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SYMPOSIUM†

PRECLUSION IN A FEDERAL SYSTEM

INTRODUCTION

Robert C. Casad ††

On behalf of the panel, I want to welcome you to this 1985 meeting of the Civil Procedure Section. The subject of our program is timely and significant. Chairman Kevin Clermont chose wisely when he selected "Preclusion in a Federal System" as the theme. It is a subject that is both fascinating and frustrating. The Supreme Court has paid quite a bit of attention to certain aspects of this subject in recent years—and two such cases are currently pending before the Court.¹

The subject is certainly not a simple one. One reason that it is so difficult to deal with, of course, stems from the obvious fact that the preclusive effects of a judgment are determined, not by the court that rendered the judgment, but by a different court—or at least in a different action. So we are always thinking about a situation involving two different actions when we think about preclusion. The implications of this duality can become quite confusing and are almost impossible to discuss in elegant English. The potential for confusion inherent in this duality is compounded in the United States by our federal system of multiple sovereignties. This makes it necessary for us to distinguish between the preclusive effects of a domestic judgment and those of a judgment rendered by a court of a different sovereignty. When the second action—i.e., the action in which the preclusive effects of the first judgment must be determined—is brought in the courts of a different state, a choice of law

† The four articles in this symposium were delivered on Jan. 5, 1985, at the meeting of the Civil Procedure Section of the Association of American Law Schools.

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¹ After these comments were delivered, the Supreme Court decided these two cases. See *Marrese v. American Academy of Orthopaedic Surgeons*, 53 U.S.L.W. 4265 (U.S. Mar. 4, 1985), *rev'g*, 726 F.2d 1150 (7th Cir. 1984) (en banc); *United States v. Dann*, 105 S. Ct. 1058 (1985), *rev'g*, 706 F.2d 919 (9th Cir. 1983). The Supreme Court opinion in *Marrese* is discussed in Burbank, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659 (1985).

problem has to be considered on top of the basic question of preclusion law. What law should the second court look to in order to determine the preclusive effect of the first court's judgment: forum one or forum two? The full faith and credit clause² and statute³ give a partial but not a complete answer. The statute says the judgments of any state, territory, or possession shall have the "same full faith and credit" in every other court in the United States as they have in the state, territory, or possession from which they are taken.⁴ But we know that there are some exceptions to that requirement. Moreover, we still do not know for sure the answer to the very fundamental question: does the word "same" in the statutory command of full faith and credit mean "exactly the same"—neither more nor less—or does it mean simply "no less," or "at least as great"?

The difficulty of our subject is further compounded by the concurrent operation within the same territory of federal and state laws and federal and state courts. Is a federal court obliged to give the same preclusive effect to a state court judgment as another state court would be? The full faith and credit statute seems to say so. But that statute says nothing about the preclusive effect of a federal court's judgment. What law does answer that question? Do the same standards apply to determine a federal judgment's preclusive effect when the second action is in the same federal court as apply when the second action is in a different federal court or in a state court? If there is no specific federal statute on point, is the question of the preclusive effect of a federal court judgment governed by state law or federal common law? If it be state law, is that so because of the Rules of Decision Act,⁵ or the Erie Doctrine, or some other reason? If it be federal common law, are the same rules of preclusion applicable nationwide to every judgment of every federal court? Or may federal law borrow and incorporate state law rules for this purpose in some kinds of cases? If so, what state's rules are to be borrowed, and in what kinds of cases? Do the answers to these questions depend on whether the federal court that rendered the first judgment was sitting in the exercise of federal question jurisdiction or diversity jurisdiction? Supreme Court cases, again, have given partial but not complete answers to these questions. They have recognized that there is a body of federal preclusion law that is not dependent upon any state's law,⁶ and that both federal and state

² U.S. CONST. art. IV, § 1.

³ 28 U.S.C. § 1738 (1982).

⁴ *Id.*

⁵ 28 U.S.C. § 1652 (1982).

⁶ *See, e.g.,* *Blonder-Tongue Laboratories v. University of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971) (citing *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)) (federal courts apply their own *res judicata* rules in nondiversity cases); *see also* RESTATEMENT (SECOND)

courts must apply that law in determining the effects of federal court judgments rendered in federal question cases (or at least some federal question cases).⁷ The source of the law that determines the preclusive effect of a diversity judgment, however, remains a subject of debate.

A further complicating duality stems from the fact that preclusion rules can implicate not only procedural but also substantive interests, both in forum one and forum two. In the state court context—where a court of state one has adjudicated a case under the substantive law of state two—it is settled that state two courts generally are bound by the full faith and credit statute to give the judgment as much effect as it would have in state one, even if that may significantly affect substantive rights based on state two law in a way that is contrary to state two policy.⁸ Moreover, the Supreme Court has indicated that state rules of preclusion determine the effects of state court judgments on matters governed by federal law even where the state court has adjudicated a federal right or cause of action.⁹ Federal courts must give the state court judgment the preclusive effects prescribed by state law, and that is true even if there would be no preclusion under federal law standards if the forum one court had been a federal court.¹⁰ And the duty to follow state rules of preclusion applies to matters of claim preclusion as well as to matters of issue preclusion, despite the conflict that this poses with the statutes purporting to give a right of access to a federal forum for the adjudication of federal rights.¹¹

OF JUDGMENTS § 87 (1982) (federal law determines effects under rules of res judicata of federal court judgment).

⁷ See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938) (question before state court reviewing federal court judgment in federal question case is res judicata, not full faith and credit); *Deposit Bank v. Frankfort*, 191 U.S. 499, 517, 520 (1903) (federal law controls res judicata effect of federal court decisions in federal question cases).

⁸ See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (Missouri court judgment applying Mississippi law is entitled to full faith and credit in Mississippi courts, even if Missouri was mistaken as to Mississippi law).

⁹ See *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980) (state court determination of issue, where parties granted full and fair opportunity to litigate, is entitled to preclusive effect in federal court even though federal right is being asserted).

¹⁰ See *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892 (1984) (extending *Allen* to claim preclusion if state law would preclude subsequent suit); see also RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment c (1982) (valid and final judgment of state court has same res judicata effect in subsequent federal action as it would in state court action).

¹¹ See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) (title VII of Civil Rights Act of 1964 does not create exception to rule that federal courts must give full faith and credit to state court judgments); *Allen v. McCurry*, 449 U.S. at 104 (42 U.S.C. § 1983 does not grant person claiming federal right unrestricted opportunity to relitigate issue already decided in state court); *Angel v. Bullington*, 330 U.S. 183 (1947) (state court judgment is res judicata on petitioner's federal question claims even if adjudication of those claims by state court was erroneous). *But see Haring v. Prosis*, 462

This last mentioned problem is particularly troublesome when the preclusive effects of a state court judgment are invoked in a later federal action in a case in which federal jurisdiction is exclusive. Should a state judgment ever be given preclusive effect so as to pre-judge any matters in such cases? Should a distinction be made between issue preclusion and claim preclusion? The Supreme Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons*¹² could produce an answer to this as well as other questions.

These opening observations are not news to any of you. They are intended merely to outline the subject of preclusion in a federal system, to pose some of its sub-problems and to warm up the audience for the main speakers who will follow. Perhaps I have made it seem like a subject more appropriate for the section on Conflict of Laws, but I do not see how we as teachers of civil procedure can avoid these conflicts problems. We certainly must try to understand them, even if we do not go deeply into them in our first year civil procedure courses. The subject is difficult, but not hopelessly so.

We are fortunate to have as our speakers today two outstanding young scholars who are currently working on articles that I think are destined to make significant contributions to the understanding of this subject: Professor Judith Resnik, whose article "Tiers" has already appeared in the *Southern California Law Review*,¹³ and Professor Stephen Burbank, whose article, tentatively entitled "Interjurisdictional Preclusion and Federal Common Law" is still in draft stage. We are also very pleased to have with us Professor Geoffrey Hazard, Jr., who will wind up the presentations as our commentator. Professor Hazard needs no introduction to a gathering of civil procedure professors. We all, I suspect, make heavy use of his many books and articles on procedure, particularly the work that is of the greatest importance to our present subject: the *Restatement (Second) of Judgments*, of which he was the principal reporter. I suspect there are few, if any, persons in the country today who have done more thinking about preclusion law in general than Professor Hazard.

U.S. 306 (1983) (guilty plea in state criminal proceeding does not bar suit under 42 U.S.C. § 1982 where state collateral estoppel rules would not be invoked).

¹² 53 U.S.L.W. 4265 (U.S. Mar. 4, 1985), *rev'g* 726 F.2d 1150 (7th Cir. 1984) (en banc).

¹³ Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).