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Intersystem Issue Preclusion and the Restatement (Second) of Judgments

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INTERSYSTEM ISSUE PRECLUSION AND THE *RESTATEMENT (SECOND) OF JUDGMENTS*

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It is hard to resist the temptation to lavish extravagant praise on the new *Restatement (Second) of Judgments*. Viewing the work with the circumspection it deserves, my cautious assessment is that it is a prodigious achievement. It provides a rational and workable set of principles for determining the preclusive effects of judgments. If some of the blackletter "rules" are vague, the commentary and Reporter's Notes generally leave little uncertainty about their intended meaning. One can hope that the federal judiciary and all the states will accept the *Restatement Second* as the authoritative statement of all aspects of the law of res judicata.

Realistically, however, such universal acceptance is probably too much to expect. A number of states in recent years have reaffirmed longstanding principles of issue and claim preclusion that the *Restatement Second* now rejects.[1] Under these circumstances, it is unlikely that the *Restatement Second* will soon become the uniform law of res judicata in the United States; consequently, determining the effect that a judgment will have outside the state of rendition will remain an important problem. Moreover, it is a problem with constitutional dimensions: both the full faith and credit clause[2] and the due process clauses[3] bear on its solution.

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[1] For example, the RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976) [§ 29] abolishes the mutuality requirement for issue preclusion. [Throughout this Article, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts.] Yet in recent years, nine states have reaffirmed their adherence to the mutuality rule. *See* Newport Div., Tenneco Chem. v. Thompson, 330 So. 2d 826, 828 (Fla. Dist. Ct. App. 1976); Porterfield v. Gilmer, 132 Ga. App. 436, 466-67, 208 S.E.2d 295, 297 (1974), *aff'd*, 233 Ga. 671, 212 S.E.2d 842 (1975); Lukacs v. Kluessner, 134 Ind. App. 452, 458, 290 N.E.2d 125, 129 (1972) (dicta); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 544-46, 498 P.2d 265, 273 (1972); Barnett v. Develle, 289 So. 2d 129, 141 (La. 1974) (based on statute); Howell v. Vito's Trucking and Excav. Co., 386 Mich. 37, 51, 191 N.W.2d 313, 320 (1971); Atencio v. Vigil, 86 N.M. 181, 183, 521 P.2d 646, 648 (1974); Wright v. Holt, 18 N.C. App. 661, 662, 197 S.E.2d 811, 812, *cert. denied*, 283 N.C. 759, 198 S.E.2d 729 (1973); Armstrong v. Miller, 200 N.W.2d 282, 288 (N.D. 1972). *See also* Annot., 31 A.L.R.3d 1044, 1062-64 (1970).

[2] U.S. CONST. art. IV, § 1.

[3] U.S. CONST. amend. V; *id.* amend. XIV, § 1.

The *Restatement Second* does not attempt to deal with intersystem[4] issue preclusion in a comprehensive way. Instead, it focuses on the "intramural law of res judicata."[5] Although the *Restatement Second* does treat some intersystem recognition and enforcement issues,[6] it generally consigns such matters to the *Restatement (Second) of Conflict of Laws*.[7]

This Article will examine two questions that may arise when a judgment from a state that does not follow the principles of the *Restatement (Second) of Judgments* is presented for recognition in a state or federal court that does. First, under what circumstances can a court following the approach of the *Restatement Second* deny preclusive effect to issues that would be precluded in the court of rendition? Second, under what circumstances can a court following the approach of the *Restatement Second* accord issue preclusive effect to matters that would not be precluded in the court of rendition?

At first glance, the answer to both of these "under what circumstances" questions would seem to be "none." Different conceptions of the scope of issue preclusion have always existed

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[4] The term "intersystem" is used in this Article instead of "interstate" because the problems discussed here may involve the interplay of state and federal courts as well as the courts of different states. "System" in this usage is taken from Professor Ronan Degnan's notable article, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976), in which he fashioned a "re-restatement" of the provisions of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) that are discussed in this Article. Professor Degnan's re-restatement is:

> A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.

85 YALE L.J. at 773 (emphasis omitted).

[5] RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 2 (Tent Draft No. 7, 1980). The intramural law of res judicata concerns "the effect in a state court of a prior judgment rendered in a court of that state, and the corresponding situation within the federal system." *Id.*

[6] The Introduction to the *Restatement Second* declares:

> In certain respects, however, this Restatement reaches beyond questions of intramural res judicata. The rules in Chapter 2, Validity of Judgments, speak not only to intramural validity but also to validity for purposes of interjurisdictional recognition of judgments. The formulations in that Chapter generally incorporate the Restatement Second of Conflict of Laws but in some respects modify the rules of that Restatement. In addition, Chapter 5, dealing with Relief from Judgments, expressly distingnishes between relief from a local judgment and relief from a judgment rendered in another jurisdiction. See §§ 126 to 130 [§§ 78-82]. Finally, Chapter 6 has provisions dealing with special problems of res judicata arising from the federal character of our legal and judicial systems. See §§ 134 and 135 [§§ 86 and 87].

Id. at 3.

[7] *See id.* at 2-3.

among the states. The Founding Fathers recognized the problem and dealt with it in article four, section one of the Constitution[8] and in what now appears as section 1738 of the United States Judicial Code.[9] The full faith and credit requirement is embodied in the *Restatement (Second) of Conflict of Laws*, which the *Restatement (Second) of Judgments* generally endorses.[10] The relevant provisions state:

> § 93. Recognition of Sister State and Federal Court Judgments
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> A valid judgment rendered in one State of the United States must be recognized in a sister State, except as stated in §§ 103-121.
>
> Comment:
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> . . . .
>
> b. *Meaning of recognition.* A foreign judgment is recognized when it is given the same conclusive effect that it has in the state of rendition with respect to the persons, the subject matter of the action and the issues involved. The extent to which a judgment must be held conclusive under full faith and credit is stated in §§ 94-97.
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> . . . .
>
> § 94. Persons Affected
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> What persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.
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> . . . .
>
> § 95. Issues Affected

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[8] "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

[9] The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1976).

[10] *See* notes 6 & 7 and accompanying text *supra*.

> What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.[11]

These provisions seem to give definitive answers to our two questions. A state must recognize the judgment of a sister state; recognition means giving that judgment "the same" conclusive effect that it has in the state of rendition. Both the persons affected and the issues determined by the judgment are questions governed by the res judicata law of the state of rendition, subject to constitutional limitations. It would seem to follow, then, that a court that adheres to the *Restatement (Second) of Judgments* can neither relitigate issues that would be precluded in the rendering state nor preclude issues that could be relitigated there.

Section 93, however, refers to some exceptions to the full faith and credit requirement that may change this answer.[12] One limitation, for example, is embodied in section 103 of the *Restatement (Second) of Conflict of Laws*:

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.[13]

Apart from the specified exceptions, Comment (b) to section 93 also creates problems by failing to define "the same conclusive effect." Is "same" merely imperative—requiring that a sister state give a judgment at least as much conclusive effect as the state of rendition, but leaving the sister state free to ascribe more conclusive effect? Or does it have both an imperative and a limiting aspect—does it require a sister state to give a foreign judgment at least as much conclusive effect as does the rendering state and no more? These matters have been ably discussed by others[14] and will be treated further here. For now it is enough to note that the question of a sister state's ability to give a judgment more or less preclusive effect than the state of rendition cannot be answered

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[11] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93-95 (1971).

[12] *See* text accompanying note 10 *supra*. The exceptions are stated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 103-121 (1971).

[13] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

[14] *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 735-39 (2d ed. 1975); A. VESTAL, RES JUDICATA/PRECLUSION 479-83 (1969); Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 383 (1963); Scoles, *Interstate Preclusion by Prior Litigation*, 74 NW. U.L. REV. 742, 749-53 (1979).

adequately by simply quoting the full faith and credit clause, section 1738, or the blackletter rules of the *Restatement (Second) of Conflict of Laws.*

The questions raised here will be discussed in the context of three situations where the issue preclusive standards of the *Restatement (Second) of Jndgments* differ from those in the first *Restatement of Judgments,*[15] which some states still appear to follow. The three situations can roughly be categorized as problems of "foreseeability," "mutuality," and "limited appearance."

I

THE FORESEEABILITY PROBLEM

Underlying the doctrine of collateral estoppel is the notion that "[o]ne who has had his day in court should not be permitted to litigate the question anew."[16] Courts, however, have traditionally observed various limitations on the operation of collateral estoppel to protect a party from being unfairly bound forever by what may be a false determination of an issue. For instance, the doctrine generally extends only to determinations that resulted from actual litigation[17] and that were essential to the judgment.[18] Some courts further limit preclusion to determinations of "ulti-

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[15] The first *Restatement of Judgments* and the *Restatement (Second) of Judgments* may conflict in other situations, but only three will be discussed here.

[16] McCarty v. Budget Rent-A-Car, 282 Minn. 497, 501, 165 N.W.2d 548, 551 (1967) (quoting Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937)).

[17] In one of the most frequently quoted passages in the literature of collateral estoppel, the Supreme Court stated, "the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). This means, according to both the first *Restatement* and the *Restatement Second,* that issue preclusion does not apply to default or consent judgments. RESTATEMENT OF JUDGMENTS § 68, Comments d, i (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27]. Some cases, however, contain language inconsistent with this interpretation. *See* Annot., 91 A.L.R.3d 1170, 1189-91 (1979); Annot. 77 A.L.R.2d 1410, 1423-25 (1961). For a criticism of New York cases that ascribe preclusive effect to default and consent judgments, see Rosenberg, *Collateral Estoppel in New York,* 44 ST. JOHN'S L. REV. 165, 173-81 (1969).

[18] The first *Restatement of Judgments* and the *Restatement (Second) of Judgments* differ significantly, however, in their treatment of judgments that rest on alternative determinations, either of which would support the judgment rendered. One of the two findings would appear to be non-essential in such a case, but it is impossible to determine which one. The first *Restatement* took the position that issue preclusion applied to both determinations. RESTATEMENT OF JUDGMENTS § 68, Comment n (1942). The *Restatement Second,* on the other hand, takes the position that issue preclusion should not apply to either finding. RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment i (Tent. Draft No. 4, 1977) [§ 27].

mate fact."[19] The first *Restatement of Judgments* adopted this view in 1948.[20] Some courts narrow preclusion still further, permitting it only to establish facts that are "ultimate" in the later suit.[21] The distinction between "ultimate facts" and other facts—sometimes referred to as "evidentiary facts" or "mediate data"—is often obscure. Moreover, it is unclear why such a distinction is relevant to the policies served by the issue preclusion rule.[22]

The *Restatement (Second) of Judgments* rejects the notion that issue preclusion depends upon fine distinctions between ultimate facts and evidentiary facts. The appropriate question now is

> whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 68.I [§ 28]—for example, that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.[23]

The *Restatement Second,* then, replaces the "ultimate fact" limitation in the first *Restatement* with the "foreseeability" exception of section 68.1(e) [section 28]. This subsection permits relitigation of even essential determinations when "[t]here is a clear and convincing need for a new determination of the issue . . . because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . . ."[24]

To illustrate the interaction between the *Restatement Second* and the first *Restatement,* assume the following situation. First, the parties to a lawsuit litigate an essential issue of ultimate fact in state A. The court determines the issue and enters judgment. State A precedents hold that determinations of essential, ultimate facts have collateral estoppel effect. Later, a lawsuit in state B between the same parties involves the same essential issue. State B, however, follows the *Restatement Second*'s "foreseeability" rule. If

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[19] The Supreme Court of the United States may have expressed this notion in Ashe v. Swenson, 397 U.S. 436, 443 (1970), stating, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

[20] RESTATEMENT OF JUDGMENTS § 68, Comment p (Supp. 1948).

[21] *See, e.g.,* Evergreens v. Nunan, 141 F.2d 927, 930-31 (2d Cir. 1944).

[22] *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.442(2) (2d ed. 1965 & Supp. 1980-81); *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 813, 842-43 (1952).

[23] RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment j (Tent. Draft No. 4, 1977) [§ 27].

[24] *Id.* § 68.1(e) [§ 28].

the second action had been brought in state A, the issue would be precluded under prior precedents. But can the state B court refuse collateral estoppel effect to the state A court's finding if the losing party could not have sufficiently foreseen at the time of the initial action that the issue would arise in the subsequent suit?

The *Restatement (Second) of Conflict of Laws* seems to say "no." Section 95 declares that the local law of the state of rendition controls what issues are affected by the judgment.[25] Full faith and credit calls for the state B court to accord a state A judgment the same effect that it has in state A. If state A would preclude relitigation of the issue, state B should likewise bar relitigation unless an exception to the requirement of full faith and credit applies.

No exception in the *Restatement (Second) of Conflict of Laws* seems specifically applicable.[26] If collateral estoppel would subject a party to unforeseeable and prejudicial consequences, however, a policy stronger than full faith and credit may be implicated. Commentators have recognized that foreseeability of the juridical consequences of conduct is an aspect of fundamental fairness—of due process of law.[27] The Supreme Court recently assessed the relationship between foreseeability of juridical consequences and due process, in the context of judicial jurisdiction. Construing the reach of a state long arm jurisdiction statute in *World-Wide Volkswagen Corp. v. Woodson*,[28] the Court stated:

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[29]

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[25] *See* text accompanying note 10 *supra*.

[26] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 103-121 (1971).

[27] For two very useful articles probing the relationship between foreseeability and due process in the choice of law context, see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1975).

[28] 444 U.S. 289 (1980). The Court considered the constitutionality of an Oklahoma state court's exercise of personal jurisdiction over a retail automobile dealer and a regional distributor located in New York for a claim arising out of an accident in Oklahoma. The Oklahoma Supreme Court ruled that the defendants' conduct outside the state brought them within the range of Oklahoma's long arm statute, and that it did not violate due process to subject them to jurisdiction there because the defendants could have forseen the possible impact of the mobile product they sold in any state—including Oklahoma. The Supreme Court reversed.

[29] *Id.* at 297.

There is a close analogy between holding a person subject to a state court's jurisdiction when he could not reasonably have anticipated that his conduct would bring him within the range of that state's long arm statute, and binding a litigant to an earlier adjudication of an issue when he could not reasonably have anticipated that the issue would arise in the later suit. In some circumstances it must be unconstitutional to deny a person the right to relitigate an issue when its later juridical significance could not reasonably have been foreseen during the earlier litigation.

If the later significance of the issue was totally unforeseeable at the time of the first action, and if precluding relitigation would seriously prejudice the party in the later action, to hold that party precluded on the issue would seem to constitute a denial of due process—even in the rendering state—unless the party had every incentive and opportunity to litigate the issue fully in the first suit. Precedents in the rendering state that would demand preclusion could not be applied constitutionally in such a case. If the later unforeseeable litigation arose in another state, the second court would not be denying full faith and credit to the rendering court's judgment if it refused, in the name of due process, to follow such precedents.

Of course, situations where later litigation of identical issues is totally unforeseeable are probably very rare. What degree of foreseeability is sufficient to obviate the due process constraint cannot now be defined. If a case such as the hypothetical one posed above should arise, however, it would seem that the recognizing court not only may, but must examine the foreseeability question and allow relitigation if it finds the due process minimum to be lacking. This would be true even if the recognizing court did not generally endorse the *Restatement (Second) of Judgments*. The *Restatement Second* does not suggest that the foreseeability provision embodied in section 68.1(e) [section 28] incorporates a due process requirement. Nevertheless, there may be an element of due process in section 68.1(e), and a court that follows the *Restatement Second* can draw upon that provision to deny preclusive effect to a sister state judgment.

II

The Mutuality Problem

The first *Restatement of Judgments* generally accepted the principle of mutuality of estoppel by providing that only those persons who are bound by a prior judgment could invoke the issue

preclusive effect of that judgment in later litigation.[30] The *Restatement (Second) of Judgments* rejects this doctrine. Subject to various limitations, it allows anyone to invoke collateral estoppel offensively or defensively, against anyone who was a party, was in privity with a party, or was represented by a party in the prior litigation.[31] In this respect, the *Restatement Second* reflects a view that the Reporter declares "has now gained general acceptance."[32] The Supreme Court's recent decision in *Parklane Hosiery Co. v. Shore*,[33] permitting the offensive assertion of collateral estoppel against a defendant in a prior action by one who was not a party to the first suit, will in all likelihood encourage more states to abandon the mutuality requirement.[34] A number of states, nevertheless, have recently reaffirmed the mutuality rule.[35]

Again, the interaction of the first *Restatement of Judgments* and the *Restatement Second* can be shown by illustration. Suppose that a court in a mutuality state decides an essential issue of ultimate fact after an active contest by parties who had incentive and a full, fair opportunity to litigate the issue. In a later suit in a state that has adopted the *Restatement Second* approach, a non-party to the earlier suit invokes collateral estoppel to establish a fact determined in that earlier action. Can the court in the second suit apply its own law and treat the issue as precluded by the initial adjudication? Or must it apply the rendering state's mutuality rule to permit the issue to be relitigated?

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[30] RESTATEMENT OF JUDGMENTS § 93(b) (1942).

[31] RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975)[§ 29].

[32] *Id.*, Reporter's Note at 98. This view is often referred to under the name of the case that is generally considered its source: Bernhard v. Bank of Am. Nat'l Trust and Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

[33] 439 U.S. 322 (1979).

[34] *See generally* Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After* Parklane Hosiery Co. v. Shore, 31 HASTINGS L.J. 755 (1980); Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery*, 64 CORNELL L. REV. 1002 (1979).

[35] The *Restatement (Second) of Judgments* cites the following cases reaffirming adherence to the mutuality rule: Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. Dist. Ct. App. 1971); Lukacs v. Kluessner, 290 N.E.2d 125 (Ind. Ct. App. 1972); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972); Howell v. Vito's Trucking & Excav. Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972); RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 98 (Tent. Draft No. 2, 1975) [§ 29]. *Compare* Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972) (mutuality rule endorsed without significant reservation), *with* Crutsinger v. Hess, 408 F. Supp. 548 (D. Kan. 1976) (Kansas law applied to allow defensive assertion of collateral estoppel by a non-party). The district court judge who announced the *Crutsinger* decision had previously served on the Supreme Court of Kansas. For a recent defense of the mutuality rule, see Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977).

The *Restatement (Second) of Conflict of Laws* again seems to prohibit the second state court from applying its own law; section 94 directs the court to look to the local law of the rendering state to determine which persons are affected by a judgment.[36] The *Restatement (Second) of Conflict of Laws,* however, does not provide a clear answer to our question. Although the heading of section 94 refers to "Persons Affected," implying that the section addresses the question of who can assert the judgment as well as who is constrained by it, the text of the rule mentions only "persons bound." If section 94 requires only that the person *bound* by the first judgment be identified by the law of the rendering state, the *Restatement (Second) of Conflict of Laws* may leave the recognizing state free to apply its own rule to determine who may claim the *benefit* of collateral estoppel. This result, however, would allow a recognizing state court to give a judgment more conclusive effect than it has in the state of rendition. The *Restatement (Second) of Conflict of Laws* declares that "recognition" means giving "the same conclusive effect."[37] Section 1738 of the Judicial Code says that each state shall give "the same full faith and credit" to a judgment that it has in the rendering state.[38] Can the recognizing court, then, properly give more conclusive effect to the judgment than it would have in the state of rendition?

The *Restatement (Second) of Judgments* raises, but does not answer, this question in its discussion of the effect of a state court judgment in a later federal court action.[39] Section 134 [section 86] of the *Restatement Second* provides that generally a federal court must accord the "same effects" to the state judgment as it is given by the law of the rendering state.[40] The Comments note the ambiguity in the term "same full faith and credit" in section 1738 of the Judicial Code, and conclude that, in general, it is "appropriate" to interpret the phrase to mean "no more as well as no less."[41]

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[36] *See* text accompanying note 10 *supra.*

[37] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93, Comment b (1971).

[38] 28 U.S.C. § 1738 (1976); *see* note 9 *supra. But see* note 61 *infra.*

[39] The *Restatement (Second) of Judgments* generally does not treat the problem of interstate recognition, deferring instead to the *Restatement (Second) of Conflict of Laws. See* note 6 *supra.* RESTATEMENT (SECOND) OF JUDGMENTS § 134 (Tent. Draft No. 7, 1980) [§ 86], however, does deal with the effect of state court judgments in federal court.

[40] RESTATEMENT (SECOND) OF JUDGMENTS § 134 (Tent. Draft No. 7, 1980) [§ 86].

[41] *Id.* § 134, Comment g at 80 [§ 86].

The Comments also suggest, however, that a federal court might recognize "preclusive effects greater than those accorded by state law," when the rendering state adheres to the mutuality requirement and the second action is brought in a federal court.[42] Although the Comments acknowledge that existing decisions hold that the federal court should defer to the rendering state's mutuality rule and allow relitigation,

> the rationale for doing so has not been made apparent. The matter could be regarded as governed by § 1738 or by § 1652, the Rules of Decision Act. On the other hand, the question can be regarded as one concerning the decisional process in federal court and therefore to be resolved by federal law. Under the latter analysis [the party] would be precluded from relitigating the issue.[43]

If a federal court can give greater preclusive effect to a state judgment than it would have in the state of rendition without violating the full faith and credit requirement, a state court similarly should be free to give expanded preclusive effect to a sister state's judgment.[44]

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[42] *Id.*

[43] *Id.* at 81. This conclusion assumes that the federal court would not insist on mutuality, but the *Restatement Second* leaves some question about the role of the mutuality requirement in federal issue preclusion. Federal law determines the effect of federal court judgments, *id.* § 135 [§ 87], and this is true whether the basis for jurisdiction is a federal question, *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971), or diversity of citizenship, *see* Aerojet-General Corp. v. Askew, 511 F.2d 210 (5th Cir.) *appeal dismissed sub nom.* Metropolitan Dade County v. Aerojet-General Corp., 423 U.S. 908 (1975); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 135, Comment a (Tent. Draft No. 7, 1980) [§ 87]. *But see* Semler v. Psychiatric Instit., 575 F.2d 922 (D.C. Cir. 1978) (federal court applied state law). In this, the *Restatement (Second) of Judgments* draws upon recent studies by three members of the advisory committee. *See* Degnan, *supra* note 4, at 741; Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U.L. REV. 759 (1979); Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635 (1975). In some diversity cases, however, the *Restatement Second* recognizes that the federal law of res judicata may incorporate state law. *Id.* § 135, Comment b [§ 87]. It is not clear whether federal law should incorporate the law of the state in which the federal court sits or the law of the state that controls the substantive relationships in the suit, but in either case the incorporated state law rule may include a mutuality requirement. Neither § 135, Comment b [§ 87], nor the Reporter's Note discusses whether the federal court should apply the mutuality rule to determine the preclusive effect of the state court judgment in this situation.

[44] Although the full faith and credit clause, U.S. CONST. art. IV, § 1, only purports to impose its requirement on "states," the implementing statute, 28 U.S.C. § 1738 (1976), requires "every court within the United States and its Territories and Possessions" to give full faith and credit to state court judgments.

The Supreme Court has not yet spoken clearly about whether a recognizing court violates the full faith and credit requirement when it ascribes greater preclusive effect to a judgment than the determination has in the state of rendition. The question has received substantial treatment, however, in other sources.[45] Edwin Abbot, in a 1912 survey of the problem, concluded that constitutional full faith and credit "forbid[s] a state court to give too much faith and credit as well as too little to a judgment of a court of a sister state."[46] The survey grounded its conclusion on Supreme Court dicta.[47] More recent dicta, however, suggest that the constitutional provision and the statute are concerned only with the minimum effect that must be given to a sister state judgment. In *Sutton v. Leib*,[48] for instance, the Court declared that the "intended function" of the full faith and credit clause is to avoid "relitigation in other states of adjudicated issues."[49] In *Durfee v. Duke*,[50] the Court said "[f]ull faith and credit thus generally requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it."[51] Such statements seem incompatible with the view that full faith and credit prescribes the maximum effect that can be given to a sister state judgment.

Modern commentators disagree about whether a non-party to a judgment in a state that requires mutuality may invoke collateral estoppel against a party to the prior judgment in a state court that rejects the mutuality rule. Professors Carrington,[52] Scoles,[53] and

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[45] *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, *supra* note 14, at 735-39; A. VESTAL, *supra* note 14, at 478-83; Abbot, *Res Judicata as a Federal Question*, 25 HARV. L. REV. 443 (1912); Scoles, *supra* note 14, at 750-55; Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590 (1968).

[46] Abbot, *supra* note 45, at 445.

[47] For example, in Board of Pub. Works v. Columbia College, 84 U.S. (17 Wall.) 521, 529 (1873), the Supreme Court observed, "No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on that subject."

[48] 342 U.S. 402 (1952).

[49] *Id.* at 407.

[50] 375 U.S. 106 (1963).

[51] *Id.* at 109.

[52] *See* Carrington, *supra* note 14, at 383 ("Surely there is no purpose of the full faith and credit principles which has application to prevent an Ohio court from giving broader effect to a foreign judgment than it would have where rendered.").

[53] *See* Scoles, *supra* note 14, at 753 ("[T]he full faith and credit clause should be construed as an interstate implementation of the basic policy of preclusion by prior litigation that was thwarted by the requirement of mutuality.").

Vestal[54] apparently would answer "yes." Professor Degnan, on the other hand, apparently would say "no."[55] Professor Overton believes that "[g]iving a judgment more effect than would be given by the rendering state would appear to violate [section 1738] as much as would giving it less effect."[56] He argues, however, that "the problem of who may assert the preclusive effect of a prior judgment should be treated not as an element of the law of judgments, but as part of the substantive law."[57] Under this approach, full faith and credit would not force the recognizing state to apply the issue preclusion rule of the rendering state.

Important historical studies of the judgments branch of the full faith and credit clause by Professors Radin[58] and Nadelmann[59] show that the Framers included the clause in the Constitution mainly to emphasize that, unlike judgments of foreign countries, sister state judgments were to be enforced *ex necessitate* rather than merely *ex comitate*:[60] to make the judgment record conclusive, not just prima facie, evidence of the rights and duties the record recites. Neither study suggests that the Framers intended the full faith and credit clause to obligate the states to give a sister state's judgment the identical effect—no more and no less—of a domestic judgment of the court of rendition.[61]

The Supreme Court has recognized several instances in which a sister state may give different effects to a judgment than would a court in the state of rendition without running afoul of the full faith and credit clause. In some situations a court may deny enforcement to judgments that are enforceable in the rendering state.[62] Conversely, in at least one situation, where statutes of

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[54] *See* A. VESTAL, *supra* note 45, at 482.

[55] *See* Degnan, *supra* note 4, at 752-53. Professor Degnan's "re-restatement" does not address the question of who may claim the benefit of collateral estoppel, but only who may be bound. *See* note 4 *supra*.

[56] Overton, *supra* note 35, at 948.

[57] *Id.* at 930.

[58] Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944).

[59] Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957).

[60] The terminology is Professor Nadelmann's, although he traces it back to VOET's COMMENTARIES (Krause Trans. 1924). Nadelmann, *supra* note 59, at 64 n.146.

[61] *Cf.* note 64 and accompanying text *infra* (state may give greater preclusive effect to sister state judgment than would state of rendition).

[62] A state can, for instance, apply its own statute of limitations to deny enforcement of a sister state judgment that is still enforceable in the rendering state. M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839); Watkins v. Conway, 385 U.S. 188 (1966). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(2) (1971).

limitations differ, it is constitutional for a sister state to enforce a judgment that would be unenforceable in the state of rendition.[63] It follows that the purpose of the clause must not be to insure *identity* of effects.

Even if identity of preclusive effect in a sister state's courts is not compelled by the Constitution, however, Congress has power to prescribe the effects of state court judgments. It is conceivable that section 1738 reflects a congressional intention to require identical effects. The statute refers to "the same full faith and credit." It seems unlikely, however, that Congress meant to create this result. The addition of the words "same" and "full" to the statute in 1948 was not intended to effect any substantive change. The legislative history of the predecessors to section 1738 does not suggest that Congress intended to restrict a state's power to give greater preclusive effect to a sister state's judgment than would the rendering court.[64] What rationale would support a rule that permits one state, by adopting narrow rules of preclusion, to impose upon other states the obligation to expend judicial resources relitigating questions that previously were litigated fully and fairly?

This is not to say that strong arguments cannot be raised against allowing the recognizing state to give more conclusive

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[63] The enforcing state probably can apply its own statute of limitations and permit enforcement of a sister state judgment even when the statute of the sister state has already run. *See* Annot., 36 A.L.R.2d 567, 584-86 (1954). The Supreme Court has not decided the question, although Justice Frankfurter's dissenting opinion in Union Nat'l Bank v. Lamb, 337 U.S. 38, 46 (1949), often is cited to support such enforcement:

> [W]here the enforcement of a judgment by State A is sought in State B, which has a longer limitation period than State A, State B is plainly free to enter its own judgment upon the basis of State A's original judgment, even though that judgment would no longer be enforceable in State A.

See, e.g., A. VESTAL, *supra* note 14, at 480.

[64] One point that seems too frequently overlooked in discussions of this problem concerns how the word "same" became part of the full faith and credit statute. That word was not in the law until 1948, when Congress enacted a major revision of the United States Judicial Code. Act of June 25, 1948, ch. 464, 62 Stat. 947 (codified at 28 U.S.C. § 1738 (1976)). Apparently, Congress did not intend to impose any greater obligation than existed previously, when it substituted the phrase "same full faith and credit" for "such faith and credit." The Reviser's Note to § 1738 regards the change merely as one of "phraseology." 28 U.S.C. § 1738 Historical and Revision Notes (1976). The mere presence of the word "same" in § 1738, then, does not mean that states cannot give greater preclusive effect to sister state judgments than would the state of rendition. If identity of effect was not a feature of full faith and credit before the 1948 revision, it is not now. Whether the full faith and credit requirement means "no more" as well as "at least as much," however, was recognized as an important question before 1948. *See* notes 46-47 and accompanying text *supra*.

effect to a judgment than it would receive where rendered. But if there is a constitutional obstacle preventing one state from according greater preclusive effect to a sister state's judgment than it has in the state of rendition, it is to be found in the due process clause, not the full faith and credit clause.[65]

Binding a party to greater preclusive effect than was recognized when the litigation first took place can be very unfair in some situations. For instance, a party may make tactical decisions in the first lawsuit based on a reasonable assumption that the only results of losing would be those prescribed by the law of the state in which the dispute is litigated. It would be unfair for a court in a sister state to hold such a party bound to conclusive effects that were not reasonably foreseeable during the first litigation. Unless later litigation involving the same issue outside the state of rendition was foreseeable, the recognizing state may deny a party due process by forbidding relitigation of an issue that the state of rendition would not preclude.

In addition to its role in insuring fundamental fairness to individual litigants, the due process clause imposes some constraints on the choice of law process.[66] Under traditional choice of law doctrine, the law of the forum governs matters of "procedure."[67] The forum state's interest in the effective and efficient conduct of litigation generally is sufficient to satisfy due process and justify applying its own procedural rules, even if the forum state has no other interest in the parties or the controversy.[68] Rules that the forum state may characterize as "procedural," however, can sometimes have an effect on the merits of the controversy that transcends any legitimate interest in the mechanics of adjudication. Statutes of limitation are common examples of such rules and, as we will see, res judicata rules may be also.

Home Insurance Co. v. Dick[69] illustrates the due process issues posed when the forum state has an inadequate interest in ap-

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[65] The due process problems discussed here are treated in A. VESTAL, *supra* note 14, at 482-83.

[66] For a thorough discussion of the effect of due process on choice of law, see R. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS § 9.2 (2d ed. 1980). *See also* Kirgis, *supra* note 27, at 95-110; Martin, *supra* note 27, at 185-216.

[67] *See* R. WEINTRAUB, *supra* note 66, § 3.2C.

[68] *See e.g.*, Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (Pennsylvania, as forum state, applies its one-year statute of limitations to wrongful death claim brought under Alabama law providing for a two year period). Professors Cramton, Currie, and Kay suggest that "a disinterested forum . . . may apply its own law only to vindicate policies relating to the conduct of litigation in its courts." R. CRAMTON, D. CURRIE & H. KAY, *supra* note 14, at 460.

[69] 281 U.S. 397 (1930).

plying its own statute of limitations. There the Supreme Court held that due process was abridged when the forum state applied its own law to permit suit on a claim that otherwise was barred by a contractual limitation period. The Court found that characterizing the issue as "not substantive" did not alleviate the due process problem.[70] A forum state's interest in procedure alone may be sufficient to justify applying its own statute of limitations to close the doors of its courts to claims too stale for appropriate litigation.[71] That sort of interest is not served, however, when the forum state's rule would keep alive a claim otherwise barred. If the forum state has no interest that would justify applying its law to the substantive issues in the case, it is unreasonable for the forum state to apply its longer statute of limitations. Professor Martin suggests the following "simple constitutional rule" for statutes of limitations in cases where the forum state has no substantive interest:

> The forum may be justified in using its own statute of limitations to bar a cause of action that is still good in the state which created it, but a state should be forbidden from entertaining a cause of action after it is dead in the state which created it.[72]

Professor Martin's "rule," of course, guides the choice of statutes of limitations applied to suits on the original cause of action—not statutes of limitation on suits to enforce sister state judgments. It was noted previously that the full faith and credit clause does not prevent the enforcing state from applying its own statute of limitations regarding enforcement actions, even when the result is to enforce a judgment that is now unenforceable in the state where it was rendered.[73] The full faith and credit clause, in such a case, does not prevent the second state from giving greater effect to the judgment than it has where rendered.

But might not due process be violated if the enforcing state had no significant interest in the underlying controversy? Can a state whose interest in the substantive issues is insufficient to permit it to apply its longer statute of limitations in a suit on the original claim nevertheless apply its longer limitation period to permit enforcement of a judgment unenforceable where

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[70] *Id.* at 405-06. *See also* Allstate Ins. Co. v. Hague, 101 S. Ct. 633, 638-39 (1981) (unlike *Home Insurance,* claim alleged sufficient contacts to justify application of forum law).

[71] *See* note 68 *supra.*

[72] Martin, *supra* note 27, at 221.

[73] *See* note 63 *supra.*

rendered—without violating due process? In most cases the answer must be "no"; such enforcement would not violate due process. Once a valid and final judgment on the merits has been rendered, the concern of the due process clause with respect to the underlying controversy has been served. The focus then shifts to the question of what process is due in connection with enforcement. A state where the defendant's executable property can be found seems to have a sufficient interest to apply its own law, not only to matters concerning the mechanics of enforcement but also to the questions of what property may be reached and how long it shall be available for that purpose.

Due process may become a problem if the enforcing state has unreasonable exemption laws or provides an unreasonably short period during which judgments can be enforced. If the enforcing state provides a longer period than the rendering state, however, it is hard to imagine a denial of due process. The enforcing state's interest as forum and as situs of executable property should be adequate to justify applying its own limitation rule, even if that means enforcing a sister state judgment that was dead in the state of rendition.[74] In sum, neither full faith and credit nor due process would be denied if the enforcing state ascribed more effect to the sister state judgment in such a case.

The recognition of a sister state judgment for its preclusive effect, which is the concern of this Article, involves some different questions from those raised in the enforcement of sister state judgments. Nevertheless, there would be no denial of due process if a recognizing state that follows the *Restatement Second* approach gave greater preclusive effect to the judgment and applied its own rule to preclude relitigating an issue determined in favor of a non-party to the prior suit, even though the rendering court followed the mutuality rule. The due process clause's concern with basic fairness is served by the constraints in section 68.1 [section 28] of the *Restatement (Second) of Judgments*,[75] which adequately

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[74] If, for some reason, the enforcing state's judgment on the first judgment cannot be executed and enforcement proceedings in another state become necessary, the second enforcing state apparently would have to use the date of the second judgment, not the date of the original, for limitation purposes. *See, e.g.*, Roche v. McDonald, 275 U.S. 449 (1928).

[75] [T]he issue in a subsequent action between the parties is not precluded in the following circumstances:

(a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; or

guards against unfairly surprising the bound party. The due process clause's concern with the choice of law process is also satisfied because, as in the enforcement situation,[76] the recognizing state's interest as the forum in avoiding repetitive litigation of issues fully and fairly decided elsewhere is sufficient to justify applying its own rule.

Hart v. American Airlines, Inc.[77] illustrates how courts that reject the mutuality rule, as does the *Restatement Second,* can treat requests by a non-party to an earlier judgment rendered in a mutuality rule jurisdiction to preclude relitigation of issues that the defendant fully and fairly litigated in the earlier action. In a related suit brought by a non-resident of New York on behalf of a non-resident decedent,[78] a New York trial court had denied issue preclusive effect to the mutuality rule jurisdiction judgment. When New York plaintiffs sued on behalf of a New York decedent, however, the trial court held the defendant precluded, despite the original jurisdiction's mutuality rule. Because the state has important interests in protecting its own residents,[79] the New

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(b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(c) A new determination of the issue is warranted by differences in the quality or extensivenss of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action. . . .

RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4, 1977) [§ 28]. *See also* text accompanying note 24 *supra.*

[76] *See* note 68 and accompanying text *supra.*

[77] 61 Misc. 2d 41, 304 N.Y.S. 2d 810 (1969).

[78] Hart v. American Airlines, Inc., N.Y.L.J., May 20, 1968, at 2, col. 6 (Sup. Ct.), *aff'd per curiam,* 31 A.D.2d 896, 397 N.Y.S.2d 587 (1969). In *Hart,* a different judge denied a summary judgment motion based on the same alleged collateral estoppel effects of a prior Texas federal court decision involving another plaintiff. The (second) plaintiff asserted that the decedent's employment and ticket purchase in New York and his boarding of a New York flight created such "predominant interest in the protection and regulation of the rights of the persons involved" that the court should undertake a choice of law analysis and chose New York's collateral estoppel law. The court disagreed, noting that there were insufficient interests at stake to apply New York issue preclusion law because neither the deceased, his survivors, nor the plaintiff were domiciled in New York. *Id.*

[79] The court found that the mutuality rule jurisdiction had "no legitimate interest in imposing its rules of collateral estoppel upon these New York residents" and that New York courts "should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from [airplane disasters where

York court in the second suit considered itself free—as a choice of law matter—to choose its own rule for determining the preclusive effect of the prior judgment.

Without regard for the wisdom of adopting its own rule as a choice of laws matter, New York might have had enough interest to apply its rule without denying due process merely by being the forum—even in the suit brought by non-residents. In any event, the *Hart* case could serve as an example for courts that follow the *Restatement Second* and reject the mutuality rule. Assuming fairness in the first litigation and reasonable foreseeability of the later one, neither full faith and credit[80] nor due process[81] is violated by preclusion.

An interesting problem would arise if a later action involving the same essential issue is brought in a third state. If the third state followed the mutuality rule, could it relitigate the issue, or would it be bound to consider the issue precluded by the second judgment? Projecting the principle established in the judgment *enforcement* cases onto this judgment *recognition* situation, the third state, indeed, even the original rendering state, probably would now have to treat the issue as precluded by the second judgment.[82] An analysis of all the implications of this problem, however, will have to await another day.

III

The Limited Appearance Problem

Anglo-American law historically has permitted an action to be brought on a personal claim against a defendant who is not subject to the court's personal jurisdiction by attaching or garnishing the defendant's property and proceeding fictitiously as though the action were in rem to determine interests in the property. This

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the place of injury is entirely fortuitous]." 61 Misc. 2d at 44, 304 N.Y.S.2d at 813 (quoting Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527-28, 211 N.Y.S.2d 133, 135 (1961)).

[80] *See* notes 36-65 and accompanying text *supra*.

[81] *See* notes 65-76 and accompanying text *supra*.

[82] *See* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). *But see* Chapman v. Aetna Fin. Co., 615 F.2d 361 (5th Cir. 1980). In *Chapman*, the Fifth Circuit ruled that full faith and credit did not require the court to give claim preclusion effect to a state court judgment that would bar the claim through a compulsory counterclaim rule. Although not bound by full faith and credit, the court recognized the claim preclusion effect of the state counterclaim rule as a matter of comity. What full faith and credit demands in recognition situations is not as clear as what it demands in enforcement cases.

kind of proceeding is usually referred to as an action "quasi in rem," or an action on "foreign attachment." Circumstances in which such actions can be brought vary according to the statutes of the forum state, but until recently it was accepted that the presence of attachable property in the state was sufficient to satisfy constitutional due process requirements for such proceedings, if adequate official notice of the action was provided.[83]

Actions of this sort can be oppressive in some situations. A defendant who has insufficient contact with a state to be constitutionally subject to personal jurisdiction is faced with the dilemma of either allowing the attached property to be taken without contest, or defending the merits of the claim in what might be a seriously inconvenient forum. If he chooses the latter alternative, the defendant may be held to have made a general appearance, thus turning the quasi in rem action into one in personam.[84] To mitigate the potential for unfairness to such a defendant, some courts[85]—but not all[86]—allow a defendant in a quasi in rem proceeding to make a "limited appearance" to defend the personal claim on the merits without submitting generally to personal jurisdiction. If the defense is unsuccessful, the judgment against the defendant would extend only to the attached property.[89] If the attached property is insufficient to satisfy the claim, the successful plaintiff is not precluded from suing again. Likewise, if the defendant wins, the plaintiff is not precluded from suing again. The judgment, even though based on actual litigation of the merits, has no claim preclusive effect. But might such a judgment have issue preclusive effect?

Courts have expressed different views on this question.[88] The first *Restatement of Judgments* reflected this split among the courts by taking seemingly contradictory positions.[89] On the one hand,

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[83] *See* Shaffer v. Heitner, 433 U.S. 186 (1977); 2 MOORE'S FEDERAL PRACTICE ¶ 4.41-1[1] to .41-1[4] (2d ed. 1978).

[84] *See* 2A MOORE'S FEDERAL PRACTICE ¶ 12.13 (2d ed. 1980).

[85] *See* Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (6th Cir. 1922); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

[86] *See, e.g.*, Bede Steam Shipping Co. v. New York Trust Co., 54 F.2d 658 (S.D.N.Y. 1931).

[87] *See* Dry Clime Lamp Corp. v. Edwards, 389 F.2d 590 (5th Cir. 1968); Grable v. Killits, 282 F. 185 (6th Cir. 1922).

[88] *Compare e.g.*, Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 17-18, 112 N.E. 500, 502 (1916), *with* United States v. Balanovski, 236 F.2d 298, 302 (2d Cir. 1956).

[89] *Compare* RESTATEMENT OF JUDGMENTS § 40, Comment a (1942) (no collateral estoppel where defendant contests the claim without submitting to personal jurisdiction), *with* RESTATEMENT OF JUDGMENTS § 76(2) (1942) (collateral estoppel applies to questions actually litigated).

the basic policies of res judicata and collateral estoppel would be undermined if issues once fully and fairly litigated could be relitigated in a later suit. On the other hand, the purpose of the limited appearance would be undercut if issue preclusion barred relitigation. What would be the purpose of a rule that denied claim preclusion effect to such judgments but allowed issue preclusion? If the property seized in the first suit left the claim unsatisfied, a successful plaintiff would have to bring another action. But if the first judgment precluded relitigating the issues, there would be nothing for the parties to litigate in the second suit. If the defendant was successful in the original action, the issues determined would effectively preclude any later suit, even if technical claim preclusion did not apply. Although recognizing that the question is close, section 75 [section 32] of the *Restatement (Second) of Judgments* endorses the view that judgments entered after a limited appearance have the same issue preclusive effect as do in personam judgments.[90]

Assume that the plaintiff obtains quasi in rem jurisdiction over the defendant in a court that does not recognize collateral estoppel effects for such judgments. The defendant makes a limited appearance and vigorously contests the merits of the claim. Assume further either that the defendant wins or that the plaintiff prevails but cannot satisfy the claim with the attached property. Later, a suit on the same claim is brought in a state that follows the *Restatement Second* position. If the limiting provisions of section 68.1 [section 28] of the *Restatement Second*[91] are met, can the court in the second suit invoke its own rule to preclude relitigation of the issues, or must it re-examine the issues as the law of the rendering state prescribes?

Again, the question is whether the recognizing state can extend greater issue preclusive effect to a sister state's judgment than would a court in the state of rendition. As was concluded previously,[92] neither the full faith and credit clause nor section 1738 prevent the recognition of greater preclusive effect, although the due process clause imposes a limitation in some circumstances. If the litigation in the first forum is fair and later

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[90] RESTATEMENT (SECOND) OF JUDGMENTS § 75(c) & Comment d (Tent. Draft No. 7, 1980). One student commentator has suggested, however, that application of issue preclusion to issues litigated in a limited appearance may violate due process. *See* Note, *Limited Appearances and Issue Preclusion: Resetting the Trap?*, 66 CORNELL L. REV. 595, 606 (1981).

[91] *See* note 75 *supra*.

[92] *See* notes 38-79 and accompanying text *supra*.

litigation involving the same question is reasonably foreseeable, however, due process is satisfied and the recognizing court should be free to decide which preclusion rule to apply.

In the aftermath of *Shaffer v. Heitner*[93] the limited appearance eventually will disappear because the dilemma that the limited appearance was designed to relieve can no longer plague a defendant. If a defendant cannot be subjected constitutionally to in personam jurisdiction, *Shaffer* prohibits a state from subjecting him to a quasi in rem action on a claim unconnected with the attached property.[94] Quasi in rem actions on claims unrelated to the property may continue to be used where no procedure is available in the state to permit the assertion of in personam jurisdiction. When the plaintiff invokes quasi in rem jurisdiction in such a situation, however, a defendant who could be subject to in personam jurisdiction constitutionally should not be able to restrict the resulting judgment to the attached property by putting in a limited appearance. Even if states continue to permit limited appearances, full issue preclusive effect should attach to the resulting judgment if an in personam judgment in that state, other things being equal, would have such effects.

For the time being, quasi in rem actions and limited appearances are still with us. Of the states that allow limited appearances, some will continue to hold that no issue preclusion results from such litigation. Can these states, by following restrictive rules of issue preclusion, force other states to open their courts to the relitigation of the same issues despite the latter states's opposing policies? Even if, contrary to the view expressed in this Article,[95] the full faith and credit clause does control whether or not a state can give more issue preclusive effect to a judgment than would the rendering state, the hypothesized situation may fall within the limitation on full faith and credit expressed in section 103 of the *Restatement (Second) of Conflict of Laws*.[96] The full faith and credit policy is not strong enough to override a state's interest in prescribing the time when judgments may be enforced in its courts.[97] Similarly, the policy of full faith and credit should not

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[93] 433 U.S. 186 (1977).

[94] Some courts have read *Shaffer* much more restrictively. *See, e.g., Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977).

[95] *See* notes 52-57 and accompanying text *supra*.

[96] *See* text accompanying note 14 *supra*.

[97] *See* notes 69-73 and accompanying text *supra*.

be so strong as to override the interest of the recognizing state in not squandering its judicial resources on issues that already have been fully and fairly litigated by a competent court. If all the conditions of fairness and foreseeability embodied in section 68.1 [section 28] of the *Restatement (Second) of Judgments* have been satisfied,[98] then a court that follows the *Restatement Second* on the issue preclusive effect of judgments resulting from limited appearances should be free to apply its own rule, even when the rendering state would not recognize issue preclusion.

CONCLUSION

Despite sections 94 and 95 of the *Restatement (Second) of Conflict of Laws,* a recognizing court that follows the *Restatement (Second) of Judgments'* approach need not adopt the law of the state of rendition to determine the collateral estoppel effect of the judgment in all three of the situations this Article has examined. If the significance of an issue for later litigation was not reasonably foreseeable at the time of the first action, and if the party against whom preclusion is urged in the later suit lacked the incentive or the opportunity to litigate the issue fully in the first action, the court in the later suit may permit relitigation of the question. This will be true even if the rendering court follows the view that determinations of "ultimate fact" essential to the first judgment may not be relitigated. In fact, an opportunity to relitigate in such a case must be afforded in the name of due process, whether the later suit is brought in the rendering state or in another.

On the other hand, if an issue was fully and fairly litigated, and if its significance for later litigation in the other state was reasonably foreseeable at the time of the first action, the court in the later suit may treat the issue as precluded even though the rendering court, following the mutuality rule, would not do so. Neither full faith and credit nor due process prevents the second court in those circumstances from giving more extensive preclusive effects to the first judgment than would the rendering court.

Similarly, if issues were litigated in a quasi in rem action in which the defendant was allowed to make a "limited appearance," the parties had a full, fair opportunity and incentive to litigate the issues, and the significance of the issues in the context of the later

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[98] *See* note 75 *supra.*

suit was reasonably foreseeable at the time of the first action, the court in the later action may treat the issues as precluded, even though the rendering state follows the view that collateral estoppel does not apply to issues litigated in a limited appearance.