts differ significantly in their determinations, little uniformity in the application of these statutes exists.<sup>32</sup> For example, Alabama courts have held that the mere sale by a foreign corporation to an Alabama customer constitutes sufficient contact with the state for the door-closing statute to apply,<sup>33</sup> while New York courts have held that in

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25. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974).

26. 419 U.S. 20 (1974).

27. *Id.* at 33-34.

28. *Id.*

29. *Id.* at 32-34.

30. *Id.*

31. See, e.g., *Boles v. Midland Guardian Co.*, 410 So. 2d 82, 84 (Ala. Civ. App. 1982) (a single sale in Alabama is all that is required to invoke the statute); *S. & L. Painting Contractors, Inc. v. Vickers*, 267 Ark. 109, 109-10, 589 S.W.2d 196, 196-97 (1979) (a single intrastate contract sufficient to invoke statute); *Integrated Container Servs. v. Overstreet*, 375 So. 2d 1146, 1149-50 (Fla. Dist. Ct. App. 1979) (repairing and storing marine containers located in state sufficient to invoke statute); *Aeropesca Ltd. v. Butler Aviation Int'l, Inc.*, 44 Md. App. 610, 618-19, 411 A.2d 1055, 1060-61 (1980) (contracting with a Maryland concern not sufficient to invoke statute); *Gru-man v. Plotkin*, 61 A.D.2d 1024, 1024-25, 403 N.Y.S.2d 88, 89 (1978) (per curiam) (statute inapplicable if corporation not "doing business" within the state).

32. See *supra* notes 12, 31.

33. E.g., *Sar Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283, 1285 (5th Cir. 1976) (applying Alabama law); *Boles v. Midland Guardian Co.*, 410 So. 2d 82, 84 (Ala. Civ. App. 1982). But see *Kentucky Galvanizing Co. v. Continental Casualty Co.*, 335 So. 2d 649, 651 (Ala. 1976) (mere solicitation not enough to invoke door-closing statute).

order for New York's statute to be invoked, "the foreign corporation must do more than make a single contract, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose."<sup>34</sup>

This lack of uniformity creates uncertainty for a foreign corporation.<sup>35</sup> A door-closing statute presents the corporation with the dilemma of either qualifying to do business in the state, and hence subjecting itself to state fees and taxes, or running the risk that it will be unable to sue in state court if its contacts are deemed sufficient to invoke the statute. A corporation may thus be deterred from conducting business in certain states because of its fear that courts of those states might deem the corporation to have the requisite intrastate contacts to bar it from those courts.<sup>36</sup> In addition, an adjudication by one state's courts that a corporation is engaged in intrastate commerce for the purpose of applying the state door-closing statute may deter that corporation from engaging in those same activities in another state because it wishes to avoid a similar result, even though the other state may judge the issue differently.<sup>37</sup>

The purpose of the commerce clause is to foster the free flow of commerce and to encourage commercial uniformity among the states.<sup>38</sup> The Supreme Court has held that "a state may not impose a

34. *Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65, 66 (S.D.N.Y. 1969) (applying New York law and quoting *International Fuel & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 230, 151 N.E. 214, 215 (1926)); *accord Gruman v. Plotkin*, 61 A.D.2d 1024, 1024-25, 403 N.Y.S.2d 88, 89 (1978) (per curiam).

35. See *infra* note 37 and accompanying text.

36. For state adjudications that a foreign corporation's contacts with the state were sufficient to invoke a door-closing statute, see *Boles v. Midland Guardian Co.*, 410 So. 2d 82, 84 (Ala. Civ. App. 1982); *S. & L. Painting Contractors, Inc. v. Vickers*, 267 Ark. 109, 109-10, 589 S.W.2d 196, 196-97 (1979); *Integrated Container Servs. v. Overstreet*, 375 So. 2d 1146, 1149-50 (Fla. Dist. Ct. App. 1979); *Aeropesca Ltd. v. Butler Aviation Int'l, Inc.*, 44 Md. App. 610, 618-19, 411 A.2d 1055, 1060-61 (1980); *Gruman v. Plotkin*, 61 A.D.2d 1024, 1024-25, 403 N.Y.S.2d 88, 89 (1978) (per curiam).

37. For example, isolated actions by a foreign corporation that would not bar it from New York's courts would likely bar it from Alabama's courts. *Compare Sar Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283, 1285 (5th Cir. 1976) (single sale sufficient to trigger Alabama's door-closing statute) *with* *Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65, 66 (S.D.N.Y. 1969) (continuity of business purpose required for New York's door-closing statute to apply).

38. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) ("Commerce Clause's overriding requirement [is to effect] a national 'common market.'"). In *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), the Court stated:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regula-



burden which materially affects interstate commerce in an area where uniformity of regulation is necessary.”<sup>39</sup> State legislation regulating the length of trains,<sup>40</sup> the length and width of trucks,<sup>41</sup> and the type of safety equipment required on trucks<sup>42</sup> has been held to violate the commerce clause because the lack of national uniformity resulting from such legislation had a deleterious effect upon interstate commerce which outweighed the state’s interest in promulgating the regulations.

In determining whether the burden that a state places upon interstate commerce is permissible, the Court has stated that “the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.”<sup>43</sup> The Court has generally upheld state statutes that imposed a burden on interstate commerce if they were promulgated to protect the health and safety of a state’s citizens.<sup>44</sup> Such is not the purpose of door-closing statutes, however, which are designed to protect primarily economic interests.<sup>45</sup> If a state statute burdens interstate commerce, then the extent of the burden that will be constitutionally tolerated depends not only upon the nature of the state interest promoted by the statute, but also upon “whether it could be promoted as well with a lesser impact on interstate activities.”<sup>46</sup> The establishment of a uniform minimum threshold for determining when a state door-closing statute may be invoked would preserve a state’s interest in regulating local business activities while removing the negative impact that states may currently impose upon interstate commerce.

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tions exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

*Id.* at 539; *see Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (state statute that presents an “unreasonable clog upon the mobility of commerce” is “hostile in conception as well as burdensome in result” and hence repugnant to the commerce clause).

39. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960) (pollution ordinance upheld in order to protect health of local community).

40. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 781-82 (1945).

41. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978). *But see South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184-85 (1938) (state statute upheld in absence of congressional legislation).

42. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-29 (1959).

43. *California v. Zook*, 336 U.S. 725, 728 (1949); *accord United Ass’n of Journeymen v. Local 334, United Ass’n of Journeymen*, 452 U.S. 615, 637 n.11 (1981) (Stevens, J., dissenting).

44. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (pollution ordinance); *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 187 (1938) (highway safety statute); *Mintz v. Baldwin*, 289 U.S. 346, 349-50 (1933) (cattle quarantine statute).

45. *See supra* notes 1-3 and accompanying text.

46. *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970); *accord Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980).

The need for uniformity is not restricted to state court adjudications. Federal courts sitting in diversity currently look to state case law to determine whether a foreign corporation has been transacting intrastate business for the purpose of applying state door-closing statutes.<sup>47</sup> The Supreme Court expressly sanctioned this practice in *Woods v. Interstate Realty Co.*,<sup>48</sup> in which the Court reasoned that the *Erie Railroad v. Tompkins*<sup>49</sup> policy of following state law in diversity cases was applicable to door-closing statutes.<sup>50</sup> The *Woods* holding appears to conflict with the Court's decision in *Sola Electric Co. v. Jefferson Electric Co.*,<sup>51</sup> in which it stated that the *Erie* policy was inapplicable "to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."<sup>52</sup> Indeed, the Supreme Court has set forth guidelines as to what constitutes intrastate, as opposed to interstate commerce.<sup>53</sup> Furthermore, the Second Circuit has stated that the application of door-closing statutes "so as to frustrate the petitioner's access to a federal forum to litigate an admittedly federal matter and thereby limit the uniform and effective application of a federal . . . statute is a result not contemplated by *Erie*."<sup>54</sup> Federal courts sitting in diversity should therefore apply a uniform minimum contacts analysis to determine whether a corporation has been conducting intrastate business for the purposes of applying a state door-closing statute.

### III. IMPORTING A UNIFORM MINIMUM THRESHOLD FROM PERSONAL JURISDICTION ANALYSIS

#### A. *The Existing Definition of Intrastate Commerce*

The Supreme Court has set forth some general guidelines as to what constitutes intrastate business so that states may tax and regulate such

47. See, e.g., *Uncle Ben's, Inc. v. Crowell*, 482 F. Supp. 1149, 1153 (E.D. Ark. 1980); *United Merchants & Mfrs. v. David & Dash, Inc.*, 439 F. Supp. 1078, 1087 (D. Md. 1977); *McCullum Aviation, Inc. v. Cim Assocs.*, 438 F. Supp. 245, 249-50 (S.D. Fla. 1977); *Stafford-Higgins Indus. v. Gaytone Fabrics, Inc.*, 300 F. Supp. 65, 66 (S.D.N.Y. 1969).

48. 337 U.S. 535 (1949).

49. 304 U.S. 64 (1938).

50. 337 U.S. at 536-37 (*Erie* intended to eliminate discrimination "in favor of those authorized to invoke the diversity jurisdiction of the federal courts").

51. 317 U.S. 173 (1942).

52. *Id.* at 176 (applicability of patent laws and Sherman Antitrust Act).

53. *Cheney Bros. v. Massachusetts*, 246 U.S. 147, 153-57 (1918); see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 280-82 (1961). See *infra* notes 55-59 and accompanying text.

54. *Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1326 (2d Cir. 1977) (citations omitted); *accord Ayer v. General Dynamics Corp.*, 82

business without burdening interstate commerce.<sup>55</sup> The maintenance of a local office for the purpose of buying, selling or repairing goods has been held to constitute intrastate business, which is subject to state taxation and regulation.<sup>56</sup> Likewise, maintaining a local office in which to conduct corporate meetings and distribute assets and dividends constitutes intrastate commerce.<sup>57</sup> On the other hand, the maintenance of a local office merely to facilitate the solicitation of orders for goods shipped from out of state does not constitute intrastate commerce for the purpose of state taxation.<sup>58</sup> Similarly, a contract made and executed entirely within one state may constitute an interstate transaction if the subject matter of the transaction is intended for interstate shipment.<sup>59</sup> There remains a need for specific guidelines to determine when a state's door-closing statute may constitutionally be applied.

### B. A Uniform Minimum Threshold is Required

The determination of the threshold of contact required to trigger a door-closing statute is currently determined by state law.<sup>60</sup> The application of such statutes based upon a foreign corporation's interstate contacts violates the commerce clause.<sup>61</sup> Elimination of this impermissible burden on interstate commerce requires a uniform minimum threshold at which contacts become sufficient to permit the application of a state's door-closing statute. Moreover, elimination of this burden would also have the salutary effect of permitting corporations to formulate a uniform national business policy.<sup>62</sup> An appropriate test may be imported from the due process principles defining the minimum contacts that a defendant must have with a state before the state may assert its jurisdiction over him.<sup>63</sup> These principles apply equally well to determine the constitutionality of a state's assertion of its

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F.R.D. 115, 119 n.7 (S.D.N.Y. 1979); see *Jerold Panas & Partners, Inc. v. Portland Soc'y of Art*, 535 F. Supp. 650, 652 n.1 (D. Me. 1982).

55. See *Cheney Bros. v. Massachusetts*, 246 U.S. 147, 153-57 (1918).

56. *Id.* at 154-55.

57. *Id.* at 155-56.

58. *Id.* at 153-54; see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 280-83 (1961) (presence of an office and 18 employees who promoted intrastate sale of foreign corporation's products held to constitute intrastate commerce for purpose of applying state door-closing statute).

59. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 292 (1921) (contract made in Kentucky for shipment of grain to Tennessee deemed interstate); see *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974) ("Delivery of the cotton to a warehouse, taken in isolation, is an intrastate transaction. But that delivery is also essential for the completion of the interstate transaction.").

60. See *supra* note 11.

61. See *supra* note 4.

62. See *supra* notes 36-37 and accompanying text.

63. See *supra* note 14.

power to tax in this context, and its power to punish by denying a plaintiff a forum in which to litigate its claims.

### C. *The Proposed Standard*

The Supreme Court has held that a state court's exercise of personal jurisdiction over a defendant who lacks certain "minimum contacts" with the forum state is inconsistent with the due process clause of the Constitution.<sup>64</sup> State courts must therefore look to constitutional principles of due process to determine whether they may exercise jurisdiction over a defendant.<sup>65</sup> The Supreme Court set forth the "minimum contacts" test in *International Shoe v. Washington*,<sup>66</sup> stating that "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations."<sup>67</sup>

It is the obligations generated by the transaction of intrastate business—registering and paying taxes—that door-closing statutes seek to enforce by mandating that a foreign corporation fulfill those obligations in order to enjoy a state court's protection.<sup>68</sup> Under the *International Shoe* test, a defendant, if not present within a state, must "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>69</sup> Similarly, a minimum intrastate contacts analysis would allow a state court to apply its door-closing statute fairly to a given fact situation without violating the commerce clause.<sup>70</sup> The Court has stated that "the fairness standard of *International Shoe* can be easily applied in the vast majority of cases."<sup>71</sup> A principal advantage of using the *International Shoe* test for intrastate contacts analysis is that it provides uniformity within a flexible framework. Like the jurisdictional determination, the intrastate threshold determination is "one in

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64. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (minimum contacts by defendant necessary for exercise of *in personam* jurisdiction to comport with due process); see *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (applying the same standards for *in personam* and *quasi in rem* jurisdiction).

65. See, e.g., *500 Motors, Inc. v. Superior Court*, 122 Cal. App. 3d 827, 832, 176 Cal. Rptr. 349, 352 (1981); *Ballard v. Rawlins, Inc.*, 101 Ill. App. 3d 601, 605, 428 N.E.2d 532, 535-36 (1981); *Gager v. White*, 53 N.Y.2d 475, 482, 425 N.E.2d 851, 853, 442 N.Y.S.2d 463, 465, *cert. denied*, 454 U.S. 1086 (1981).

66. 326 U.S. 310, 316 (1945).

67. *Id.* at 319.

68. See *supra* notes 1-3 and accompanying text.

69. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

70. For examples of how door-closing statutes have been applied to fact situations so as not to burden interstate commerce, see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944); *Railway Express Agency v. Virginia*, 282 U.S. 440 (1931).

71. *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977).

which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'<sup>72</sup>

Three interrelated concerns are addressed when applying the minimum contacts fairness standard. One concern is whether the defendant has purposefully availed itself of the benefits of state law.<sup>73</sup> This requirement allows the corporation to plan its activities and eliminates uncertainty as to whether a door-closing statute may properly be invoked. If a foreign corporation has purposefully availed itself of state law by conducting a pattern of intrastate business, it may reasonably expect that it must qualify to do such business or be denied access to that state's courts.<sup>74</sup> The actual filing of the lawsuit which gives rise to a state's attempt to invoke its door-closing statute does not constitute purposeful availment, however, because door-closing statutes bar a plaintiff from bringing an action if the plaintiff was not qualified to do business *at the time that the cause of action arose*.<sup>75</sup> Consequently, any purposeful availment after the cause of action arises, such as the filing of the lawsuit, cannot constitute purposeful availment for the purpose of minimum threshold analysis.

The foreseeability that a defendant's contacts with the forum will render it amenable to suit must also be analyzed. Jurisdiction may not be imposed on a defendant unless "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>76</sup> This test also should be used to determine whether a state's door-closing statute should apply. If a foreign corporation could reasonably anticipate being sued in that state, then it should be precluded from suing unless it meets the state's

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72. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

73. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 n.10 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Noel v. S.S. Kresge Co.*, 669 F.2d 1150, 1154-55 (6th Cir. 1982); *Santiago v. BRS, Inc.*, 528 F. Supp. 755, 757-59 (D.P.R. 1981).

74. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974) (foreign corporation's "contacts with Mississippi [did] not exhibit the sort of localization or intrastate character which [the Court has] required in situations where a State seeks to require a foreign corporation to qualify to do business"); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 280 (1961) (Court agreed with trial court's determination that foreign corporation was transacting intrastate business, stating that "[t]o hold . . . that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality.") (citation omitted).

75. See, e.g., *La. Rev. Stat. Ann. § 12:302(A)* (West Supp. 1983) (maintaining action in Louisiana court does not constitute doing business in Louisiana for purpose of applying Louisiana's door-closing statute); *Md. Corps. & Ass'ns Code Ann. § 7-103(1)* (1975) (bringing action in Maryland court does not constitute intrastate business in Maryland).

76. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

qualification requirements.<sup>77</sup> The foreseeability analysis is useful because it allows corporations to formulate national business policy based upon uniformity.<sup>78</sup> It would help to remove the burden on interstate commerce presently imposed by the uncertainty engendered by the lack of a uniform minimum intrastate contacts threshold.<sup>79</sup>

Another consideration of minimum contacts is "the relationship among the defendant, the forum, and the litigation."<sup>80</sup> This also aids in the intrastate contacts analysis because the forum state's interest lies in the proper application of its door-closing statute. The statutes are designed to encourage foreign corporations to qualify properly before availing themselves of the benefits of state law.<sup>81</sup> Indeed, the relationship between a foreign corporation and the forum state must be analyzed to determine if the corporation has been conducting intrastate business in the forum state.<sup>82</sup> In addition, the relationship between the litigation and the foreign corporation determines the nature of the corporation's contacts with the forum state.<sup>83</sup> For example, a door-closing statute may not constitutionally bar a foreign corporation from suing to enforce a contract made for interstate commerce.<sup>84</sup> The relationship among the foreign corporation, the forum and the litigation is particularly important when a door-closing statute leaves a foreign corporation without a remedy for an otherwise valid claim.<sup>85</sup>

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77. This comports with the purpose of door-closing statutes, which is to encourage foreign corporations to qualify. See *supra* notes 1, 3.

78. The Supreme Court has stressed the role of the commerce clause in ensuring the prosperity of the nation by promoting centralized regulations affecting commerce. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-35 (1949) ("The necessity of centralized regulation of commerce among the states was obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate."); see also *California v. Zook*, 336 U.S. 725, 728 (1949) ("the familiar test is that of uniformity"). See *supra* note 38.

79. See *supra* notes 12, 31.

80. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

81. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 40 n.6 (1974) (Rehnquist, J., dissenting). See *supra* notes 1-3 and accompanying text.

82. For examples of such analyses, see *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279-81 (1961); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291 (1921).

83. See, e.g., *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 33-34 (1974); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 282-83 (1961); *Sar Mfg. v. Dumas Bros. Mfg.*, 526 F.2d 1283, 1285 (5th Cir. 1976); *Uncle Ben's, Inc. v. Crowell*, 482 F. Supp. 1149, 1152-53 (E.D. Ark. 1980); *United Merchants & Mfrs. v. David & Dash, Inc.*, 439 F. Supp. 1078, 1089 (D. Md. 1977).

84. See *supra* note 5.

85. Some door-closing statutes forever bar a plaintiff foreign corporation's claim if the corporation was unqualified at the time that its cause of action arose. See, e.g., Ala. Code § 10-2A-247 (1980); Ark. Stat. Ann. §§ 64-1201 to -1202 (1980); Miss. Code Ann. § 79-3-247 (1972). These statutes thus differ significantly from other statutes that provide a *nunc pro tunc* curative provision, allowing a foreign corpora-

In such cases, the plaintiff foreign corporation may be unable to obtain jurisdiction over the domestic corporation in another state.<sup>86</sup> The plaintiff corporation's contacts with the litigation should therefore be analyzed carefully to prevent a claim from being forever barred.<sup>87</sup> The flexibility afforded by the relationship analysis of the minimum contacts test is quite appropriate to these situations.

#### CONCLUSION

Courts should apply a uniform minimum threshold analysis when determining whether a foreign corporation has conducted intrastate business for the purpose of imposing the penalties of a state's door-closing statute. Such a minimum threshold would remove the burden to interstate commerce currently posed by states that close their court doors to foreign corporations engaging solely in interstate business. Moreover, a uniform minimum threshold would assist corporations in formulating a uniform business policy. The minimum contacts analysis presented in *International Shoe* and its progeny provides a uniform yet flexible standard that may appropriately be applied to establish a uniform minimum intrastate contacts threshold.

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tion to gain access to state courts if it pays back taxes and the requisite fees and penalties prescribed in the statute. *See, e.g.*, Fla. Stat. Ann. § 607.354 (West 1977); Ga. Code Ann. § 14-2-331(b) (1982); N.Y. Bus. Corp. Law § 1312 (McKinney 1963).

It has been suggested that such non-curative statutes may violate the foreign corporation's due process rights. *See* *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 41-42 & n.9 (1974) (Rehnquist, J., dissenting). The statutes, however, appear to withstand a due process attack even though they discriminate against foreign corporations because they bear a rational relationship to a legitimate state purpose (controlling intrastate business activities). *Exxon Corp. v. Maryland*, 437 U.S. 117, 124 (1978). The Supreme Court has shown a great reluctance to invalidate state economic regulations on the basis of due process. *Id.* ("It is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation." ' ") (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)).

Similarly, the Court has been reluctant to find that state economic regulations violate the Equal Protection Clause. *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 668, 674 (1981) (no equal protection violation when a state statute discriminated against foreign corporations because a legitimate state purpose was furthered by such discrimination); *see* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63, 470 (1981) (no equal protection violation when a state's interest in promoting conservation discriminated against producers of plastic milk containers).

86. *See* *Qualification Statutes*, *supra* note 1, at 130 & n.87.

87. *See* *supra* note 85 and accompanying text. One district court has suggested that a greater burden upon interstate commerce should be tolerated when a door-closing statute does not leave the corporation without a remedy. *McCullum Aviation, Inc. v. Cim Assocs.*, 438 F. Supp. 245, 251 (S.D. Fla. 1977). Indeed, the analysis set forth by the *McCullum* court suggests that flexibility in the application of door-closing statutes is desirable. Minimum contacts analysis affords such flexibility.

# THE RES JUDICATA EFFECT OF PRIOR STATE COURT JUDGMENTS IN SHERMAN ACT SUITS: EXALTING SUBSTANCE OVER FORM

## INTRODUCTION

The federal courts exercise exclusive jurisdiction<sup>1</sup> over claims arising under the federal antitrust laws.<sup>2</sup> Because Congress has not preempted<sup>3</sup> state regulation of antitrust violations,<sup>4</sup> however, conduct

1. In those areas of law over which the federal courts have been granted exclusive jurisdiction, affirmative claims for relief arising under federal statutes may only be brought in federal court. Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 510 (1957) [hereinafter cited as *Jurisdiction of the Federal Courts*]; see *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897). State courts may, however, determine the merits of federal "questions" that are raised "collaterally." *Jurisdiction of the Federal Courts, supra*, at 510; see *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897). For example, a state court has jurisdiction to consider the defense of illegality under the federal antitrust laws in a breach of contract action. *Jurisdiction of the Federal Courts, supra*, at 510-11; see *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 187-88 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

2. *E.g.*, *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 279 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967); see *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 188 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); see, *e.g.*, *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 & n.6 (1943); *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440-41 (1920). The federal antitrust statutes do not explicitly provide the federal courts with "exclusive" jurisdiction. See *Sherman Act*, 15 U.S.C. § 4 (1976); *Clayton Act*, 15 U.S.C. § 15 (1976 & Supp. V 1981). The statutes have, however, been judicially construed as vesting this jurisdiction in the federal courts. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 489 n.11 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); see 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4470, at 691 & n.41 (1981) [hereinafter cited as C. Wright & A. Miller]. See *infra* notes 128-33 and accompanying text. This omission has led at least one commentator to conclude that "exclusive jurisdiction was not intended." *Jurisdiction of the Federal Courts, supra* note 1, at 510 n.13. Congress has expressly granted the federal courts exclusive jurisdiction over several other major areas of federal law, see, *e.g.*, 15 U.S.C. § 78aa (1976) (*Securities Exchange Act of 1934*); 28 U.S.C. § 1338 (1976) (*patent and copyright law*); *id.* § 1334 (*bankruptcy*); *id.* § 1333(1) (*admiralty*). The res judicata effect of prior state court judgments in the areas of admiralty and bankruptcy is beyond the scope of this Note. For a discussion of exclusive jurisdiction and res judicata in the SEC, copyright and patent areas, see *infra* note 90.

3. The issue whether federal legislation is intended to preempt state regulation is determined by statutory construction. L. Tribe, *American Constitutional Law* § 6-23, at 376 (1978). A congressional purpose to occupy a field of law exclusively may be inferred only if Congress explicitly provides for this result or if the nature of the subject matter of the regulation compels this determination. *Id.* § 6-25, at 384; see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). If it is determined that Congress did intend to preempt state law by occupying the field, then state regulation will be invalidated even if it is in keeping with the federal policy. L. Tribe, *supra*, § 6-25, at 384. For a discussion of some areas in which state law is preempted by federal legislation, see *infra* note 87.

4. See, *e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495 (1949); *Standard Oil v. Tennessee*, 217 U.S. 413, 422 (1910); *Woods Exploration & Produc-*



giving rise to claims under the Sherman Act may also be grounds for affirmative relief under state antitrust statutes in state court.<sup>5</sup> Given this concurrent regulation, the issue may arise whether a claim under section one of the Sherman Act<sup>6</sup> should be barred under the doctrine of res judicata<sup>7</sup> if its merits have already been adjudicated by a state

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ing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1313 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 573-74 (N.D. Cal. 1981); *see also* 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman) (the Sherman Act is intended to supplement existing state antitrust statutes). "Although the Supreme Court has consistently upheld the exercise of the state police power" to regulate trade restraints affecting purely intrastate commerce, Rubin, *Rethinking State Antitrust Enforcement*, 26 U. Fla. L. Rev. 653, 667 (1974); *see, e.g.*, *International Harvester Co. v. Missouri*, 234 U.S. 199, 209 (1914); *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 130 (1905), it has failed to define the precise constitutional limits on state antitrust regulation of interstate commerce. For a comprehensive discussion of the constitutional limitations imposed on state regulation of antitrust violations, *see generally* Rubin, *supra*, at 667-77.

5. Restatement (Second) of Judgments § 26 comment c(1) (1980); *see, e.g.*, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 404-05 (1981) (Brennan, J., dissenting); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 n.1 (9th Cir.), *cert. denied*, 102 S. Ct. 2308 (1982); *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir), *cert. denied*, 454 U.S. 878 (1981); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1303 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1254-55 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 31 (8th Cir. 1964). A plaintiff who has a claim under both federal and state law is generally free to ignore the federal ground and litigate his state claim in state court. *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960, 964 (2d Cir. 1981); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 346 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 574 (N.D. Cal. 1981); *see also* 1A J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 0.160 [3.-3], at 231-32 (2d. ed. 1983).

6. This Note focuses on federal suits based on § 1 of the Sherman Act because most state antitrust actions involve claims arising under state statutes that are similar to § 1. *See infra* pt. II(B). Although some states have enacted state antitrust statutes modeled on the Robinson-Patman Act, § 2 of the Sherman Act, and the Clayton Act, the issue whether res judicata effect should be given to prior state judgments involving claims arising under these statutes has not arisen frequently and therefore is not considered in this Note.

7. Although the term "res judicata" has traditionally broadly comprised two related doctrines, claim preclusion or "true res judicata," and issue preclusion or collateral estoppel, 18 C. Wright & A. Miller, *supra* note 2, § 4402, at 6-7, this Note, adhering to recent Supreme Court methodology, treats "res judicata" as distinct from "collateral estoppel," *see Allen v. McCurry*, 449 U.S. 90, 94 (1980). The term "res judicata" in this Note, therefore, comprises only the claim preclusion doctrine. Under the doctrine of res judicata, a final judgment on the merits of an action precludes parties or those in privity with them from relitigating the same cause of action and any claims or defenses that were or that might have been raised in a prior suit. *E.g.*, *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); 18 C. Wright & A. Miller, *supra* note 2, § 4402, at 7 (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). Collateral estoppel, on the other hand, only precludes further litigation of those issues actually determined in a prior suit and

court<sup>8</sup> under a state statute substantively identical to the Sherman Act.<sup>9</sup> A novel and more problematic issue is whether the res judicata doctrine should preclude a plaintiff from instituting a Sherman Act

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necessary to the earlier judgment. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876). Although the distinction between res judicata and collateral estoppel is only one of degree. *see* 18 C. Wright & A. Miller, *supra* note 2, § 4402, at 10, the availability of res judicata as a potential defense is essential in situations in which the doctrine of collateral estoppel may be inapplicable in the exclusive jurisdiction context, as, for example, when no findings of fact were made in the prior state action. *See, e.g.*, *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 362-63 (6th Cir. 1967) (dismissal on the merits with prejudice in prior state action); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 687 n.32 (settlement of prior state action by consent decree); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 Harv. L. Rev. 1281, 1284-85 (1978) (state court judge expresses his findings merely as a legal conclusion or a jury returns only a general verdict) [hereinafter cited as *Prior State Court Findings*]; Note, *Exclusive Federal Jurisdiction: The Effect of State Court Findings*, 8 Stan. L. Rev. 439, 446 & n.35 (1956) (same) [hereinafter cited as *Exclusive Jurisdiction*].

The traditional doctrine of res judicata is designed to end needless and repetitive litigation. *See* *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Suggested reasons for this policy include fairness to the defendant, sound judicial administration, and the elimination of unnecessary costs on opposing parties and an overburdened judicial system. *See* *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980). Both res judicata and collateral estoppel are affirmative defenses under the Federal Rules of Civil Procedure, and therefore must be pleaded and proved. 18 C. Wright & A. Miller, *supra* note 2, § 4405, at 34-35. Generally, res judicata applies only if a prior suit involved: 1) a final, valid judgment on the merits, 2) between the same parties, 3) of the same cause of action. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1029 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); 1B J. Moore & J. Wicker, *Moore's Federal Practice* ¶ 0.405 [1], at 624 (2d ed. 1982) [hereinafter cited as J. Moore]. This Note focuses on the identity of claims requirement. It therefore is assumed in the analysis that the remaining requirements have been satisfied. The issue whether a federal court hearing an exclusive federal claim should give preclusive effect to a prior state court determination under the doctrine of collateral estoppel is beyond the scope of this Note. For a detailed discussion, see generally *Prior State Court Findings, supra, passim*.

8. This Note addresses the issue of the res judicata effect of a prior state court judgment of a state antitrust claim in a subsequent federal suit. The issue whether to give res judicata effect to a prior suit in federal court involving a state antitrust claim based on diversity or pendent jurisdiction does not require an analysis of exclusive federal court jurisdiction over the federal antitrust laws. For cases involving these issues, *see infra* notes 95, 120-21.

9. 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 675; *see* *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1029 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *cf.* *Brown v. Felsen*, 442 U.S. 127, 127-28 (1979) (whether federal bankruptcy court should give res judicata effect to prior state court judgment); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 668 (1978) (Burger, C.J., dissenting) (whether state court judgment should be given preclusive effect in a subsequent federal action involving a 10b-5 claim).

suit if he *could have* asserted a substantively identical state antitrust claim in a prior state court action involving non-antitrust claims.<sup>10</sup>

Most federal courts have refused to give res judicata effect to a prior state suit and thereby bar a subsequent federal antitrust action involving the same operative facts.<sup>11</sup> While not rejecting the applicability of the doctrine of collateral estoppel,<sup>12</sup> these courts have reasoned, in conclusory fashion, that a state action by definition can never be the same cause of action for res judicata purposes as a federal antitrust suit simply because of the existence of exclusive federal jurisdiction.<sup>13</sup> These decisions may be predicated on the objectives underlying exclusive federal court jurisdiction over federal antitrust claims:<sup>14</sup> promot-

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10. See *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1090-92 (7th Cir. 1982), *vacated, reh'g granted*, 5 Trade Reg. Rep. (CCH) ¶ 65,214 (7th Cir. Jan. 25, 1983), *order granting reh'g vacated*, No. 81-2671, slip op. (7th Cir. May 11, 1983). See *infra* note 68.

11. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 n.1 (9th Cir.), *cert. denied*, 102 S. Ct. 2308 (1982); *Hayes v. Solomon*, 597 F.2d 958, 984-85 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363-64 (6th Cir. 1967); *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 417-19 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.) (dictum), *cert. denied*, 350 U.S. 825 (1955); *New Eng. Liquor Sales Co. v. General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798, at 71,934-35 (D. Mass. 1982); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981); see also *Restatement (Second) of Judgments* § 26 comment c(1), illustration 2 (1980); *Prior State Court Findings, supra* note 7, at 1292 & n.59; cf. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 674-76 (1978) (Brennan, J., dissenting) (Securities Exchange Act of 1934 context; not appropriate to accord res judicata effect to state court determination of a claim within the exclusive jurisdiction of the federal courts); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1254-55 (9th Cir. 1969) (state court action under state unfair practices statute did not preclude Robinson-Patman claim, but precluded Sherman and Clayton Act claims in subsequent federal action), *cert. denied*, 396 U.S. 1012 (1970).

12. See, e.g., *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 362-63 (6th Cir. 1967); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981). For a discussion of the doctrine of collateral estoppel, see *supra* note 7.

13. See, e.g., *Hayes v. Solomon*, 597 F.2d 958, 984-85 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363-64 (6th Cir. 1967); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981).

14. See *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979) (holding that state court could not award federal antitrust damages), *cert. denied*, 444 U.S. 1078 (1980); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.) (stating that uniform and efficient administration of federal antitrust laws could only be accomplished by the federal courts), *cert. denied*, 350 U.S. 825 (1955); cf. *Will v. Calvert*

ing uniform interpretation of federal law<sup>15</sup> and assuring a plaintiff the advantages of both a federal forum, which include the expertise of federal judges,<sup>16</sup> the availability of jury trials<sup>17</sup> and liberal discovery rules,<sup>18</sup> and an automatic right to treble damages.<sup>19</sup> Nevertheless, in light of the prevalence of state antitrust statutes that are substantively identical to section one of the Sherman Act,<sup>20</sup> and the existence of state antitrust enforcement mechanisms,<sup>21</sup> application of which would not frustrate the original goals behind a grant of exclusive federal court jurisdiction,<sup>22</sup> the Court of Appeals for the Fourth Circuit has applied the *res judicata* doctrine to bar a subsequent Sherman Act suit.<sup>23</sup>

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Fire Ins. Co., 437 U.S. 655, 670 (1978) (Brennan, J., dissenting) (arguing that exclusive federal jurisdiction "evinces a legislative desire for the uniform determination of [federal] claims by tribunals expert in the administration of federal laws and sensitive to the national concerns underlying them").

15. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); *Exclusive Jurisdiction*, *supra* note 7, at 449.

16. *See* 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 676; Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L. Rev. 1360, 1366, 1383 (1967) [hereinafter cited as *Res Judicata Effect*].

17. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 676; *Res Judicata Effect*, *supra* note 16, at 1383 n.85.

18. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 675 (1978) (Brennan, J., dissenting); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 676; *see Res Judicata Effect*, *supra* note 16, at 1383 & n.85.

19. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

20. *See* Miles, *Current Trends In State Antitrust Enforcement*, 47 *Antitrust L.J.* 1343, 1346 (1979); Project, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine In Old Wine Skins*, 4 *J. Corp. L.* 547, 618 (1979) [hereinafter cited as *Reviving State Antitrust Enforcement*]. For a compilation of the official texts of state antitrust statutes, see 4 *Trade Reg. Rep. (CCH)* ¶ 30,000, at 35,011-40,506 (1982).

21. This term comprises 1) the ability of the state judiciary to administer state antitrust law uniformly; and 2) the state rules of civil procedure, particularly the rules providing for discovery and a right to a jury trial. *See Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

22. *See id.* at 1031-32 (state antitrust mechanisms "fulfilled" the goals underlying a grant of exclusive federal court jurisdiction over the federal antitrust laws).

23. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486, 497 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *see also* *Classen v. Weller*, 516 F. Supp. 1243, 1244-45 (N.D. Cal. 1981) (federal court stayed its own proceeding pending state court adjudication of state antitrust claim which may have been "dispositive" of federal antitrust claim); *see supra* notes 68-74 (discussion of *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1982), *vacated, reh'g granted*, 5 *Trade Reg. Rep. (CCH)* ¶ 65,214 (7th Cir. Jan. 25, 1983), *order granting reh'g vacated*, No. 81-2671, slip op. (7th Cir. May 11, 1983)).

This Note concludes that federal courts should not refuse to apply res judicata to bar a Sherman Act suit simply because of their exclusive jurisdiction over the federal antitrust laws.<sup>24</sup> An exception to the general rule of finality of judgments<sup>25</sup> is unwarranted when the state

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24. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), cert. denied, 454 U.S. 878 (1981).

25. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1032 (E.D.N.C. 1978) ("Court should recognize exceptions to the operation of res judicata only when the interests countervailing thereto are very strong indeed"), *aff'd*, 640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981); see *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 35 (8th Cir. 1964) (dictum) ("The real problem in Lyons was . . . whether for policy reasons an exception should be made to the general rule of finality of prior adjudications."). In *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), which involved successive federal antitrust suits, the Supreme Court stated that there is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*," *id.* at 401 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)), on the basis of "simple justice" or "public policy." The doctrine of res judicata is "a rule of fundamental and substantial justice [and its importance] is even more compelling in view of today's crowded dockets . . ." *Id.* at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)).

"[F]ederal respect for state court judgments is [more than] a matter of judicial grace." *Currie, Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 326 (1978). It is a congressional command. See 28 U.S.C. § 1738 (1976) ("The . . . judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . ."). Most courts that have addressed the issue whether to accord preclusive effect to a prior state court judgment in a subsequent federal action based on an exclusively federal claim have ignored the mandate of this statute, see *supra* note 42, possibly implying an exception to the application of § 1738 in the exclusive federal jurisdiction context. In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), however, the Court addressed the issue of an "implied exception" to § 1738 in the civil rights context over which the state and federal courts exercise concurrent jurisdiction. The question was whether a federal court, in a Title VII case, should give preclusive effect to a state court decision upholding a state administrative agency's rejection of an employment discrimination claim. *Id.* at 463. According to the prior state judgment preclusive effect in the federal suit, the Court held that an implied exception to § 1738 should not be recognized because there was "[n]othing in the legislative history of the 1964 Act [suggesting] that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court." *Id.* at 473. Although *Kremer* involved an area of law within the concurrent jurisdiction of the state and federal courts, "[i]t could be argued that under [the Court's] demanding approach to the statute, there is no room for implied exceptions in other areas of clearly exclusive jurisdiction." 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 68 (Supp. 1982). Professor Wright's argument is even more compelling in the antitrust area, in which the existence of exclusive federal court jurisdiction is not clear. See *infra* notes 128-32 and accompanying text. For a detailed discussion of the preclusive effect to be given prior state court judgments in Title VII suits, see generally Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 Mich. L. Rev. 1485 (1981).

and federal antitrust claims are substantively identical<sup>26</sup> and use of a state's antitrust enforcement mechanisms would not undermine the objectives of the exclusive jurisdiction grant. In such a situation, a balance of the conflicting policies of exclusive jurisdiction and res judicata<sup>27</sup> weighs in favor of giving full res judicata effect to the prior state court judgment.

Part I of this Note examines federal courts' recent application of res judicata to bar federal antitrust suits instituted subsequent to state actions involving the same operative facts. Part II suggests that the requisite identity of claims in state and federal antitrust actions for res judicata purposes is not destroyed simply because the state action was or could have been based on a state antitrust statute and the federal action on the Sherman Act. Part III examines the objectives underlying a grant of exclusive jurisdiction in the antitrust context and suggests that, in certain situations, according a prior state court judgment res judicata effect does not frustrate these goals.

## I. THE RES JUDICATA EFFECT OF PRIOR STATE COURT JUDGMENTS IN THE ANTITRUST CONTEXT

### A. *The Legacy of Lyons*

The earliest case to decide whether a state action brought under a state antitrust statute barred, under the res judicata doctrine, a subsequent federal Sherman Act suit was *Straus v. American Publishers' Association*.<sup>28</sup> The Second Circuit held that the federal antitrust action was barred even though the federal claim was within the exclusive jurisdiction of the federal courts.<sup>29</sup> The court did not, however, analyze the substantive similarity of the claims that arose under the state and federal antitrust statutes,<sup>30</sup> emphasizing instead that the state court plaintiffs initially had a choice of either a state or federal

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26. See *infra* pt. II(B).

27. A balancing approach has been proposed by a few commentators and adopted by at least one court. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); see 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 677-78; *Res Judicata Effect*, *supra* note 16, at 1384. *But see* 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 68 (Supp. 1982) (in light of *Kremer*, courts may be compelled to accord res judicata effect to prior state court judgments irrespective of a grant of exclusive jurisdiction).

28. 201 F. 306 (2d Cir. 1912), *appeal dismissed*, 235 U.S. 716 (1914), *questioned in Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.) (denial of rehearing), *cert. denied*, 350 U.S. 825 (1955).

29. 201 F. at 310.

30. *See id.* The relevant section of New York's antitrust statute, the Anti-Monopoly Act, ch. 690, § 1, 1899 N.Y. Laws 1514 (currently codified as amended at N.Y.

forum in which to litigate their antitrust claim.<sup>31</sup> The plaintiffs, therefore, by choosing to proceed in state court under the state antitrust statute, were precluded from presenting their antitrust claim a "second time to any other court."<sup>32</sup>

This choice-of-forum rationale was rejected by the Second Circuit, however, in *Lyons v. Westinghouse Electric Corp.*,<sup>33</sup> the "seminal

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Gen. Bus. Law § 340 (McKinney 1968 & Supp. 1982)), provided: "Every contract, agreement, arrangement or combination whereby a monopoly . . . is or may be created, established or maintained, or whereby competition in this state . . . is or may be restrained or prevented . . . is hereby declared to be against public policy, illegal and void." *Id.* The federal court, in the subsequent treble damage action, did not consider the unavailability of such damages in the prior state action. *See* 201 F. at 310. The state statute authorized only imprisonment or a fine. Anti-Monopoly Act, ch. 690, § 2, 1899 N.Y. Laws 1514 (currently codified as amended at N.Y. Gen. Bus. Law § 341 (McKinney 1968 & Supp. 1982)).

31. 201 F. at 310.

32. *Id.*

33. 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). The procedural issue in *Lyons* involved a motion by the federal defendant to stay a federal action under the Sherman Act on the grounds that a judgment on appeal in a state suit between the same parties would be dispositive of the federal proceeding. The state action involved a claim for breach of contract to which the defendant had asserted the defense of illegality under the federal antitrust laws. *Id.* at 185. The state court, finding the defense without merit, awarded judgment to the plaintiff. The state court defendant then instituted the federal antitrust suit. *Id.* The district court granted the stay, *Lyons v. Westinghouse Elec. Corp.*, 16 F.R.D. 384, 385 (S.D.N.Y. 1954), but on appeal, the Second Circuit vacated the stay, reasoning that the state court determination would not have binding effect on the subsequent federal action. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 185, 189-90 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

The Supreme Court, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), recognized that a federal action could be stayed on the grounds of judicial economy when there was a pending state action, but only in exceptional circumstances. *Id.* at 818-19, *reaffirmed in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 938-39 (1983). Six circuits apparently recognize the discretionary power of federal courts to stay a federal proceeding in the interests of "wise judicial administration." *See Vairo, Issuing Stays in Diversity Cases: A Cure for Growing Congestion?*, Nat'l L.J., Feb. 14, 1983, at 22, col. 1. A stay of a federal action is most compelling in routine diversity cases involving purely state law issues, assuming a parallel action is pending in state court. Arguably, no clear justification is presented for permitting the federal court to proceed. *See Aro v. Lichtig*, 537 F. Supp. 599, 601-02 (E.D.N.Y. 1982); *Vairo, supra*, at 27, col. 2. The issuance of a stay is less compelling when federal rights are involved. If a federal court determines that Congress intended the federal forum to be the primary forum for the claim asserted, the court should not stay the proceedings before it. *See id.* at 27, col. 3. Finally, a stay of the federal proceeding is least compelling when the federal action involves a claim within the exclusive jurisdiction of the federal courts. Because Congress intended the federal forum to be the exclusive forum for adjudicating the merits of such a claim, there is no justification warranting the issuance of a stay. *See Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 832-33 (9th Cir. 1963) (antitrust action); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189-90 (2d Cir.) (same), *cert. denied*, 350 U.S. 825 (1955); *Wellington Computer Graphics, Inc. v.*

decision" addressing the general preclusive effect of state court judgments in the antitrust area.<sup>34</sup> The court held that a state court determination of the merits of a defense based on the Sherman Act in a breach of contract action should not be given collateral estoppel<sup>35</sup> effect, except as to findings of "evidentiary facts,"<sup>36</sup> in a subsequent Sherman Act suit brought by the state court defendant.<sup>37</sup> In an opinion that discredited<sup>38</sup> and arguably overruled *Straus*,<sup>39</sup> Judge Learned

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Modell, 315 F. Supp. 24, 25-26 (S.D.N.Y. 1970) (Securities Exchange Act of 1934); Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 Colum. L. Rev. 684, 700 (1960). But see *Classen v. Weller*, 516 F. Supp. 1243, 1244-45 (N.D. Cal 1981) (staying federal antitrust action because issues presented "coincided" with issues presented in a previously filed state action and state court decision may have been "dispositive" of federal action under res judicata or collateral estoppel doctrines).

34. See *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1029-30 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *Res Judicata Effect*, *supra* note 16, at 1364-65; *Exclusive Jurisdiction*, *supra* note 7, at 440-44.

35. When a different cause of action is asserted in a subsequent suit, only the doctrine of collateral estoppel may preclude relitigation of issues that were actually determined in the prior suit and necessary to the earlier judgment. See *supra* note 7. Because a claim and a defense are not deemed to be the same cause of action, the assertion of a defense in a prior suit does not bar, under the doctrine of res judicata, the assertion in a subsequent action of a claim based on the same facts. See *Restatement of Judgments (Second) § 22* comments c & d (1980).

36. Judge Hand stated that collateral estoppel would apply to preclude relitigation of "constituent facts" but not of "the entire congeries of such facts, taken as a unit." 222 F.2d at 188. This distinction between "constituent" facts and "congeries" of facts is generally equated with the distinction between findings as to purely "observable phenomena—termed 'evidentiary facts,'" and the application of law to fact—issues or "ultimate facts." *Exclusive Jurisdiction*, *supra* note 7, at 444; see *Jurisdiction of the Federal Courts*, *supra* note 1, at 515. It has been further argued that even state court determinations of purely evidentiary facts, on occasion, should not be given collateral estoppel effect. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 675 (1978) (Brennan, J., dissenting); Note, *Exclusive Federal Court Jurisdiction and State Judgment Finality—The Dilemma Facing the Federal Courts*, 10 Seton Hall L. Rev. 848, 867-68 (1980) [hereinafter cited as *The Dilemma Facing the Federal Courts*].

37. See 222 F.2d at 190. Judge Hand recognized that absent exclusive federal jurisdiction over the federal antitrust claim, the state court judgment would have been accorded full collateral estoppel effect. *Id.* at 188.

38. 222 F.2d at 195 (denial of rehearing).

39. See *id.* Although the opinion is unclear, some courts have suggested that *Lyons* overruled *Straus*. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 490 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 418 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967). Judge Hand could have used the choice-of-forum factor to distinguish, rather than overrule, *Straus*, which based its holding almost entirely on the fact that the plaintiff had voluntarily selected a state forum in which to litigate its antitrust claims. See *supra* notes 31-32 and accompanying text. Since the defendant in *Lyons*



Hand concluded that the grant of exclusive jurisdiction to the federal courts was intended to ensure the strict and uniform administration of the federal antitrust laws, particularly the application of the treble damages provision.<sup>40</sup> Accordingly, he held that this grant to the federal courts "should be taken to imply an immunity of their decisions from any prejudgment elsewhere."<sup>41</sup>

In determining the res judicata effect to be accorded a prior state court judgment, most courts, relying on the *Lyons* rationale, have assumed, simply because of exclusive federal court jurisdiction over such actions, that a subsequent federal antitrust suit cannot be barred.<sup>42</sup> Two courts readily held that res judicata would not bar the federal suit because the state court, not adjudicating antitrust claims, could not provide the same right to treble damages as the federal

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did not have a choice of forum, the court's decision not to give preclusive effect to the prior state determination seems equitable under the circumstances. See *infra* notes 62-63 and accompanying text. "[T]he result [of the *Lyons* decision] has been the disregard of this [choice-of-forum] factor in the analysis of res judicata problems raised when a state court has rendered a judgment, the facts of which are the basis for a subsequent action within the exclusive jurisdiction of federal courts." *Res Judicata Effect*, *supra* note 16, at 1367; see *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 417-18 (2d Cir.) (reaffirming *Lyons*' rejection of choice-of-forum rationale), *cert. denied*, 387 U.S. 921 (1967); *The Dilemma Facing the Federal Courts*, *supra* note 37, at 867 ("Factors such as choice of forum should have no effect on [the] determination of finality."). One court, however, in applying res judicata to bar a federal antitrust suit, instituted subsequent to a state court action involving the same operative facts, has predicated its decision in part on the choice-of-forum policy. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 492 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). See *infra* pt. I(B).

40. 222 F.2d at 189.

41. *Id.*

42. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 n.1 (9th Cir.), *cert. denied*, 102 S. Ct. 2308 (1982); *Hayes v. Solomon*, 597 F.2d 958, 984-85 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967); *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 417-19 (2d Cir. 1967), *cert. denied*, 387 U.S. 921 (1967); *New Eng. Liquor Sales Co. v. General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798, at 71,935 (D. Mass. 1982); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981); see also *Restatement (Second) of Judgments* § 26 comment c(1), illustration 2 (1980); *Prior State Court Findings*, *supra* note 7, 1292 & n.59; *cf.* *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 674-76 (1978) (Brennan, J., dissenting) (Securities Exchange Act of 1934 context: not appropriate to accord res judicata effect to state court determination of a claim within the exclusive jurisdiction of the federal courts); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1254-55 (9th Cir. 1969) (state court action under state unfair practices statute not preclusive of Robinson-Patman claim, but preclusive of Sherman and Clayton Act claims in subsequent federal action), *cert. denied*, 396 U.S. 1012 (1970).

forum.<sup>43</sup> In most of these cases, the claims asserted in state court were based on common-law theories<sup>44</sup> and not on state antitrust statutes. For example, the state actions involved claims for breach of contract,<sup>45</sup> breach of a fiduciary duty,<sup>46</sup> unfair competition,<sup>47</sup> restraint of trade,<sup>48</sup> wrongful termination of employment,<sup>49</sup> and the review of state administrative agency proceedings.<sup>50</sup> More recently, one court has rejected outright the *Lyons* policy of absolute federal court immu-

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43. See *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979) ("We have found no decision . . . which applies [the doctrine of res judicata] to bar a second suit when the first forum lacked the ability to provide the relief sought in the second forum.") (footnote omitted), *cert. denied*, 444 U.S. 1078 (1980); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967) ("There seems to be some question as to whether [res judicata] is applicable when the first forum lacks the ability to give the relief sought in the second forum."); see also *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.) (inadequacy of state court remedies), *cert. denied*, 350 U.S. 825 (1955); cf. *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1254-55 (9th Cir. 1969) (state action under state unfair practices statute preclusive of claims in federal court under Sherman and Clayton Acts but not of a claim under the Robinson-Patman Act when the state statute contained prohibitions "similar" to those made by the Sherman and Clayton Acts but not similar to those in the Robinson-Patman Act), *cert. denied*, 396 U.S. 1012 (1970). These cases suggest that notwithstanding the existence of exclusive federal court jurisdiction over the federal antitrust laws, res judicata would be applicable in a situation in which the state forum could provide the same right to treble damages as the federal forum. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

44. See, e.g., *Hayes v. Solomon*, 597 F.2d 958, 971-72 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 361 (6th Cir. 1967); *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 410 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967); *New Eng. Liquor Sales Co. v. General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798, at 71,934-35 (D. Mass. 1982); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981). *But see Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 & n.1 (9th Cir.) (prior state action involved claim arising under antitrust statute), *cert. denied*, 102 S. Ct. 2308 (1982); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1254-55 (9th Cir. 1969) (same), *cert. denied*, 396 U.S. 1012 (1970).

45. *Hayes v. Solomon*, 597 F.2d 958, 971 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

46. *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 410 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967).

47. *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 361 (6th Cir. 1967).

48. *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981) (counterclaim in federal court alleging Sherman Act violation not barred on basis of assertion of prior state court claim alleging tortious interference with business and restraint of trade).

49. *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 380 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979).

50. *New Eng. Liquor Sales Co. v. General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798, at 71,935 (D. Mass. 1982).

nity<sup>51</sup> by applying the doctrine of res judicata to bar a plaintiff from instituting a Sherman Act claim in federal court following a prior state court judgment.<sup>52</sup>

### B. Embracing Res Judicata

In an "innovative" decision, *Nash County Board of Education v. Biltmore Co.*,<sup>53</sup> the Fourth Circuit held that a plaintiff who had brought a suit in state court<sup>54</sup> under a state antitrust statute that was identical to the Sherman Act was barred, under the doctrine of res judicata, from pursuing his Sherman Act claim in a subsequent federal action.<sup>55</sup> The court found the requisite identity of claims for res judicata purposes even though a state statute was the basis for one action and a federal statute for the other:<sup>56</sup> Both suits involved the same price-fixing claim,<sup>57</sup> both statutes contained identical language and offered an automatic right to treble damages.<sup>58</sup> Noting that a number of federal courts have not followed *Lyons* in the collateral estoppel context,<sup>59</sup> the court thought it illogical that a federal antitrust

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51. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.), cert. denied, 350 U.S. 825 (1955). See *supra* note 41 and accompanying text.

52. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), cert. denied, 454 U.S. 878 (1981); see *infra* notes 68-74; see also *Classen v. Weller*, 516 F. Supp. 1243, 1244-45 (N.D. Cal. 1981). In *Classen*, the court stayed a federal antitrust action because the issues and remedies presented were "virtually identical" to those presented in a previously filed state action. *Id.* at 1245. The reason for the issuance of the stay was that the potential state court determination on the merits of a counterclaim, based on a state antitrust statute, might have been "dispositive of the federal claims." *Id.* at 1244. It is not clear, however, whether the subsequent federal action should be precluded because of an application of res judicata or collateral estoppel. 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 69 n.22 (Supp. 1982).

53. 640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981).

54. In fact, the state action was not actually brought by the federal plaintiff. The State Attorney General had filed the prior suit on behalf of a class of public school systems, of which the plaintiff was a member. Under the identity of parties requirement of res judicata, only parties or those in privity with them are bound by a prior judgment. *Id.* at 494. The court readily found that the federal plaintiff was a party to the prior state suit, which ended in a consent decree. *Id.* at 493-94. A consent decree constitutes a final judgment on the merits for res judicata purposes. See *Rector v. Suncrest Lumber Co.*, 52 F.2d 946, 948 (4th Cir. 1931).

55. 640 F.2d at 493.

56. *Id.* at 488.

57. *Id.*

58. See *id.* Compare Clayton Act, 15 U.S.C. § 15 (1976 & Supp. V 1981) with N.C. Gen. Stat. § 75-16 (1981). The *Nash* court distinguished the case in which a state forum could not provide the same right to treble damages as the federal forum. 640 F.2d at 490.

59. The court cited *Becher v. Contoure Labs., Inc.*, 279 U.S. 388, 390-92 (1929) (patent infringement) and *Azalea Drive-In Theatre, Inc. v. Hanft*, 540 F.2d 713, 715 (4th Cir. 1976) (antitrust), cert. denied, 430 U.S. 941 (1977), as two examples of

suit could be precluded under collateral estoppel principles without violating the purposes behind a grant of exclusive federal jurisdiction, but could not be barred under the doctrine of *res judicata* when there was an identity of claims.<sup>60</sup>

In addition, the court distinguished *Lyons* on the ground that the federal plaintiff in that case had been compelled to assert his defense in a forum chosen by the state court plaintiff.<sup>61</sup> If collateral estoppel were applicable in that situation, the state court defendant would be confronted with a "harsh dilemma."<sup>62</sup> He would have to elect to risk either 1) his federal treble damage action if he asserted the defense in the state action and the court did not uphold its validity; or 2) a state court loss if he did not plead the defense.<sup>63</sup> By contrast, the federal plaintiff in *Nash* had exercised its choice of forum by electing initially to proceed in state court,<sup>64</sup> and thus could be said to have "voluntarily waived the benefits, if any, of a federal forum."<sup>65</sup>

those cases not in accord with *Lyons*. 640 F.2d at 491 & n.14. While it is clear that state court determinations of pure fact may be accorded collateral estoppel effect in a subsequent federal suit within the exclusive jurisdiction of the federal courts, see *infra* note 108 and accompanying text, some courts have gone further, as Judge Hand said they could not, and applied collateral estoppel to preclude relitigation of issues determined in a prior state proceeding. See, e.g., *Vanderveer v. Erie Malleable Iron Co.*, 238 F.2d 510, 511-14 (3d Cir. 1956) (patent infringement), *cert. denied*, 353 U.S. 937 (1957); *McNally v. Esmark, Inc.*, 427 F. Supp. 1211, 1218-22 (N.D. Ill. 1977) (Securities Exchange Act of 1934); *Connelly v. Balkwill*, 174 F. Supp. 49, 60-61 (N.D. Ohio 1959) (same), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960). *But see* *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 262, 274 (7th Cir. 1981) (state court action in which federal antitrust defenses were advanced and later withdrawn had no preclusive effect in subsequent federal antitrust action brought by state court defendant), *cert. denied*, 455 U.S. 921 (1982).

Many commentators have also disagreed with the result reached in *Lyons*. See *Currie*, *supra* note 25, at 347-48; 1B J. Moore, *supra* note 7, § 0.445, at 4113-14; see also *Res Judicata Effect*, *supra* note 16, at 1383 (application of collateral estoppel warranted when federal plaintiff brought parallel claim initially in state court); *Prior State Court Findings*, *supra* note 7, at 1290 (same). The court, in *New York State Teamsters Conference Pension & Retirement Fund v. Pension Benefit Guaranty Corp.*, 591 F.2d 953 (D.C. Cir.), *cert. denied*, 444 U.S. 829 (1979), noted that the *Lyons* rationale is strongest when: 1) the federal plaintiff did not choose to litigate in the state forum, and 2) the prior state judgment turns on questions of law as distinguished from facts and involves the interpretation of federal rather than state law. *Id.* at 957.

60. 640 F.2d at 492. For a discussion of the distinctions between the two doctrines, see *supra* note 7.

61. 640 F.2d at 492-93.

62. *Res Judicata Effect*, *supra* note 16, at 1369 n.37; *accord Exclusive Jurisdiction*, *supra* note 7, at 441-42.

63. See *supra* note 62.

64. 640 F.2d at 493.

65. *Id.* at 492.

While *Nash* adopted a novel, well-reasoned approach for applying res judicata in the exclusive jurisdiction context, it was not presented with the question whether a federal court should give res judicata effect to a prior state action in which the plaintiff failed to, but could have alleged a state antitrust claim identical to a Sherman Act claim.<sup>66</sup> Furthermore, it did not determine whether state and federal antitrust claims could be substantively identical for res judicata purposes if the state statute did not provide for an automatic right to treble damages.<sup>67</sup>

It has been suggested,<sup>68</sup> however, based on the reasoning in *Nash*,<sup>69</sup> that a Sherman Act suit could be barred even though a prior state court action<sup>70</sup> did not involve a claim arising under a state antitrust statute.<sup>71</sup> Moreover, a state statute that could have been asserted as the basis for an antitrust claim in the prior action need not be "identical" to its federal counterpart: For example, it may not provide for automatic trebling of damages<sup>72</sup> and may not be interpreted by the state courts as rendering certain violations illegal per se.<sup>73</sup> Despite this

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66. *See id.* at 488.

67. *Id.* at 490.

68. *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1982), *vacated, reh'g granted*, 5 Trade Reg. Rep. (CCH) ¶ 65,214 (7th Cir. Jan. 25, 1983), *order granting reh'g vacated*, No. 81-2671, slip op., (7th Cir. May 11, 1983). The res judicata portion of the *Marrese* opinion is, however, without legal force, since the order vacating the grant of rehearing held that the court had no jurisdiction to decide the res judicata issue.

69. The court emphasized the following factors: 1) the availability of treble damages, although discretionary, in the state action; 2) the inconvenience to the defendant and the judicial system caused by "piecemeal" litigation; and 3) the inconsistency of giving preclusive effect to a state court judgment in a subsequent federal action under the doctrine of collateral estoppel but not under the doctrine of res judicata when there is an identity of claims. *Id.* at 1091-92.

70. The state court had only decided whether the plaintiff had a right under state law to a hearing on his application for membership in a private association of surgeons. *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 755, 396 N.E.2d 1225, 1231 (1979).

71. 692 F.2d at 1090.

72. 692 F.2d at 1091. Under the state statute, if a plaintiff could show that a boycott violation was "willful," the court could, in its discretion, award treble damages. Ill. Ann. Stat. ch. 38, § 60-7(2) (Smith-Hurd Supp. 1982-1983). Because proving a "willful" conspiracy may be inherently difficult, the state provision allowing for treble damages at the discretion of the trial judge is not the same as its federal counterpart, Clayton Act, 15 U.S.C. § 15 (1976 & Supp. V 1981), which provides an automatic right to treble damages irrespective of the defendant's intent. *Id.*

73. 692 F.2d at 1090. Anticompetitive conduct constituting a group boycott would be challenged under Ill. Ann. Stat. ch. 38, § 60-3(2) (Smith-Hurd Supp. 1982-1983), which forbids conspiracies and other agreements to restrain trade "unreasonably." The difference in language between the state statute and the Sherman Act had persuaded the state courts to hold that a group boycott could never be declared illegal

dissimilarity, some propose that the federal suit should be precluded because of the inconvenience of "piecemeal litigation" to the defendant and to the judicial system.<sup>74</sup>

This approach would require a plaintiff wishing to sue in a state forum on a non-antitrust claim to plead his state antitrust claim as well even though it would not provide the relief he seeks. If the plaintiff failed to do so, he would be barred from asserting his subsequent Sherman Act claim. Therefore, the plaintiff is in effect compelled to sue initially in a federal forum in order to obtain full relief. This reasoning obscures the policy that plaintiffs, not judges, choose forums. More appropriately, a court should bar a Sherman Act suit only if a state antitrust claim that was or that could have been asserted in a prior state action is substantively identical to the federal claim.<sup>75</sup>

## II. THE APPLICATION OF RES JUDICATA: SATISFYING THE REQUIREMENT OF IDENTITY OF ACTIONS

### A. *Defining the Identity of Actions Standard*

The application of res judicata depends in part on the determination that there is an "identity of causes of action";<sup>76</sup> the same claims must be asserted in both suits.<sup>77</sup> While no definition of a cause of action for res judicata purposes has received universal acceptance,<sup>78</sup> the modern tendency is for courts to adopt a "transactional" approach.<sup>79</sup> Under this approach, a court will bar a subsequent action if the claim asserted is based on the same operative facts as those adjudi-

per se; it would have to be evaluated under Rule of Reason analysis. *See, e.g.*, *Blake v. H-F Group Multiple Listing Serv.*, 36 Ill. App. 3d 730, 742-43, 345 N.E.2d 18, 28 (1976). Under federal law, horizontal boycotts are generally illegal per se. *See, e.g.*, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild Inc. v. FTC*, 312 U.S. 457, 467-68 (1941).

74. *See* 692 F.2d at 1092.

75. *Res Judicata Effect*, *supra* note 16, at 1375-76; *see* *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

76. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

77. *E.g.*, *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); 18 C. Wright & A. Miller, *supra* note 2, § 4402, at 7 (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). *See supra* note 7.

78. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); 18 C. Wright & A. Miller, *supra* note 2, § 4407, at 54-64.

79. 18 C. Wright & A. Miller, *supra* note 2, § 4407, at 55; Restatement (Second) of Judgments § 24 comment a, at 197 (1980); *see* *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487-88 & n.7 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

cated in the prior suit.<sup>80</sup> Consequently, the identity of claims requirement under this standard will not be defeated simply because the two suits are based on different statutes,<sup>81</sup> or because a state statute or common-law theory was the basis for one action and a federal statute for the other.<sup>82</sup>

In the exclusive jurisdiction context, however, this broad definition of a cause of action appropriately has not been accepted.<sup>83</sup> A stricter

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80. 18 C. Wright & A. Miller, *supra* note 2, § 4407, at 55; *see* Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982); Silcox v. United Trucking Serv., Inc., 687 F.2d 848, 852 (6th Cir. 1982); Costantini v. TWA, 681 F.2d 1199, 1201-02 & n.7 (9th Cir.), *cert. denied*, 103 S. Ct. 570 (1982); O'Hare v. General Marine Transp. Corp., 534 F. Supp. 120, 124 (S.D.N.Y. 1981). A similar test is whether the primary right and duty or wrong are the same in each case. *See* Ray v. TVA, 677 F.2d 818, 821 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 788 (1983); White v. World Fin. of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. 1981); Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 487-88 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). Both approaches, however, reject a legal theory definition of a cause of action, which provides that a mere change in theories of recovery, as for example, when a different statute is pleaded as the basis for a claim in a subsequent suit, constitutes a new cause of action. *See* Davis v. United States Steel Supply, 688 F.2d 166, 171-72 (3d Cir. 1982); White v. World Fin. of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. 1981); *see also* 18 C. Wright & A. Miller, *supra* note 2, § 4407, at 63 ("a mere change in legal theory does not create a new cause of action").

81. 18 C. Wright & A. Miller, *supra* note 2, § 4411, at 86-87; *see, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 n.22 (1982); Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982); White v. World Fin. of Meridian, Inc., 653 F.2d 147, 150 (5th Cir. 1981) (quoting Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981)); Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434, 437 (6th Cir. 1981); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 468 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

82. 18 C. Wright & A. Miller, *supra* note 2, § 4411, at 86-87, 91-92; *see, e.g.*, Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring in the judgment); Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 945-46 (7th Cir. 1981); Brown v. Federated Dept. Stores, Inc., 653 F.2d 1266, 1267 (9th Cir. 1981) (*per curiam*); Green v. ABC, 572 F.2d 628, 632 (8th Cir. 1978); Mitchell v. NBC, 553 F.2d 265, 267-68 (2d Cir. 1977); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1312-13 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 32-35 (8th Cir. 1964); Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 581-83 (N.D. Cal. 1981); Kirk v. First Nat'l Bank, 439 F. Supp. 1141, 1146-47 (M.D. Ga. 1977); Davis v. Towe, 379 F. Supp. 536, 538 (E.D. Va. 1974), *aff'd mem.*, 526 F.2d 588 (4th Cir. 1975).

83. *See, e.g.*, Hayes v. Solomon, 597 F.2d 958, 983-85 (5th Cir. 1979) (because an exclusive federal claim could not have been asserted in state court due to a lack of subject matter jurisdiction, *res judicata* not applicable to bar the subsequent federal suit), *cert. denied*, 444 U.S. 1078 (1980); Kurek v. Pleasure Driveway & Park Dist., 583 F.2d 378, 379-80 (7th Cir. 1978) (*per curiam*) (same), *cert. denied*, 439 U.S. 1090 (1979); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir.) (same), *cert. denied*, 423 U.S. 841 (1975); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th

standard should be employed in determining whether to preclude the assertion of a claim in a subsequent action that is not within the jurisdiction of the first forum.<sup>84</sup> Without such a qualification, any state suit involving a common-law claim based on the same facts could be dispositive of a subsequent Sherman Act suit, thereby depriving a plaintiff of the opportunity to assert a claim over which only a federal court can exercise jurisdiction.<sup>85</sup>

Unfortunately, most courts have adopted an overly restrictive approach by relying on the form and not the substance of the state and federal claims. They hold that the mere existence of exclusive federal jurisdiction precludes a federal court in a Sherman Act suit from ever according a prior state antitrust action *res judicata* effect.<sup>86</sup> Because a plaintiff could not have pleaded a federal antitrust claim in a prior state action, they reason that traditional principles of *res judicata* are not applicable.<sup>87</sup> In addition, some courts rely implicitly, unlike many

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Cir. 1967) (same). Some courts have merely concluded that the federal antitrust claim is a "different cause of action" from a prior state claim. *E.g.*, *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils, of Del., Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981). In the cases cited *supra* note 76, the first action was brought in federal court, which had jurisdiction to adjudicate both the state and federal claims. A different situation is presented when the first forum is a state court, which does not have jurisdiction to adjudicate the Sherman Act claim. *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 35 (8th Cir. 1964); 18 C. Wright & A. Miller, *supra* note 2, § 4412, at 93, 103.

84. *See Res Judicata Effect*, *supra* note 16, at 1375 ("If the federal and state statutes are not equally strict, to give [res judicata] effect to the state-court judgment would appear to undermine the federal statute."); Note, *The Effect of Prior Non-federal Proceedings on Exclusive Federal Jurisdiction over Section 10(b) of the Securities Exchange Act of 1934*, 46 N.Y.U. L. Rev. 936, 942-43, 963 (1971) (when "transactional" test is applied, the state and federal claims are generally considered identical for *res judicata* purposes; therefore this definition should not be adopted in the exclusive jurisdiction context) [hereinafter cited as *Nonfederal Proceedings*]. *But see* 1B J. Moore, *supra* note 7, § 0.410[2], at 1182-83 n.38 (*res judicata* applicable even though state and federal claims are not identical).

85. *Hayes v. Solomon*, 597 F.2d 958, 983-84 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *cf. Nonfederal Proceedings*, *supra* note 87, at 942-43 (10b-5 claim).

86. *See, e.g.*, *Hayes v. Solomon*, 597 F.2d 958, 984-85 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Part Dist.*, 583 F.2d 378, 379 (7th Cir. 1978) (*per curiam*), *cert. denied*, 439 U.S. 1090 (1979); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967); *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 417-19 & n.18 (2d Cir.) (*dictum*), *cert. denied*, 387 U.S. 921 (1967); *cf. RX Data Corp. v. Department of Social Servs.*, 684 F.2d 192, 198 (2d Cir. 1982) (exclusive jurisdiction over copyright infringement action forecloses affording prior state judgment *res judicata* effect); *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975) (exclusive federal court jurisdiction over 10b-5 claim forecloses federal court from giving prior state common-law action *res judicata* effect), *cert. denied*, 423 U.S. 841 (1975); *McNally v. Esmark, Inc.*, 427 F. Supp. 1211, 1218 (N.D. Ill. 1977) (same) (§ 14(e) of the Securities Exchange Act of 1934).

87. *See supra* note 13 and accompanying text. The issue whether a federal court hearing an exclusively federal claim should give preclusive effect to a prior state court



judgment of a related state law claim has arisen most often in 10b-5 litigation. The overwhelming weight of authority has held that a prior state suit based on common-law duties is not the same cause of action for res judicata purposes as a federal suit involving a 10b-5 claim simply because of the grant of exclusive federal jurisdiction to the federal courts under the 1934 Act. *See, e.g.*, *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968); *Lincoln Nat'l Bank v. Lampe*, 414 F. Supp. 1270, 1279-80 (N.D. Ill. 1976). *But see In re Clinton Oil Co. Sec. Litig.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,015, at 91,563 (D. Kan. 1977) (prior state common-law suit not different cause of action from 10b-5 suit merely on basis of grant of exclusive jurisdiction); *Connelly v. Balkwill*, 174 F. Supp. 49, 60 (N.D. Ohio 1959) (because common-law duty to disclose material facts was identical to defendant's duty of disclosure under a 10b-5 claim, the subsequent federal action should be precluded under both res judicata and collateral estoppel doctrines), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960). Although § 28 of the Securities Exchange Act of 1934 does not preempt state regulation of securities violations, 15 U.S.C. § 78bb(a) (1976), the claims asserted in state court in this area are generally not substantively identical to a 10b-5 claim with respect to duties and standards of liability. State law claims in this area typically are based on the common-law theories of fraud, deceit, misrepresentation and breach of a fiduciary duty. *Nonfederal Proceedings, supra* note 84, at 937 n.9. By contrast, § 10b "is a more exacting standard and creates many duties and liabilities unknown to the common law." *Id.* at 937 n.9; *see Kohler v. Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963); *McClure v. Borne Chem. Co.*, 292 F.2d 824, 833-34 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961); 3 L. Loss, *Securities Regulation 1430-44* (1961); Note, *Rule 10b-5: Elements of a Private Right of Action*, 43 N.Y.U. L. Rev. 541, 542-43 (1968). In *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983), the Court stated: "the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud . . . [A]n important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry." *Id.* at 691; *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (common-law doctrines ill-suited for regulation of securities industry). In *Huddleston*, the Court held that the standard of proof in a 10b-5 action is a preponderance of the evidence rather than the clear and convincing standard traditionally used in common-law civil fraud actions. 103 S. Ct. at 692. Because the burden of proof is lighter in a 10b-5 action, giving preclusive effect to the state court judgment under either res judicata or collateral estoppel is inappropriate, *see* 18 C. Wright & A. Miller, *supra* note 2, § 4422, at 211; *Res Judicata Effect, supra* note 16, at 1383 & n.85; it would appear to frustrate the congressional objective of establishing higher standards of conduct in the securities industry. One court, in refusing to apply res judicata in this situation, has interpreted § 28 of the Act, 15 U.S.C. § 78bb(a) (1976), as not foreclosing a plaintiff from obtaining the federal statutory remedies because they are available "in addition to any other remedies existing in law or equity." *Lincoln Nat'l Bank v. Lampe*, 414 F. Supp. 1270, 1279 (N.D. Ill. 1976).

Although the federal courts are also granted exclusive jurisdiction in the copyright and patent areas, 28 U.S.C. § 1338 (1976), the issue whether to give res judicata effect to a prior state court judgment rarely arises. State actions in the patent field typically involve issues of "state" law relating to licensing agreements, assignments of patents, and other state contractual questions, *see Cooper, State Law of Patent Exploitation*, 56 Minn. L. Rev. 313, 318 (1972), and in the absence of diversity, do not provide a basis for federal jurisdiction, 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 691-92; *see Cooper, supra*, at 318. Recently, one court has recognized that a prior state judgment may be accorded collateral estoppel effect in a subsequent federal copyright infringement action. *See RX Data Corp. v. Department of Social Servs.*, 684 F.2d 192, 196-97 & n.4 (2d Cir. 1982) (if identical issues were presented

other courts and several commentators,<sup>88</sup> on the *Lyons* rationale<sup>89</sup> that exclusive federal court jurisdiction in the antitrust context bestows total immunity on the federal courts from prior state court judgments.<sup>90</sup>

The particular results reached under either approach were warranted because the courts were not confronted with substantively identical state and federal antitrust claims.<sup>91</sup> However, when a plaintiff asserts a Sherman Act claim in federal court following an adverse judgment in a state action based on an identical antitrust claim, summarily refusing to accord the prior state judgment *res judicata* effect appears inappropriate.<sup>92</sup> In this situation, in the interests of judicial economy<sup>93</sup> and fairness to the defendant, absolute federal court immunity is unwarranted.<sup>94</sup>

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in both forums). Nevertheless, the state claims are not generally identical to a federal copyright infringement claim for purposes of collateral estoppel or *res judicata* because of federal preemption. 17 U.S.C. § 301 (Supp. V 1981); *see* RX Data Corp. v. Department of Social Servs., 684 F.2d 192, 196-98 (2d Cir. 1982) (“[N]o issue necessary to the determination of the . . . state court judgment is identical to any issue in this action for copyright infringement.” (footnote omitted)).

88. *See supra* note 59 and accompanying text.

89. *See* Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967); International Rys. of Cent. Am. v. United Fruit Co., 373 F.2d 408, 417-18 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967).

90. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

91. *See supra* notes 44-50 and accompanying text.

92. *See* Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 492-93 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); 1B J. Moore, *supra* note 7, § 0.410[2], at 1182-83 n.38; *Res Judicata Effect*, *supra* note 16, at 1375-76.

93. Congress has expressed concern with reducing unnecessary and repetitive antitrust litigation. A recent amendment to § 5(a) of the Clayton Act, Antitrust Procedural Improvements Act of 1980, § 5(a), Pub. L. No. 96-349, 94 Stat. 1157 (1980) (currently codified in 15 U.S.C. § 16(a) (Supp. V 1981)), sought to clarify that the application of collateral estoppel in antitrust cases should not be foreclosed, *see* 15 U.S.C. § 16(a) (Supp. V 1981), because of the costs of complex and lengthy antitrust litigation, H.R. Rep. No. 874, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2752, 2753; *see Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 327 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 50-51 (1979) (testimony of Sen. Metzbaum).

Under § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1976 & Supp. V 1981), judgments in an antitrust proceeding brought by the United States establishing an antitrust violation may be used as *prima facie* evidence of an antitrust violation against that defendant in a subsequent action brought by a private plaintiff. *Id.* Because § 5(a) addresses the issue of different plaintiffs bringing multiple Clayton Act suits against the same defendant, *see* 15 U.S.C. § 16(a) (Supp. V 1981), it is unclear whether Congress' concerns for preventing repetitive antitrust litigation would encourage the application of *res judicata* to bar a plaintiff from maintaining a federal antitrust action following an adverse judgment in state court on the same claim. In this situation, an examination of the policies behind a grant of exclusive jurisdiction to the federal courts over the federal antitrust statutes would be compelled.

94. *See* Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 492-93 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *Res Judicata Effect*, *supra* note 16, at 1375-

Thus, in determining whether there is an identity of claims, the fact that the prior action is based on a state rather than federal antitrust statute should not be dispositive.<sup>95</sup> Courts should consider, in addition to determining whether the same operative facts were involved in both actions, whether the state and federal claims are substantively identical.<sup>96</sup> Today, it is likely that many state and federal antitrust claims will satisfy this standard.

### B. Application of the Substantive Identity Standard

The revitalization of state antitrust statutes in the last decade<sup>97</sup> has resulted in an increasing number of state laws similar to their federal counterparts.<sup>98</sup> For example, several prohibit the most common per se

76; see also 1B J. Moore, *supra* note 7, § 0.410[2], at 1182-83 n.38 (state plaintiff could have joined state claim in federal court under doctrine of pendent jurisdiction); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 687 (a rule requiring a plaintiff to advance a state claim in the jurisdiction of a federal antitrust court would serve the needs of "judicial efficiency" and protection of the defendant).

95. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *cf. Green v. ABC*, 572 F.2d 628, 630-32 (8th Cir. 1978) (federal antitrust claim is same cause of action for res judicata purposes as breach of contract claim asserted in subsequent federal diversity action); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1315 (5th Cir. 1971) (failure to pend state antitrust claim in federal antitrust suit precluded maintenance of subsequent state antitrust action), *cert. denied*, 404 U.S. 1047 (1972); *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 32-34 (8th Cir. 1964) (federal diversity action involving state antitrust claim was res judicata as to subsequent federal Sherman Act claim because same cause of action was asserted in both suits); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362, 364 (5th Cir. 1961) (federal diversity action involving breach of contract claim was res judicata as to subsequent federal antitrust claim); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 582 n.18 (N.D. Cal. 1981) (failure to pend state antitrust claim in federal antitrust suit precluded maintenance of subsequent state antitrust action).

96. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488, 493 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *Res Judicata Effect*, *supra* note 16, at 1375-76; *cf. Connelly v. Balkwill*, 174 F. Supp. 49, 55-60 (N.D. Ohio 1959) (because state common-law fraud claim was identical to a 10b-5 claim asserted in a subsequent federal action, the prior state judgment should be given res judicata effect), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960).

97. See Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement*, 4 J. Corp. L. 479, 480 (1979); Miles, *supra* note 20, at 1345 ("Since 1970 . . . thirty-one jurisdictions . . . enacted new [antitrust] legislation."). Today, all 50 states have enacted antitrust statutes. LaRue, *Defending Antitrust Cases in the State Courts*, 50 Antitrust L.J. 875, 875 (1982). See generally 4 Trade Reg. Rep. (CCH) ¶ 30,000, at 35,011-40,508 (1982) (compilation of official texts of state antitrust statutes).

98. Many state statutes contain language identical to the Sherman Act. LaRue, *supra* note 97, at 875. Compare Alaska Stat. § 45.50.562 (1980) and Del. Code Ann. tit. 6, § 2103 (Supp. 1980) and Idaho Code § 48-101 (1977) and Me. Rev. Stat. Ann. tit. 10, § 1101 (1980) and Neb. Rev. Stat. § 59-801 (1978) and N.C. Gen. Stat. § 75-1 (Supp. 1981) and Okla. Stat. Ann. tit. 79, § 1 (West 1976) and Wash. Rev. Code Ann. § 19.86.030 (1978) with 15 U.S.C. § 1 (1976).

violations under section one of the Sherman Act<sup>99</sup> and offer the same automatic right to treble damages.<sup>100</sup> Furthermore, many authorize construction of their laws in accordance with established federal antitrust precedent.<sup>101</sup> In other states, judicial decisions have found federal case law "instructive" in interpreting and applying state law.<sup>102</sup> In light of these developments, it is likely that in some cases state antitrust claims<sup>103</sup> may be substantively identical to section one claims under the Sherman Act.<sup>104</sup>

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99. *Revising State Antitrust Enforcement*, *supra* note 20, at 617-18. Many states enumerate the specific activities prohibited under the statute. *See, e.g.*, Cal. Bus. & Prof. Code § 16,720 (West 1964); Hawaii Rev. Stat. § 480-4 (1976); Ill. Ann. Stat. ch. 38, § 60-3 (Smith-Hurd 1982-1983); Miss. Code Ann. § 75-21-1 (1972); N.C. Gen. Stat. § 75-5 (1981); Tex. Bus. & Comm. Code Ann. § 15.02 (Vernon 1968). Other states have enacted only general restraint of trade provisions, which may prohibit these per se restraints. *See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1402 (Supp. 1982-1983); Iowa Code Ann. § 553.4 (West Supp. 1982-1983); Mo. Ann. Stat. § 416.031 (Vernon 1979); Va. Code § 59.1-9.5 (1982).

100. *Compare* Cal. Bus. & Prof. Code § 16,750(a) (West Supp. 1982) and Conn. Gen. Stat. Ann. § 35-35 (West 1981) and Hawaii Rev. Stat. § 480-13(a)(1) (1976) and Me. Rev. Stat. Ann. tit. 10, § 1104 (1980) and N.Y. Gen. Bus. Law § 340(5) (McKinney Supp. 1982) and N.C. Gen. Stat. § 75-16 (1981) and Okla. Stat. Ann. tit. 79, § 25 (West 1976) and W. Va. Code § 47-18-9 (1980) with 15 U.S.C. § 15 (1976 & Supp. V 1981). The Justice Department has recently proposed to limit treble damage awards under the federal antitrust laws to per se violations. *DOJ Proposes Single-Damages Remedy for Antitrust*, *Legal Times*, Mar. 28, 1983, at 5, col. 1. If this proposal becomes law, a plaintiff may have greater incentive to sue initially in state court to ensure treble damage relief for violations that are subject to Rule of Reason analysis.

101. Ariz. Rev. Stat. Ann. § 44-1412 (Supp. 1982-1983); Ill. Ann. Stat. ch. 38, § 60-11 (Smith-Hurd 1982-1983); Iowa Code Ann. § 553.2 (West Supp. 1982-1983); Md. Com. Law Code Ann. § 11-202(2) (1975); Mo. Ann. Stat. § 416.141 (Vernon 1979); Neb. Rev. Stat. § 59-829 (1978); N.J. Stat. Ann. § 56:9-18 (West Supp. 1982-1983); Va. Code § 59.1-9.17 (1982).

102. *E.g.*, *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973); *see, e.g.*, *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925, 549 P.2d 833, 835, 130 Cal. Rptr. 1, 3 (1976); *Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 901-04, 315 N.Y.S.2d 897, 905-08 (Sup. Ct. 1970).

103. In the situation in which a defendant asserts an antitrust counterclaim in state court and then attempts to bring the same claim as a plaintiff in a subsequent federal suit, the potential application of *res judicata* should depend on the nature of the counterclaim. If the claim was permissive, the defendant can be said to have exercised his choice of forum and should therefore be precluded from instituting the federal action if the suggested standards have otherwise been satisfied. *Cf. Prior State Court Findings*, *supra* note 7, at 1293 (precluded under collateral estoppel). By contrast, if the counterclaim was compulsory, the defendant did not in fact have a choice of forum, much like the state court defendant in *Lyons*, and should not, therefore, be barred from maintaining his subsequent federal antitrust suit. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979) (application of offensive collateral estoppel may be unfair if defendant is forced to defend in the first forum).

104. Of course, the state and federal claims can be substantively identical even though only the federal statute, 15 U.S.C. § 1 (1976) ("in restraint of trade or

In determining whether this substantive identity standard is satisfied, a federal court should examine whether the state antitrust statute: 1) provides the same right to relief as the Sherman Act, particularly whether an automatic right to treble damages is authorized irrespective of the defendant's intent;<sup>105</sup> and 2) has not been construed differently than the Sherman Act for purposes of the claim asserted with respect to the requisite elements of proof<sup>106</sup> and whether a per se or Rule of Reason analysis is mandated. If a state antitrust statute fails to satisfy these requirements, then the prior state court action should not be given res judicata effect in a Sherman Act suit. For example, if a particular claim is subject to a per se analysis in federal court and a Rule of Reason inquiry in the state forum, res judicata should not be available to bar the subsequent Sherman Act suit<sup>107</sup> because the claims are not substantively identical. The plaintiff has an easier burden of proving the illegality of the defendant's conduct in the federal action and therefore, in conformity with the goals of exclusive jurisdiction, should not be deprived of the opportunity for a more favorable outcome in the federal forum.<sup>108</sup>

Nonetheless, a plaintiff may be precluded, under the doctrine of collateral estoppel,<sup>109</sup> from relitigating those issues of fact adjudicated in the state forum.<sup>110</sup> A state court judgment therefore may, in certain

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commerce among the several states"), requires a showing of an adverse impact on interstate commerce. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488 (4th Cir.), cert. denied, 454 U.S. 878 (1981); *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 32-33 (8th Cir. 1964).

105. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488, 490 (4th Cir.) (res judicata applicable because state statute authorized same right to automatic treble damages as the Sherman Act), cert. denied, 454 U.S. 878 (1981); *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979) (res judicata not applicable when first forum lacked the ability to provide relief sought in second forum), cert. denied, 444 U.S. 1078 (1980); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967) (same).

106. *Res Judicata Effect*, supra note 16, at 1375-76.

107. See 18 C. Wright & A. Miller, supra note 2, § 4422, at 211 ("Failure to carry a special burden of persuasion . . . does not preclude a later attempt to prove the same issue by a [lighter burden].") (footnote omitted); accord *Res Judicata Effect*, supra note 16, at 1383 n.85.

108. See *Res Judicata Effect*, supra note 16, at 1383 n.85; see also 18 C. Wright & A. Miller, supra note 2, § 4422, at 211 (if burden of proof is less stringent in second action, res judicata and collateral estoppel not applicable).

109. See supra note 7.

110. E.g., *Calvert Fire Ins. Co. v. American Mut. Reinsurance Co.*, 600 F.2d 1228, 1236 n.18 (7th Cir. 1979); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 196 (2d Cir.), cert. denied, 350 U.S. 825 (1955); *Singer v. A. Hollander & Sons*, 202 F.2d 55, 59-60 (3d Cir. 1953); *Nationwide Mut. Ins. Co. v. Automotive Serv. Councils, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 63,958, at 75,961 (D. Del. 1981); *Overseas Motors, Inc. v. Import Motors, Ltd.*, 375 F. Supp. 499, 522-23 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir.), cert. denied, 423 U.S. 987 (1975); *Movielab, Inc. v. Berkey Photo, Inc.*, 321 F. Supp. 806, 810 (S.D.N.Y. 1970), aff'd per curiam,

circumstances, be dispositive of and, in effect, preclude adjudication of the plaintiff's federal antitrust claim.<sup>111</sup> By contrast, if the federal courts adopt a Rule of Reason analysis with respect to the asserted claim and the state court engages in a per se inquiry, an exception to the substantive identity standard should be recognized and therefore the state court judgment should be given res judicata effect. Clearly, if the plaintiff failed to meet the easier burden of proof in the state court, he should not be allowed to relitigate his claim when his burden is even more difficult in the federal forum.<sup>112</sup>

### C. Claims That Could Have Been Asserted

Under this suggested standard, the doctrine of res judicata should also preclude a plaintiff from instituting a Sherman Act suit if, in a prior state court suit, he could have asserted, in addition to his non-antitrust claims, a claim under a state antitrust statute that is substantively identical to section one of the Sherman Act.<sup>113</sup> While this result may seem harsh, the plaintiff would be neither unduly prejudiced nor without recourse. Moreover, from the defendant's viewpoint, asserting res judicata is necessary because collateral estoppel is a less viable defense in this situation. Because the antitrust issues were raised for the first time in the federal forum, a court, under this doctrine, could only preclude relitigation of facts actually determined in the prior state court action and necessary to the judgment.<sup>114</sup>

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452 F.2d 662 (2d Cir. 1971); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 680; *Res Judicata Effect*, *supra* note 16, at 1382. Some courts may go further and preclude under this doctrine mixed findings of fact and law or pure legal issues. *Id.* See *supra* note 59.

111. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 196 (2d Cir.) (denying petition for rehearing), *cert. denied*, 350 U.S. 825 (1955).

112. See 18 C. Wright & A. Miller, *supra* note 2, § 4422, at 211.

113. See *New Eng. Liquor Sales Co. v. General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798, at 71,935 (D. Mass. 1982) (noting the lack of substantive identity between the state and federal statutes; held that the failure to plead a state antitrust claim in state court did not bar the subsequent Sherman Act suit).

114. The doctrine of collateral estoppel only precludes relitigation of questions actually determined in a prior suit and necessary to the judgment. See *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876). See *supra* note 7. Moreover, if no specific findings of fact were made by the state court, application of the doctrine would have no preclusive effect on the subsequent Sherman Act claim. *Prior State Court Findings*, *supra* note 7, at 1284-85; *Exclusive Jurisdiction*, *supra* note 7, at 446 & n.35. See *supra* note 7. By contrast, if the state and federal claims are grounded on the same constituent facts, application of collateral estoppel to preclude the assertion of facts actually determined in the state action, may, as a practical matter, "put an end to the plaintiffs' [Sherman Act] claim." *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 196 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); see *Exclusive Jurisdiction*, *supra* note 7, at 443.

Generally, because a plaintiff originally has a choice of either a state or federal forum in which to litigate his claims,<sup>115</sup> in the interests of judicial economy and fairness to the defendant, he should be required to present them in one forum.<sup>116</sup> Thus, if the plaintiff brings a common-law claim in state court, he should also allege his state antitrust claim based on the same facts if, under the suggested standard, it is substantively identical to the Sherman Act claim. If the plaintiff is uncertain whether the state statute has, in fact, been construed differently than the Sherman Act for purposes of his claim, he should nonetheless plead the antitrust claim in state court. In the event that the federal court in the subsequent Sherman Act suit determines that the state statute has been construed differently on that claim, the federal suit should not be barred.

Alternatively, the plaintiff could initially bring a Sherman Act claim in federal court and, under the doctrine of pendent jurisdiction,<sup>117</sup> join any state law claims that he may have.<sup>118</sup> Although the exercise of this jurisdiction is discretionary,<sup>119</sup> many courts have permitted the pending of state claims to federal antitrust claims.<sup>120</sup> Significantly, some courts have even held that a plaintiff who did not pend his state antitrust or breach of contract claim in a federal antitrust action was barred, under the doctrine of res judicata, from asserting these state claims in a subsequent state suit.<sup>121</sup> If the federal court

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115. See *supra* note 5.

116. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 492-93 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *cf. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring in judgment) (failure to pend state-law claim in prior federal antitrust action precludes assertion of claim in subsequent state suit); *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 657 F.2d 939, 946 (7th Cir. 1981) (same); *Brown v. Federated Dep't Stores, Inc.*, 653 F.2d 1266, 1267 (9th Cir. 1981) (*per curiam*) (same); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1315 (5th Cir. 1971) (same), *cert. denied*, 404 U.S. 1047 (1972); 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 687.

117. The doctrine of pendent jurisdiction permits a federal court that has subject matter jurisdiction over a substantial federal claim to adjudicate state law claims arising out of "a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

118. 1B J. Moore, *supra* note 7, § 0.410[2], at 1183 n.38.

119. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

120. *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1315 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *see, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring in judgment); *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 426-27 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 582 n.18 (N.D. Cal. 1981); *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 299 F. Supp. 331, 335-36 (E.D. Pa. 1969).

121. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring in judgment); *Three J Farms, Inc. v. Plaintiffs' Steering*

refuses to exercise pendent jurisdiction because the state claims predominate, these claims may be dismissed without prejudice and left for resolution in the state courts.<sup>122</sup> If the federal claims are without merit, then the whole action may be dismissed and the plaintiff may pursue his state claims in state court.<sup>123</sup> Although this choice-of-forum factor is not a traditional element of the *res judicata* doctrine,<sup>124</sup> it nevertheless merits consideration in balancing the competing policies of *res judicata* and exclusive federal jurisdiction.<sup>125</sup>

### III. BALANCING THE CONFLICTING POLICIES UNDERLYING EXCLUSIVE FEDERAL JURISDICTION AND THE DOCTRINE OF RES JUDICATA

Assuming that the claims in a state and federal antitrust action are substantively identical, a federal court should give *res judicata* effect to a prior state court judgment unless the purposes behind the grant of exclusive federal court jurisdiction would be undermined thereby<sup>126</sup>

Comm., 659 F.2d 1332, 1335-36 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 945-47 (7th Cir. 1981); Brown v. Federated Dep't Stores, Inc., 653 F.2d 1266, 1267 (9th Cir. 1981) (per curiam); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1312-16 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 582 n.18 (N.D. Cal. 1981); Boccardo v. Safeway Stores, Inc., 134 Cal. App. 3d 1037, 1053-54, 184 Cal. Rptr. 903, 914 (1982); Silver v. Queen's Hosp., 629 P.2d 1116, 1121-23 (Hawaii 1981); Restatement (Second) of Judgments § 25 comment e, illustration 10 (1980); cf. McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 663, 293 S.E.2d 331, 332 (1982) (plaintiff barred from asserting common-law fraud claim in state action following federal suit under Securities Exchange Act of 1934 in which state claims could have been joined). *But cf.* Rennie v. Freeway Transp., 640 P.2d 704, 707 (Or. 1982) ("because of the lack of a uniform application of the rules of pendent jurisdiction and because the plaintiff had no *right* to have his state [fraud] claim adjudicated in federal court, the better rule would seem to be not to apply *res judicata*" (emphasis in original)).

122. United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966).

123. Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 946 (7th Cir. 1981) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966)).

124. See 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 685-86.

125. See *id.*

126. This approach seems to have been advocated by at least two courts. See Engelhardt v. Bell & Howell Co., 327 F.2d 30, 35 (8th Cir. 1964) (dictum) ("The real problem in Lyons was . . . whether for policy reasons an exception should be made to the general rule of finality of [judgments]."); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027, 1032 (E.D.N.C. 1978) (rationale behind grant of exclusive jurisdiction should be balanced against "strong interest in finality [of litigation] that the doctrine of *res judicata* is designed to promote"), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); see also 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 689 (the "federal courts exercising exclusive jurisdiction may often honor the preclusive effects of state court judgments . . . . [A]ttention must



through the utilization of state antitrust enforcement mechanisms.<sup>127</sup> Identification of those purposes, however, has been frustrated because Congress never expressly granted the federal courts exclusive jurisdiction over claims arising under the federal antitrust laws.<sup>128</sup> Moreover, the legislative history affords little indication that Congress intended to vest the federal courts with exclusive jurisdiction<sup>129</sup> or immunize

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focus on the values of preclusion, [and] the reasons for making federal jurisdiction exclusive.”). *But see* *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 488-93 (4th Cir.) (did not consider whether purposes behind exclusive federal jurisdiction over federal antitrust laws would be undermined by according prior state court judgment *res judicata* effect), *cert. denied*, 454 U.S. 878 (1981).

127. *See* *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1032 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). The district court concluded that the state antitrust mechanisms “fulfilled” the goals underlying a grant of exclusive federal jurisdiction. *Id.* Theoretically, while a state scheme may “fulfill” the congressional goals of guaranteeing a plaintiff an automatic right to treble damages and providing for certain procedural advantages, it cannot satisfy the objective of promoting the efficient and uniform administration of the federal antitrust laws by “expert” judicial decision-making. The proper inquiry, therefore, should not be whether the state mechanisms can “satisfy” the rationale underlying a grant of exclusive federal court jurisdiction, but rather whether their application would subvert these objectives.

128. *Compare* 15 U.S.C. § 4 (1976) (Sherman Act) (“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 . . . .”) and *id.* § 15 (1976 & Supp. V 1981) (Clayton Act) (“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides . . . .”) with *id.* § 78aa (1976) (Securities Exchange Act of 1934) (“The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter . . . .”).

129. *Jurisdiction of the Federal Courts*, *supra* note 1, at 510 n.13 (“exclusive jurisdiction was not intended”). Several Senators had recommended that Sherman Act suits be within the concurrent jurisdiction of the state and federal courts. *See* S. Doc. No. 147, 57th Cong., 2d Sess., 21 Cong. Rec. 3150 (remarks of Sen. Edmunds); *id.* at 3147 (remarks of Sen. George); *id.* at 2612, 3146 (remarks of Sen. Reagan). It was thought, however, that even though a plaintiff could sue in state court to recover actual damages under the federal statutes, a state court could not award treble damages because they were considered a penalty. *Id.* at 4091 (remarks of Sen. Culberson); *id.* at 3146 (remarks of Sen. Hoar). An amendment to the Sherman bill authorizing a plaintiff to sue in “any state of competent jurisdiction” was ultimately rejected by the Senate. *Id.* at 3151. Nevertheless, the statutes were subsequently interpreted by at least two Senators as not precluding state jurisdiction over the federal act. *See id.* at 4091 (remarks of Sen. Culberson) (It is a misconstruction to assume that “sole jurisdiction to enforce a claim for damages [under] this Act is limited to the Circuit Courts of the United States”); *id.* at 3148 (remarks of Sen. Edmunds) (concurrent jurisdiction amendment was “useless” and “unnecessary”).

The Supreme Court has recognized that the existence of a clear legislative purpose to vest federal courts with exclusive jurisdiction militates against giving a prior state

them from the effect of prior state court judgments.<sup>130</sup> The Supreme Court, however, has assumed without explanation that this jurisdiction exists.<sup>131</sup>

Despite the tenuous ground upon which this jurisdiction is based,<sup>132</sup> lower courts have concluded that exclusive jurisdiction in the antitrust context: 1) promotes uniformity of federal law; 2) allows federal judges to utilize their expertise in adjudicating claims arising under federal statutes; 3) guarantees the availability of federal statutory remedies; and 4) provides for a jury trial and an opportunity to proceed under the expansive discovery rules of the Federal Rules of Civil Procedure.<sup>133</sup>

The established body of federal antitrust precedent today<sup>134</sup> suggests that according res judicata effect to a prior state antitrust action would not subvert the public interest in developing a uniform body of federal law. Merely because federal courts would not be adjudicating antitrust cases that would have otherwise appeared on their overcrowded dockets does not suggest that the existing uniformity would be adversely affected. Furthermore, both the existence of substantively identical state and federal statutes and the increased reliance by state court judges on federal case law in interpreting and applying state antitrust laws reduce the likelihood of confusion in this area.<sup>135</sup> If state court judges misconstrue federal law in adjudicating state anti-

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court judgment res judicata effect. See *Brown v. Felsen*, 442 U.S. 127, 138 (1979) (bankruptcy discharge case). The Court in *Brown* held that a prior state court judgment of the validity of a debt should not be given res judicata effect so as to preclude the bankruptcy court from independently determining the debt's dischargeability. *Id.* at 138-39. The determinative factor for the Court's decision appears to be the congressional intent, explicit in the 1970 statutory amendments, for vesting the bankruptcy courts with exclusive jurisdiction over these questions. See *id.* at 138, 18 C. Wright & A. Miller, *supra* note 2, § 4470, at 679 n.12 ("Unlike many of the exclusive jurisdiction statutes, the problem presented by this case arose from recent legislation with a clearly articulated background and purpose."). For a comprehensive discussion of the Court's decision in *Brown* and the res judicata effect to be given prior state court judgments in a federal bankruptcy case, see *The Dilemma Facing the Federal Courts*, *supra* note 37, at 862-69.

130. *Exclusive Jurisdiction*, *supra* note 7, at 447. Rather, Congress may have only intended to encourage injured plaintiffs to assert their federal antitrust claims in federal court. See *Jurisdiction of the Federal Courts*, *supra* note 1, at 511.

131. See, e.g., *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 n.6 (1943); *Blumentstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920).

132. *Exclusive Jurisdiction*, *supra* note 7, at 451.

133. See *supra* notes 14-19 and accompanying text.

134. Rubin, *supra* note 4, at 732; *Reviving State Antitrust Enforcement*, *supra* note 20, at 619; see 2 P. Areeda & D. Turner, *Antitrust Law* § 314, at 45-51 (1978).

135. See Rubin, *supra* note 4, at 682; *Jurisdiction of the Federal Courts*, *supra* note 1, at 515. The Supreme Court has recently given greater deference to state court

trust claims, these decisions will not be binding on federal court judges<sup>136</sup> and therefore will not impact on the uniformity of federal law in the federal courts. Likewise, the individual plaintiff's interest may not be injured because the disparity of expertise between the two judicial systems has diminished;<sup>137</sup> state courts have, with increasing frequency, adjudicated state antitrust claims<sup>138</sup> that are identical to claims arising under the federal antitrust laws.<sup>139</sup>

A federal court should also consider whether the particular state system, like the federal,<sup>140</sup> provides for a right to a jury trial and the use of liberal discovery rules.<sup>141</sup> Today, many states afford these procedural advantages.<sup>142</sup> Even if these benefits are not available in a state forum, however, the application of *res judicata* should not be automatically foreclosed if the above objectives behind the exclusive jurisdiction grant would not be undermined. The plaintiff initially had his choice-of-forum and thus could be said to have waived the

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judgments of civil rights claims, over which the state and federal courts exercise concurrent jurisdiction. See *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 476 (1982) (federal proceeding under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980) was barred, under doctrine of collateral estoppel, due to prior state court action under state discrimination laws); *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (collateral estoppel applicable to bar § 1983 claim, 42 U.S.C. § 1983 (1976 & Supp. IV 1980), in federal suit on basis of prior state criminal proceeding in which same issues were fairly litigated). See *supra* note 25.

136. 18 C. Wright & A. Miller, *supra* note 2, § 4515, at 275-76; see *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1079 (D. Utah 1981) (federal courts not bound to follow state court interpretations of federal law).

137. See *Jurisdiction of the Federal Courts*, *supra* note 1, at 515.

138. This is true, at least with respect to antitrust suits brought by the states. See Ashcroft, *A Renewed Commitment to State Antitrust Enforcement and a State Policy of Competition: The Missouri Experience*, 46 Mo. L. Rev. 469, 470-71 (1981); Flynn, *supra* note 100, at 480-81; LaRue, *supra* note 97, at 875.

139. See *supra* notes 101-05 and accompanying text.

140. 2 P. Areeda & D. Turner, *supra* note 140, ¶ 315, at 51 ("either party in a treble damage action may demand trial by jury"); see Fed. R. Civ. P. 38 (preserves right to jury trial afforded by the seventh amendment in actions at law); Fed. R. Civ. P. 26-37 (liberal discovery rules).

141. *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *Res Judicata Effect*, *supra* note 16, at 1383 n.85; cf. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 675 (1978) (Brennan, J., dissenting) (discovery rules in state court; 10b-5 context).

142. See McCormick's Handbook of the Law of Evidence § 3, at 3 & n.7 (2d ed. 1972) (at least 28 states have adopted the federal rules of discovery with variations). To the extent that a private party in a state antitrust action seeks damages, he can demand a jury trial in many jurisdictions. See, e.g., Iowa R. Civ. P. 177; Ky. R. Civ. P. 38; Mass. R. Civ. P. 38; Nev. R. Civ. P. 38; N.C. R. Civ. P. 38; N.D. R. Civ. P. 38; Ohio R. Civ. P. 38; Utah R. Civ. P. 38; W. Va. R. Civ. P. 38. The discovery rules in many jurisdictions are virtually identical to the liberal federal rules. Compare

procedural benefits provided by a federal forum by bringing his state antitrust claim in state court.<sup>143</sup>

### CONCLUSION

Federal courts should not mechanically refuse to give res judicata effect to a prior state court action based on a state antitrust statute. If the state law claim is substantively identical to the federal claim and use of a particular state's antitrust enforcement mechanisms would not undermine the objectives behind the grant of exclusive federal court jurisdiction, the state court judgment should be accorded res judicata effect. Even though the Sherman Act suit would be precluded, the plaintiff had a full and fair opportunity to litigate his antitrust claim in state court and there is no reason to believe that the subsequent federal decision would have been more favorable. Application of res judicata in the antitrust field has become particularly compelling today in light of the overburdened federal courts, the prevalence of state antitrust statutes that are substantively identical to section one of the Sherman Act, and the diminished likelihood that use of state mechanisms will undermine the goals of exclusive federal court jurisdiction.

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Colo. R. Civ. P. 26-37 and Kan. Stat. Ann. § 60-226-237 (1976) and Ky. R. Civ. P. 26-37 and Idaho R. Civ. P. 26-37 and Mass. R. Civ. P. 26-37 and N.C. R. Civ. P. 26-37 and Ohio R. Civ. P. 26-37 and S.D. Comp. Laws Ann. § 15-6-(26) to -(37) (1967 & Supp. 1982) with Fed. R. Civ. P. 26-37.

143. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 492-93 (4th Cir.), cert. denied, 454 U.S. 878 (1981); *Res Judicata Effect*, supra note 16, at 1383; see 1B J. Moore, supra note 7, ¶ 0.410[2], at 1182-83 n.38.