1990

If at First You Do Succeed: Recognition of State Preclusive Laws in Subsequent Multistate Actions

Gregory S. Getschow

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol35/iss1/4

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Lawsuits of every kind involve matters that cross state boundaries. Whether the event is of media proportion, such as an airplane crash, or a matter as private as a divorce proceeding, unique legal considerations arise. When an event spurs legal filings which encompass several jurisdictions, both the time of filing and the number of civil cases burdening the court's docket will affect the length of time it will take for an action to proceed to trial. Consequently, while some cases are pending trial a judgment based on the same event may be rendered by a court of a different jurisdiction. It is possible that this judgment may be used in subsequent actions. If this judgment is favorable to the plaintiff in the pending trial, the court may be asked to review the judgment at the request of the plaintiff in a motion for summary judgment. If the judgment is unfavorable, the defendant may raise it as an affirmative defense.

In its review, the court of the pending action initially must determine whether the prior judgment should bind the parties to the pending action in any way. If the court finds that the judgment warrants such a binding effect, it must then establish which issues have been previously decided and what parties are bound by the initial action. This determination necessarily involves a review of the preclusive laws of both the sitting forum and those of the forum which rendered the prior judgment. If the rules are the same in both jurisdictions, then no conflict arises and the determination is clear. However, because preclusive rules vary among jurisdictions, a conflict may arise requiring a court to choose between its preclusive laws and those of the prior rendering jurisdiction to determine the binding effect of a prior judgment.

Some jurisdictions faced with this problem have determined that the full faith and credit clause of the United States Constitution requires the application of the rendering jurisdiction's preclusive laws, whereas other courts have held that the full faith and credit clause is inapplicable. Still other courts have failed to address the applicability of the full faith and credit clause completely.

This Comment examines the problems created when a court must choose between differing preclusive rules and suggests that much of the

1. For a discussion of these cases, see infra notes 123-43 and accompanying text.
2. For a discussion of these cases, see infra notes 144-56 and accompanying text.
3. For a discussion of these cases, see infra notes 157-61 and accompanying text.
existing case law is at odds with the policies supporting preclusivity, specifically judicial economy and uniformity. Part I of this Comment briefly defines rules of preclusivity, their purpose and supporting policies. Part II surveys the different approaches taken by jurisdictions in determining whether they may apply their own preclusive rules to a judgment or whether they must apply those of the prior rendering jurisdiction. Part III discusses the full faith and credit clause of the United States Constitution and its applicability to the recognition of out-of-state judgments. Part IV analyzes the cases dealing with this problem and suggests that courts are making their decisions based upon one of two premises. Some courts view preclusive rules as an integral part of the judgment and merge the rules with the judgment. Conversely, other courts interpret these rules as local forum rules which remain separate and apart from the judgment. Finally, Part V sets out a rubric which courts should follow when faced with a choice of preclusive laws, and further suggests that a variable full faith and credit analysis is warranted.

I. RES JUDICATA AND COLLATERAL ESTOPPEL

Res judicata, in its broad interpretation, refers to the general binding effect one judgment has upon another. The definition of res judicata in a particular context can be confusing, however, because res judicata has a dual meaning. One aspect of res judicata duality is claim preclusion, while the other is issue preclusion.

Claim preclusion, res judicata's narrower and historic definition, concerns the specific preclusive effect of a final judgment which bars a party from relitigating the same or related cause of action.

4. For a discussion of these cases, see infra notes 123-43 and accompanying text.
5. For a discussion of these cases, see infra notes 144-61 and accompanying text.
8. See C. Wright, supra note 6, at 680; see also James & Hazzard, supra note 7, § 11.3, at 590.
9. In addition to the same parties being precluded from relitigating the same cause of action, non-parties are also precluded through collateral estoppel when they "assume control over litigation in which they have a direct financial or proprietary interest." Montana v. United States, 440 U.S. 147, 154 (1979). This language replaces the traditional term "privy" because that term does not adequately define the possibilities that can arise to bind a party. See id. at 154 n.5.
10. See C. Wright, supra note 6, at 680; see also James & Hazzard, supra note 7, § 11.3, at 591. The Restatement (Second) of Judgments succinctly states that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) of Judgments § 19 (1982).
preclusion prohibits relitigation of the same or related cause of action and prevents a party from litigating any matter that could have been raised in the initial action. 11

A party may properly invoke claim preclusion in a subsequent action if the prior judgment was a final judgment based on the merits of the case and the initial rendering court had jurisdiction over the controversy. 12 The application of claim preclusion generally requires that the parties in the second suit be the same as the parties in the initial suit. 13 If no differences exist in the subsequent action which warrant relitigation of the claim, 14 a court may recognize the asserted claim preclusion and prevent relitigation, even though new legal theories are raised.

11. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); see also Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana, 440 U.S. at 153. The Restatement (Second) of Judgments has adopted this understanding of res judicata:

When a valid and final personal judgment is rendered in favor of the plaintiff: [(t)he plaintiff cannot thereafter maintain an action on the original claim or any part thereof . . . [and] [(i)n an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.]

RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982).

When the plaintiff obtains a valid and final judgment, his original claim merges into the judgment as the original claim is extinguished and the judgment is substituted in place of the rights under the claim. See id. § 18 comment a. The scope of the extinguishment has been stated to include: “all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” Id. § 24; see also C. WRIGHT, supra note 6, at 681.

12. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982); see also JAMES & HAZZARD, supra note 7, § 11.4, at 591-92. If, however, the judgment fails from want of proper jurisdiction or is a judgment based on procedure rather than on merits, the judgment may not be used as binding by a party in a subsequent action. See RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982) (valid and final personal judgment for defendant does not bar another action by plaintiff on same claim if action was dismissed for lack of jurisdiction, improper venue, non-joinder or misjoinder, action was dismissed without prejudice, statute or court rule prohibits bar, and basis of judgment was breached condition precedent to suit).

13. Extension of claim preclusion to nonparties is permitted; however, this is through issue preclusion rather than claim preclusion. See Montana, 440 U.S. at 154 (nonparties are precluded by issue preclusion when they assume control over actions in which they have direct financial or proprietary interest); see also 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.412, at 503 (2d ed. 1988) [hereinafter MOORE'S FEDERAL PRACTICE].

14. In Cromwell, the United States Supreme Court stated that various considerations, other than the actual merits, may allow a party to relitigate other claims arising out of the same transaction in a second action. 94 U.S. at 356. Such considerations are the smallness of the amount or value of property in the first controversy as compared with the second, difficulty in obtaining necessary evidence, expense of litigation, and the parties' own situation at the time. Id. However, these are simply factors that a court should consider rather than a list which automatically warrants relitigation if present. The Court stated that “[a] party acting upon considerations like these ought not to be precluded [from bringing a second action for a different claim].” Id.
which may change the outcome of the action.\textsuperscript{15}

There are three purposes behind barring a second claim which has
been validly decided in a prior suit. First, claim preclusion eliminates
the cost to the parties of multiple lawsuits based on the same claim.\textsuperscript{16}
Second, claim preclusion conserves judicial resources by allowing a
party only one opportunity to litigate a claim.\textsuperscript{17} Finally, claim preclu-
sion encourages reliance on judgments by preventing the opportunity
for a court in a subsequent action to render an inconsistent judgment on
the same claim.\textsuperscript{18}

Issue preclusion, or collateral estoppel, although generally under-
stood to have a uniform meaning, can be as complex as claim preclu-
sion. Generally, issue preclusion refers to the preclusive effect given to
an issue of ultimate fact, rather than an entire judgment.\textsuperscript{19} Issue preclu-
sion may be invoked either "defensively" or "offensively."\textsuperscript{20} Defensive
issue preclusion is raised by defendants to estop a plaintiff from reliti-
gating an issue unsuccessfully litigated by the plaintiff against the same
or a different party.\textsuperscript{21} Offensive issue preclusion is raised by a plaintiff
who seeks to estop a defendant from raising an issue the defendant had
unsuccessfully litigated against the same or different plaintiff in another
action.\textsuperscript{22}

II. CONFLICTING APPLICATION OF PRECLUSION RULES AS A RESULT OF
THE MUTUALITY REQUIREMENT

Mutuality requires that the parties in a second suit be the same as
the parties in the initial suit. The mutuality requirement of claim preclu-
sion is inherent in its definition of prohibiting the relitigation of all
claims that were or could have been raised between the actual parties.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} Restatement (Second) of Judgments § 25 (1982).
\item \textsuperscript{16} Allen v. McCurry, 449 U.S. 90, 95-96 (1980); see also Montana, 440 U.S.
at 155-54.
\item \textsuperscript{17} Montana, 440 U.S. at 153-54.
\item \textsuperscript{18} Id.
Court, however, stated that there may be a general exception to this rule for
"unmixed questions of law" which arise from "successive actions" involving un-
related subject matter. Id. at 171 (citing Montana, 440 U.S. at 162). The Court
further noted that this exception requires predetermination of whether an issue
of fact or an issue of law is to be relitigated. Id. Then, the court must conclude
whether that issue of law is so substantially unrelated to the prior case that the
relitigation is justified. Id.
\item \textsuperscript{20} United States v. Mendoza, 464 U.S. 154, 158-59 n.4 (1984) (common
law limited collateral estoppel to defensive use but Court has approved offensive
use by nonparties).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.; see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979)
(offensive issue preclusion estops relitigation of issues previously asserted by
defendant).
\item \textsuperscript{23} Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).
\end{itemize}
The mutuality requirement for the application of issue preclusion is not inherent in its definition but rather is a judicially imposed requirement. Although originally all jurisdictions required mutuality of parties, the recent trend has been to move away from the mutuality requirement in issue preclusion.

Those jurisdictions that continue to require mutuality of parties for issue preclusion do so for several reasons. A primary concern is the desire to avoid consequences which necessarily result from the relaxation or abandonment of the rule. Specifically, without mutuality, a defendant may be subject to a multiplicity of claims arising from an initial judgment. These potential, unforeseeable claims would force a defendant to evaluate a present case with an eye toward all potential future cases, including those against adversaries not known to the defendant at the time of the initial action. As a result, a defendant would be forced to attempt to resolve all issues in his favor, even those issues that have little relevance and are nonconsequential in the present case, in anticipation of an unfavorable ruling on a particular issue being used against him in a subsequent suit. This may result in unnecessary, costly and time consuming investigations into potential subsequent lawsuits and can complicate, lengthen and burden trials with the litigation of tangential issues. Further, this has the practical effect of prolonging litigation which offsets the conservation of judicial resources otherwise derived from the application of issue preclusion.

While a majority of courts retain mutuality to prevent unnecessary litigation, there are other reasons courts adhere to the mutuality requirement. For example, at least one court retains the mutuality requirement as a supplement to the state court rules of civil procedure. In Tenneco Chemical, Inc. v. Thompson, a Florida district court of appeals

---

24. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 320 (1971). In Blonder-Tongue, the Supreme Court abandoned the mutuality requirement after a thorough review of its supporting principles. Id. at 350.

25. Allen v. McCurry, 449 U.S. 90, 94 (1980). This application of the doctrine is known as mutual defensive or offensive issue preclusion. See JAMES & HAZZARD, supra note 7, § 11.24, at 631-37.


28. Id. at 197, 443 N.E.2d at 982.

29. Id.

30. Id., 443 N.E.2d at 983.

31. Id. at 198, 443 N.E.2d at 983.

32. Id., 443 N.E.2d at 983-84.


declined to abandon mutuality because the civil procedure rules limited
the joinder of additional defendants to those who may have contribution
rights. Consequently, a defendant might be held solely liable
although another party should share the blame. This potential injustice
caused the court to cling to mutuality to protect defendants from the
widespread use of judgments by potential plaintiffs in subsequent ac-
tions. Therefore, the court decided not to relax Florida's mutuality
requirement despite its belief that mutuality no longer served "the com-
monly accepted policies" supporting the doctrine of judicial finality.

Some courts attempt to moderate the harsh results produced by a
universal application of mutuality through the use of exceptions. First, courts generally do not require mutuality when some relationship
between the parties and the present action exists to form the basis of estoppel. Second, courts do not require mutuality where the nonparty
ostensibly had an interest in, or took control of, the first action. Where such interest or control is present, courts manipulate this privity
concept to circumvent the strict identity of the parties requirement. Finally, other jurisdictions permit parties to use issue preclusion defen-
sively without any mutuality, yet maintain the mutuality requirement for
its offensive use. The rationale for this exception is to prevent a plain-
tiff who had unsuccessfully litigated an issue in a prior suit from reliti-
gating the same issue "as long as the supply of unrelated defendants
holds out . . . ."

Jurisdictions which permit nonmutual defensive issue preclusion

35. Id. at 828. The court stated:
We also decline to abandon the doctrine [of mutuality]. While we may
doubt that mutuality serves commonly accepted policies undergirding
the doctrine of judicial finality and we are sorely tempted to grasp any
remedy which promises a consolidation and expedition of litigation, yet
we are persuaded that to abrogate the doctrine, in the absence of re-
formed procedure rules affecting joinder of parties, would lead to un-
just and unpredictable impositions of estoppel.

Id. (citation omitted).

36. Id.

37. Id.

38. See Note, Collateral Estoppel Without Mutuality: Accepting the Bernhard Doc-

39. Id. at 1436-37 & nn.90-98.

40. Id. at 1436-38 & nn.99-106.

41. Id. at 1436, 1438-39 & nn.107-112.

1979); Thomas M. McInnis & Assoc. v. Hall, 318 N.C. 421, 432-34, 349 S.E.2d
552, 558-60 (1986).

43. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402
U.S. 313, 329 (1970). The Court further stated that "[a]lthough neither judges,
the parties nor the adversary system performs perfectly in all cases, the require-
ment of determining whether the party against whom an estoppel is asserted had
a full and fair opportunity to litigate is a most significant safeguard." Id.
stress the need to protect parties from being subject to the relitigation of issues and the desire to promote judicial economy by preventing needless litigation. Therefore, a plaintiff has only one full and fair opportunity to litigate a claim. When a final judgment on the claim has been rendered, all attempts to relitigate the claim will be denied. By relaxing the mutuality requirement, issue preclusion may be applied to more cases, which has the practical effect of reducing congested dockets.

While a number of jurisdictions have modified their rules of mutuality to permit nonmutual defensive issue preclusion, still other courts have abandoned the mutuality requirement entirely. In these jurisdictions, the desire to minimize unnecessary litigation prevails over every other consideration except the requirement that a party be given a full and fair opportunity to litigate an issue. Furthermore, these jurisdictions conclude that a party's opportunity to litigate an issue fully and fairly has little to do with whether his adversary, who is asserting issue preclusion, was bound by the previous litigation. For this reason, many jurisdictions now recognize offensive as well as defensive nonmutual issue preclusion.

One of the earliest and most influential decisions to abandon the mutuality requirement was Bernhard v. Bank of America National Trust & Savings Association. In Bernhard, the California Supreme Court reasoned that the criteria applied to parties asserting issue preclusion are

45. Hall, 318 N.C. at 434, 349 S.E.2d at 560 (it is both elementary and fundamental that every person is entitled to his day in court to assert or defend his rights, but public policy demands that litigation end once that right is exercised).
49. Hanson, 294 Or. at 29, 653 P.2d at 968 (quoting Bahler v. Fletcher, 257 Or. 1, 6, 474 P.2d 329, 332 (1970)). An opportunity to litigate an issue fully and fairly is all that should be required. The person before whom this opportunity was exercised is not relevant to a determination of whether one had a full and fair chance to litigate.
51. 19 Cal. 2d 807, 122 P.2d 892 (1942). In Bernhard, heirs of the decedent brought an action against Bank of America alleging that the Bank owed the heirs a sum of money that had been transferred to the prior executor of the estate. Id. at 809-10, 122 P.2d at 893. The heirs claimed that the decedent never authorized the withdrawal of the funds. Id. at 810, 122 P.2d at 893. In a prior action against the former executor, a probate court had found that the transfer of those funds had been approved by the decedent. Id. at 809-10, 122 P.2d at 893.
distinct from the criteria used to determine against whom it can be asserted. The party against whom issue preclusion is asserted must have been a party or closely associated to a party in the prior, binding action. However, the court stated that no reason compels subjecting the asserting party to the same requirement. Consequently, the court held that a party not bound by a prior judgment may assert issue preclusion when satisfying three criteria: (1) the issue to be precluded is identical with the one decided in the previous action; (2) a final judgment on the merits has been entered in the prior action; and (3) the party against whom the judgment is asserted was a party or in privity with a party in the prior adjudication. Many of the jurisdictions that abandoned the mutuality requirement have adopted the Bernhard reasoning.

In Parklane Hosiery Co. v. Shore, the United States Supreme Court addressed the offensive use of issue preclusion. The Court considered the criticisms asserted against the use of nonmutual offensive issue preclusion. Although the Court previously adopted the Bernhard rationale abandoning the mutuality requirement in federal courts, it concluded that trial courts could apply offensive issue preclusion only when in their broad discretion they deemed it appropriate.

Following the lead of Parklane, the New York courts have liberally applied offensive nonmutual issue preclusion. In Koch v. Consolidated Edison Co., the plaintiffs sought to use a prior judgment to which they

Although not a party to the initial action, the bank asserted issue preclusion as a defense to the unauthorized withdrawal claim. Id. at 810, 122 P.2d at 893-94.

52. Id. at 811-12, 122 P.2d at 894.
53. Id. at 812, 122 P.2d at 894.
54. Id.
55. Id. at 813, 122 P.2d at 895.
58. Id. at 329-31 (offensive issue preclusion does not promote judicial economy, could result in potential unfairness, denies any additional procedural opportunities presently available yet unavailable in first action). For a general discussion of the criticisms of offensive nonmutual issue preclusion, see Flanagan, Offensive Collateral Estoppel: Inefficiency and Foolish Consistency, 1982 Ariz. St. L.J. 45.
60. Parklane, 439 U.S. at 331. The Court stated, however, that offensive preclusion should not be applied in cases where the plaintiff could have easily joined the earlier action, when it is unfair to the defendant as he did not have the same incentive to defend vigorously the earlier case, when the second action affords procedural opportunities unavailable in the first action which could readily cause a different result, and when inconsistent prior judgments exist. Id. at 329-31.
were not parties against the defendant power company. The prior judgment held the defendant grossly negligent in causing a twenty-five hour blackout in New York City. Consolidated Edison argued that mutuality should be required for the offensive assertion of issue preclusion because of the large number of potential claims to which it would be subject if the court allowed nonmutual issue preclusion. Although it acknowledged Consolidated Edison's concern, the court refused to require mutuality. The court stated that "no sufficient justification is advanced to turn the clock back with respect to so fundamental a legal development as the elimination of the requirement of mutuality."

III. Full Faith and Credit as Applied to Issue and Claim Preclusion

When a court renders a final judgment, the United States Constitution mandates that the judgment be treated as final in all other states. Specifically, article IV section 1 of the United States Constitution directs courts to give "full faith and credit" to the judicial proceed-

62. Id. at 554, 468 N.E.2d at 3, 479 N.Y.S.2d at 165.
63. Id. at 553, 468 N.E.2d at 3, 479 N.Y.S.2d at 165 (prior judgment entered in Food Pagent, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167, 429 N.E.2d 738, 445 N.Y.S.2d 60 (1984)).
64. Id. at 557, 468 N.E.2d at 5, 479 N.Y.S.2d at 167. Consolidated Edison made several arguments in opposition to issue preclusion, but the court found them insufficient to prevent its application. Id., 468 N.E.2d at 5-6, 479 N.Y.S.2d at 167-68 (defendant argued that there were inconsistent judgments, new evidence available could change outcome, jury made compromise, initial verdict was smaller than potential liability from multiplicity of claims so there was no incentive to litigate vigorously and issue preclusion deprives one of constitutional due process).
65. Id. at 557-58, 468 N.E.2d at 5, 479 N.Y.S.2d at 167-68.
66. Id.
67. Generally, a judgment is final when it is not "tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court" or simply that the judgment is a proper one for appellate review. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment b (1982). For a discussion of the finality of judgments, see JAMES & HAZARD, supra note 68, § 11.4, at 591-93. See also Fed. R. Civ. P. 54(b). The pertinent part of the rule as it affects finality is as follows:

When more than one claim for relief is presented in an action, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties. In the absence of such determination and direction, any order or other form of decision, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties [if the order or other form of decision can be revised at any time before entry of judgment adjudicating all the claims and rights and liabilities of all parties].

68. See Brilmayer, Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context, 70 IOWA L. REV. 95, 95 (1984).
ings of every other state. Moreover, this section provides Congress with the power to prescribe the specific effect to be given to sister state judgments. Accordingly, Congress enacted the Full Faith and Credit Statute which requires that "judicial proceedings 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 from which they are taken." 

The primary goal of full faith and credit is to unify the administration of justice throughout the nation. In addition, the full faith and credit doctrine requires a state to enforce the rights determined in sister state courts through an inexpensive and simplified method. This doctrine has the practical effect, once litigation has been reduced to a final judgment in one state court, of extinguishing the rights of the parties elsewhere. 

Both the full faith and credit clause and statute require every court to give a sister state judgment at least the claim preclusive effect that the judgment would have in the rendering state. Moreover, the principles supporting claim preclusion, namely finality, uniformity and simplicity, are similar to the policy considerations supporting the full faith and credit doctrine. Whether it is full faith and credit or claim preclusion which requires that a judgment be recognized by a sister state, this effect is necessary for a uniform federal system of government.

69. Article IV, section 1 states, "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.

70. Id.


72. 28 U.S.C. § 1738 (1966). The relevant portion of the statute provides that such Acts, 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.

73. See Sumner, The Full Faith and Credit Clause, 34 Or. L. Rev. 224, 241 (1955); see also Brilmayer, supra note 68, at 100 (refusal to recognize viability of preclusion poses threat to national unity).


75. See Sumner, supra note 73, at 244.

76. Durfee v. Duke, 375 U.S. 106, 109 (1963); see also C. Wright, supra note 6, at 690.

77. Sumner, supra note 73, at 249. For a discussion of the policy considerations that support full faith and credit, see supra notes 67-75 and accompanying text.

78. Magnolia, 320 U.S. at 439. These principles are addressed by the Supreme Court in the following excerpt:
The applicability of the full faith and credit doctrine to questions of issue preclusion presents different considerations. While full faith and credit applies to entire claims reduced to judgment, issue preclusion concerns only previously litigated issues. Thus, issue preclusion occupies a more ambiguous position with respect to full faith and credit.

As noted issue preclusion is a judicial doctrine aimed at the conservation of judicial and litigant resources, and the rules of issue preclusion, unlike those of claim preclusion, are vested in the discretion of the particular jurisdiction. Although many issue preclusive questions are controlled by the law of judgments in that no lesser effect may be given, questions concerning whether to give greater effect to a judgment are not so controlled.

A literal reading of the full faith and credit clause indicates that judgments are to receive exactly the same effect in a sister state that they would receive in the rendering state. This interpretation, however, has not been accepted by all courts and commentators. The history and policy behind the Full Faith and Credit Statute must be examined in order to determine whether the words “full faith and credit” are interchangeable with “exactly,” or whether a different reading is warranted.

The full faith and credit clause can be viewed historically as a response to the difficulty encountered in attempting to unify the thirteen colonies. Prior to the adoption of both the Constitution and the Articles of Confederation (Articles), a final judgment rendered in one colony was regarded by other colonies only as prima facie evidence of the facts decided in that initial case. This left a conclusive judgment rendered by

These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other.

Id.

79. For a discussion of the differences between issue and claim preclusion, see supra notes 6-22 and accompanying text.
82. See supra notes 24-26 and accompanying text.
83. See Federal Practice, supra note 80, § 4467, at 634.
85. Id.
86. For a discussion of the debate over the linguistic interpretation of the full faith and credit doctrine, see generally Lewis, Mutuality in Conflict—Flexibility And Full Faith and Credit, 23 Drake L. Rev. 364 (1974).
87. Costigan, The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of
a court in one colony entirely open to reexamination by a court of another.\textsuperscript{88} This result not only fostered feelings of resentment between colonies, but also created a lack of certainty concerning the effect of judgments obtained in the different colonies.\textsuperscript{89} The problems resulting from nonrecognition of the finality of sister colony judgments led the drafters of the Articles to include a full faith and credit clause.\textsuperscript{90} The text of this particular clause mandated that courts give full faith and credit to judgments of sister states.\textsuperscript{91} However, the Articles failed to define the meaning of "full faith and credit." Commentators have suggested that full faith and credit required a state court's judgment to be admitted in the other states' courts as conclusive proof of its contents; thus, it replaced the common practice of treating foreign judgments as only prima facie evidence.\textsuperscript{92} Further, commentators have suggested that "full faith and credit" under the Articles provided that although sister colony judgments were to be treated as conclusive proof of their contents, they were not treated as conclusive and binding judgments enforceable in any other court.\textsuperscript{93}

At the Constitutional Convention of 1789, the framers of the Constitution chose to adopt a full faith and credit clause that was similar to the one in the Articles.\textsuperscript{94} While the language of the texts are similar, the Constitution supplemented the language of the Articles with a stronger provision, granting Congress the power to prescribe the effect one state court judgment will have on another.\textsuperscript{95} Pursuant to its express power, Congress subsequently enacted the Full Faith and Credit Statute.\textsuperscript{96}

The Full Faith and Credit Statute, in its original form, required that a state judgment be accorded "such faith and credit" as it would have

\textit{Federal Legislation, 4 COLUM. L. REV. 470, 470 (1904); see also Sumner, supra note 73, at 226.}

\begin{itemize}
\item [88.] See Costigan, supra note 87, at 470.
\item [89.] Id. at 471.
\item [90.] Sumner, supra note 73, at 228-29. The particular clause reads as follows: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."
\item [91.] For the text of the clause, see supra note 90.
\item [93.] See Whitten, supra note 92, at 27.
\item [94.] See Costigan, supra note 87, at 471-72.
\item [95.] Id.; see also Whitten, supra note 92, at 31-32. Whereas the Articles required that full faith and credit be given to the records, acts and judicial proceedings of courts and magistrates of every other state, the Constitution includes "public acts" within its clause. \textit{Id.} at 31.
\end{itemize}
"by law or usage in courts of the state" in which it was rendered. 97 Today, the statute requires the same full faith and credit that it would be accorded in the jurisdiction from which it is taken. 98 One interpretation of the statute is that the judgment of a state court "cannot be given a less preclusive effect by [another court] than it would be given in the jurisdiction that rendered it." 99 Conversely, the statutory language suggests that a judgment may, but need not, be given more preclusive effect. 100

IV. APPLICATION OF FULL FAITH AND CREDIT

When a court presides over an action which involves a previously litigated issue, the court must decide the scope of the effect of that judgment and specifically to which parties the judgment applies. If the previous judgment was rendered in a jurisdiction which adheres to laws of issue preclusion different than those of the sitting forum, the effect given to the judgment will depend on whether the sitting court chooses its own rules of issue preclusion or those of the prior rendering forum. This decision turns on whether the court views the first forum’s preclusive laws as such a part of the decision that they merge into the judgment, or whether the local policy rules remain separate and distinct from the judgment. This decision affects the weight the sitting court must give to the first jurisdiction’s rules as to the parties to be bound by an adjudicated issue. 101

If the court views the issue preclusion laws as merging into the

97. See Federal Practice, supra note 80, § 4467, at 626-27.
98. See 28 U.S.C. § 1738 (1966). For the pertinent text of the statute, see supra note 72 and accompanying text. See also Federal Practice, supra note 80, § 4467, at 627; 1B Moore’s Federal Practice, supra note 13, ¶ 0.406[1], at 270.
99. 1B Moore’s Federal Practice, supra note 13, ¶ 0.406[1], at 270 (footnote omitted).
100. Id.
101. Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1188-89 (3d Cir. 1970). In Williams, the court was faced with the decision of whether to apply its rules of collateral estoppel or those of the rendering forum. The court reasoned as follows:
The choice between alternatives . . . is in a sense a choice between alternative bases of rationalization for the collateral estoppel rule. If the policy behind the collateral estoppel rule is the same as that of the full faith and credit clause and 28 U.S.C. § 1738 (1964), then perhaps the starting point should be the effect which should be given to the first . . . judgment as a judicial proceeding of a sister sovereign. Such a policy would suggest looking to the law applied in the first forum for the preclusionary effect of the first judgment. If the rule is based on a policy of preserving courts from the onerous burden of relitigating issues fully and fairly disposed of once, the second alternative should apply. Id. (footnotes and citations omitted). The court in Williams decided that where a substantial interest exists in applying the second forum’s preclusionary rules, a court should be able to do so. Id. at 1189-90. For a further discussion of Williams, see infra notes 162-68 and accompanying text.
judgment itself, then the analysis used by the court will be controlled by full faith and credit.\textsuperscript{102} Courts which merge the preclusion rules with the judgment are required to look to the preclusion rules of the prior rendering forum because the rules have become part of the judgment.\textsuperscript{103} However, some courts view issue preclusion as a collection of local rules developed solely for the purpose of relieving courts in a jurisdiction from the burden of relitigating issues which have been fully and fairly decided, and thus, choose their own rules of preclusion.\textsuperscript{104}

Courts faced with this issue have asserted one of three views. First, the majority of jurisdictions have held that the full faith and credit doctrine governs this dilemma.\textsuperscript{105} Second, a minority of courts have decided that the doctrine does not apply to this question.\textsuperscript{106} Finally, several courts have simply applied their own preclusive laws without any discussion or analysis of full faith and credit.\textsuperscript{107}

\textbf{A. Issue Preclusion Directed by Full Faith and Credit}

In \textit{Marrese v. American Academy of Orthopaedic Surgeons}\textsuperscript{108} the United States Supreme Court concluded that when a federal court hearing a diversity action is faced with a prior federal or state court judgment, it must choose the claim preclusion rules of the prior rendering federal or state court.\textsuperscript{109} In an earlier decision, the Court had held that the full faith and credit clause of the Constitution required that credit be given in each state to the judicial proceedings of every other state if the first forum had proper jurisdiction and the judgment was final.\textsuperscript{110}

\textsuperscript{102} Note, \textit{Mutuality of Collateral Estoppel in Multistate Litigation: An Evaluation of the Restatement (Second) of Conflict of Laws}, 35 \textit{WASH. & LEE L. REV.} 993, 1000 (1978) (full faith and credit clause is precise in its demand that state court determination of issue be given same effect in courts of another state). For a discussion of the full faith and credit clause, see \textsuperscript{supra} note 69 and accompanying text.

\textsuperscript{103} For a discussion of the full faith and credit doctrine, see \textsuperscript{supra} notes 67-78 and accompanying text.

\textsuperscript{104} Note, \textit{Collateral Estoppel in Multistate Litigation}, 68 \textit{COLUM. L. REV.} 1590, 1594 (1968) (if forum rules of collateral estoppel serve legitimate state interest, full faith and credit clause should not prevent their application). For a discussion of the rationale supporting issue preclusion, see \textsuperscript{infra} notes 108-22 and accompanying text.

\textsuperscript{105} For a discussion of these cases, see \textsuperscript{infra} notes 123-43 and accompanying text.

\textsuperscript{106} For a discussion of these cases, see \textsuperscript{infra} notes 144-56 and accompanying text.

\textsuperscript{107} For a discussion of these cases, see \textsuperscript{infra} notes 159-61 and accompanying text.

\textsuperscript{108} 470 U.S. 373 (1985).

\textsuperscript{109} Id. at 375.

\textsuperscript{110} Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 529 (1873). The court held that when a judgment was interlocutory in nature and not final, it will not be entitled to any credit by a subsequent forum. \textit{Id.} For this reason, the Court stated, "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 ren-
Court further held that judgments are not final in this respect with regard to interlocutory decisions,111 in suits where the prior rendering court had no personal or subject matter jurisdiction over one of the litigants,112 or where the prior judgment was modifiable by the rendering court rather than final.118

In a recent series of cases, the Supreme Court decided that a federal court sitting in a diversity action must look to prior judgment-rendering state court rules to determine the law governing issue preclusion as well as claim preclusion.114 With respect to claim preclusion, the Supreme Court held in Migra v. Warren City School District Board of Education115 that a state court judgment has the same claim preclusive effect in the federal court as it would have in the rendering state court.116 In support of its

111. See Board of Pub. Works, 84 U.S. (17 Wall.) at 529-30.
112. See Riley v. New York Trust Co., 315 U.S. 343, 349 (1942) (citing Roche v. McDonald, 275 U.S. 449, 451 (1928)). Additionally, the Court held that a specific finding that jurisdiction over a party existed is not a finding to which full faith and credit must be given. Id. at 349-50.
113. Ford v. Ford, 371 U.S. 187, 190-91 (1962). In Ford, the Supreme Court held that another court must give full faith and credit to a decision if the rendering court is bound by it. Id. When the rendering court is not bound because it may modify the judgment, the other jurisdiction need not give full faith and credit to such judgments. Id.; see also Kovacs v. Brewer, 356 U.S. 604, 607 (1958). In Kovacs, Justice Frankfurter stated in his dissent that "the purpose of the Full Faith and Credit Clause was to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in another." Id. at 611 (Frankfurter, J., dissenting). Moreover, he stated that the purpose of the clause was "to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation." Id. (Frankfurter, J., dissenting).
Claims precluded in federal court as a result of a state judgment have been of various types. See, e.g., Marrese, 470 U.S. at 384 (antitrust claim, although having exclusive federal jurisdiction, may be precluded by state judgment); Migra, 465 U.S. at 85 (civil rights action under 42 U.S.C. § 1983 may be precluded by state judgment); Kremer, 456 U.S. at 485 (employment discrimination action under 42 U.S.C. § 2000e may be barred by state judgment).
116. Id. at 85. In Migra, petitioner had a teaching contract with the school district which the board of education breached. Id. at 77-78. A state court ordered the Board to reinstate the petitioner. Id. at 78-79. Subsequently, petitioner brought a federal civil rights action against the Board. Id. at 79-80. Justice Blackmun, writing for the majority, stated, "[P]etitioner's state-court
conclusion, the Supreme Court held that notions of comity and full faith and credit outweigh other considerations, and these policies are furthered by applying the state's preclusive law.\footnote{117}

The Supreme Court has held that issues may be precluded in a subsequent federal action by a final judgment within a state court.\footnote{118} As with claim preclusion, the federal courts are directed to first consider the preclusive effect given a judgment in a rendering state when it evaluates a judgment for its issue preclusive effect in federal court.\footnote{119} By requiring federal courts to apply state preclusion laws when determining the extent of a judgment's full faith and credit, several benefits are achieved. The Supreme Court has stated that this policy "not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] comity between state and federal courts [which is the] bulwark of the federal system."\footnote{120} In addition, the Court stated that by requiring federal courts to apply state preclusion laws, a state is able to determine the full faith and credit effect of a judgment entered in its jurisdiction for nearly all subsequent litigation both in and out of state.\footnote{121}

Prior to the Supreme Court's declaration that a federal court must apply the preclusivity rules of the prior rendering state,\footnote{122} a number of federal and state courts arrived at this conclusion based on different reasoning. This reasoning continues to be relevant for those state courts not bound by the Supreme Court decisions. Therefore, the analysis of the federal and state court decisions holding that a judgment may be given a "greater effect" than given by the rendering jurisdiction are supportive of a state court's decision to do so. In addition, the analysis used in those decisions holding that the judgment should be given the "same effect" as would be given in the rendering jurisdiction would give is instructive.

\footnote{117. Id., at 84. The Court further held that its decision reflected a variety of concerns including the need to prevent vexatious litigation and a desire to conserve judicial resources. \textit{Id.}}

\footnote{118. See \textit{Montana v. United States}, 440 U.S. 147 (1979).}


\footnote{120. See \textit{Allen v. McCurry}}, 449 U.S. 90, 95-96 (1980).

\footnote{121. See \textit{Marrese v. American Academy of Orthopaedic Surgeons}}, 470 U.S. 373, 381-82 (1984). Commentators have suggested that fairness demands that a party contemplating litigation be able to foresee the consequences of the judgment, and this can only be done if the party realizes the extent of the applicable mutuality requirement before trial. \textit{See Note, supra} note 102, at 1003-04.

In *Clyde v. Hodge*, the United States Court of Appeals for the Third Circuit held that the mandate of both the United States Constitution and the Full Faith and Credit Statute created an "unquestionable" duty for federal courts to give full faith and credit to the final judgment of a state court. However, the court provided only a cursory discussion of why the Constitution and the statute required such a result. The court examined the case law of the state in which the first judgment was rendered to determine the judgment's preclusive effect. The court held that Ohio's strict adherence to the mutuality requirement would prevent that state from giving any preclusive effect to the present action had that action been brought in the Ohio courts. Consequently, the court did not give the judgment any preclusive effect.

In *Lober v. Moore*, the United States Court of Appeals for the District of Columbia Circuit affirmed a lower court decision which gave a prior judgment the preclusive effect it would have had in the rendering forum state. In *Lober*, the plaintiff had previously and unsuccessfully sued a cab company for injuries he had sustained as a passenger, and subsequently filed another suit in federal court against the driver of the cab. The defendant cab driver responded by claiming that the issue of liability had been decided in the previous action, and the plaintiff should be estopped from attempting to relitigate the issue. The court chose to look to Virginia's preclusive law as the controlling law which precluded the second suit.

123. 413 F.2d 48 (3d Cir. 1969).
124. *Id.* at 50. The court held that a district court was compelled to give the state court judgment the same force it would have had in the rendering state. *Id.* Therefore, according to the court, "Ohio law controls the effect to be given the Ohio judgment notwithstanding the fact that the district court was sitting in diversity in Pennsylvania." *Id.* at 50 n.2.
125. *Id.* at 50.
126. *Id.* at 50-51.
127. *Id.* at 51.
128. *Id.*
129. 417 F.2d 714 (D.C. Cir. 1969).
130. *Id.* at 720-21.
131. *Id.* at 715. The defendant cab driver was never served with process in the first action, although he was a named defendant in the original suit. *Id.*
132. *Id.* The only essential differences in the actions, according to the court, arose from the exigencies of respondeat superior. *Id.* However, the court stated that the issues of controlling significance in both cases, that of negligence and its causal relationship to appellant's injury, had been validly resolved in the prior suit. *Id.*
133. *Id.* at 716-18. In its discussion of the benefits of rejecting the mutuality requirement for collateral estoppel, the court stated:

"Especially in these times when all courts, including our own, are struggling with crowded and growing dockets, we are sensitive to the persuasive force of these precedents [abandoning mutuality] and the cogent reasons underlying them. And our own jurisprudence leaves us free to pursue a similar course, for the rule of mutuality, which fre-
In *Braselton v. Clearfield State Bank*, the United States Court of Appeals for the Tenth Circuit stated that to measure the preclusive effect of a judgment, the best rule utilizes issue and claim preclusion laws of the rendering state forum. In support of its decision, the court stated that the concept of res judicata is one of constitutional significance. Consequently, the court decided that courts are required "to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." A majority of states require that courts give the same effect to a sister state judgment as would be accorded in the rendering jurisdiction. New York is a proponent of the majority rule. In *Farmland Dairies v. Barber*, the Court of Appeals of New York held that "the judgment can be given no less force or effect than it had in the state rendering it." In *Barber*, the petitioner was denied a license to sell milk in New York because of a prior price-fixing conviction in New Jersey. However, the New Jersey judgment contained a provision that made that judgment inapplicable for evidentiary purposes in any other proceeding. The question for the court was whether the agreement was such a part of the judgment as to warrant a preclusive effect. The court concluded that the full faith and credit clause required the courts of New York to recognize the extraneous provision.

*United Air Lines* frequently has appeared as something of an obstacle elsewhere, is not embedded in the decision of this court. *Id.* at 717; see also United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962). In *United Air Lines*, several of the heirs of 42 deceased passengers brought an action against the airline in the federal district courts of Washington and Nevada arising out of a mid-air collision. *Id.* at 712. There were several other actions filed in many federal district court jurisdictions across the United States. *Id.* On a motion for summary judgment, the court held that the airline was collaterally estopped to deny liability to the heirs who brought suit in Washington and Nevada because a federal district court in southern California had previously determined the issue. *Id.* at 729. The court applied California's laws of collateral estoppel and held that mutuality was not necessary for the application of issue preclusion. *Id.* at 727.

134. 606 F.2d 285 (10th Cir. 1979).
135. *Id.* at 287.
136. *Id.* The court stated that the collateral estoppel aspect of res judicata is within the scope of the full faith and credit clause of the United States Constitution. *Id.*
137. *Id.* (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)).
139. *Id.* at 56-57, 478 N.E.2d at 1317, 489 N.Y.S.2d at 716.
140. *Id.* at 54, 478 N.E.2d at 1315, 489 N.Y.S.2d at 714. The New York licensing board could validly deny an application where a license applicant was found unqualified based on character, or where the issuance of such license was not in the public interest. *Id.* at 53-54, 478 N.E.2d at 1315, 489 N.Y.S.2d at 714.
141. *Id.* at 55, 478 N.E.2d at 1316, 489 N.Y.S.2d at 715.
142. *Id.* at 56-57, 478 N.E.2d at 1316-17, 489 N.Y.S.2d at 715-16.
143. *Id.* at 57, 478 N.E.2d at 1317, 489 N.Y.S.2d at 716. The court further noted that states enjoy no flexibility in deciding whether they will not recognize
As gleaned from the rationales of the courts that have determined that full faith and credit applies to the choice of preclusion rules, the basic premise upon which these courts rely is that the forum rules of preclusion merge with the judgment mandating their application in a subsequent action. This basic premise, however, is not followed by all courts.

B. Issue Preclusion Independent of Full Faith and Credit

While most courts interpret the Full Faith and Credit Statute and clause as mandating that preclusive laws merge with a prior judgment, resulting in the application of the rules of the prior rendering state, a minority of jurisdictions choose to apply their own rules of issue preclusion. The explanation most often presented by courts to support this minority position is that full faith and credit applies only to entire judgments. Thus, the full faith and credit clause effectively precludes the relitigation of claims, but it does not apply piecemeal to issue preclusion, which is governed instead by individual forum rules. While this minority of courts holds that the law of the rendering state must be applied when faced with claim preclusion, they feel free to apply their own rules to issue preclusion. Other courts following the minority approach apply their own rules of issue preclusion without any discussion of the effect of full faith and credit.

The apparent difference between those courts which merge preclusive rules with the judgment and those which do not is that the minority courts use different analyses to govern issue preclusion problems and claim preclusion problems. All courts give a judgment the same preclusive effect as the prior state for purposes of claim preclusion as required by full faith and credit. However, a divergence of opinion exists for purposes of issue preclusion, with some courts giving the prior adjudicated issues a greater preclusive effect than would have been given in the prior forum by binding more than the initial parties to the

---


145. The language of both the full faith and credit clause and corresponding statute has been interpreted to provide "a prior judgment" with the same effect it would have in the rendering state. See Durfee v. Duke, 375 U.S. 106, 109 (1963). For the text of the clause, see supra note 69; for the text of the relevant portion of the statute, see supra note 72.

146. See Finley, 105 Ill. App. 3d at 7, 433 N.E.2d at 1117 (constitution limits effect of prior state's judgment to parity, but it does not prevent states from providing greater effect to issues of that claim).


148. See, e.g., Ditta v. City of Clinton, 391 So. 2d 627, 629 (Miss. 1980).

This situation arises when the forum of the first judgment requires mutuality for the application of issue preclusion and the second forum does not. The first forum's rules are far more restrictive as to who may use the judgment than are the second forum's rules. The second forum, by applying its rules, is giving the judgment a greater preclusive effect than it would have had in the first forum. The most persuasive reason offered to support this position is that the initial forum's issue preclusion rules serve no legitimate interest by being applied in another state.  

Clark v. Clark\(^1\) is paradigmatic of those courts holding that full faith and credit applies only to the claim preclusive effect of a judgment. In Clark, the defendant asserted issue preclusion as an affirmative defense to the relitigation in Nevada of a domestic relation issue previously decided by a Florida court.\(^2\) The court acknowledged that a final judgment or decree of a sister state acquires constitutional stature pursuant to the full faith and credit clause.\(^3\) The court held that full faith and credit was limited to claim preclusion and should not be extended to control issue preclusion.\(^4\) The court found that the plaintiff's claim was not precluded and that the Florida judgment would have no issue

---

\(^1\) Finley, 105 Ill. App. 3d at 7, 433 N.E.2d at 1117; see also Williams v. Ocean Transp. Lines, 425 F.2d 1183, 1189 (3d Cir. 1970).

\(^2\) Hart v. American Airlines, Inc., 61 Misc. 2d 41, 43-44, 304 N.Y.S.2d 810, 813 (Sup. Ct. 1969) (courts are to protect citizens of their state from unfair and anachronistic treatment; such would result if another state's issue preclusion rules were applied when no legitimate interest supports it).

\(^3\) 80 Nev. 52, 389 P.2d 69 (1964).

\(^4\) Id. at 54-55, 389 P.2d at 70. In the Florida state action, a wife brought an action against her husband for separation and spousal support alleging extreme cruelty. Id. at 54, 389 P.2d at 70. The Florida court entered a default judgment in her favor. Id. Subsequently, the husband moved to Nevada and commenced a divorce proceeding, charging his wife with extreme cruelty. Id. at 55, 389 P.2d at 70. The wife, in her answer and in a motion for summary judgment, stated that the full faith and credit clause of the United States Constitution compelled Nevada to recognize the Florida judgment as conclusive as to all issues that were or could have been decided in that case. Id. The Nevada Supreme Court reversed the trial court's entry of summary judgment on behalf of the wife. Id. at 59, 389 P.2d at 73.

\(^5\) Id. at 57, 389 P.2d at 71.

\(^6\) The court further concluded that the constitutional requirement was fully met when it recognized the Florida judgment as it stood. Id. Moreover, in deciding the preclusive effect to be accorded to the final judgment of the Florida court, the Nevada court stated:

[W]e are not to be governed by the Florida law of res judicata or estoppel, or by the effect of those doctrines upon the husband's ability to procure a divorce in that state, had he litigated his case there. It seems to us that we are at liberty to follow Nevada law as to the scope of the doctrine of res judicata and estoppel, particularly in cases dealing with status where important state interests and public policies are involved. Id. at 71-72 (footnote omitted).
preclusive effect upon that action. 156

_Ditta v. City of Clinton_ 157 is representative of those jurisdictions which omit any discussion of full faith and credit when deciding the effect to be given to a prior sister state judgment. In _Ditta_, the Supreme Court of Mississippi evaluated a prior Louisiana judgment on a particular issue using its own issue preclusion rules without a full faith and credit analysis. 158 The court formulated the issue as whether the previous judgment entitled the defendant to assert issue preclusion although it was not a party in the prior case. 159 The court held that its mutuality rule prevented the defendant from asserting issue preclusion. 160 The court reached this conclusion without a discussion of full faith and credit. The court implicitly held that its rules of issue preclusion prevail over those of the prior rendering forum. 161

_Williams v. Ocean Transport Lines, Inc._ 162 and _Finley v. Kesling_ 163 are decisions which held that full faith and credit governs issue preclusion, but only as a minimum requirement. In _Williams_ and _Finley_, the courts held that under full faith and credit it is permissible to give issues decided by a prior court a greater preclusive effect than they would have received in their rendering states. 164

In _Williams_, a Pennsylvania federal district court applied its own rules of issue preclusion to a New Jersey judgment. 165 Pennsylvania had abandoned the mutuality requirement for the operation of issue preclusion and would apply the judgment to parties other than those involved in the initial action. 166 New Jersey retained this requirement. Consequently, the application of Pennsylvania's law provided a greater preclu-

---

156. _Id._ at 58, 389 P.2d at 72.
157. 391 So. 2d 627 (Miss. 1980).
158. _Id._ at 628-29.
159. _Id._ at 628. The Louisiana judgment exonerated a contractor relating to the construction of a retaining wall. _Id._
160. _Id._ at 628-29. The court held that the defendant could not assert issue preclusion in the Mississippi action because he was not a party to the prior action. _Id._ at 629. The court arrived at this conclusion after it analyzed its issue preclusion laws, not those of Louisiana. _Id._
161. _Id._
162. 425 F.2d 1183 (3d Cir. 1970).
164. Finley, 105 Ill. App. 3d at 7, 433 N.E.2d at 1117; _Williams_, 425 F.2d at 1189.
165. _Williams_, 425 F.2d at 1187-89. In this case, the plaintiff, a longshoreman, filed different suits against a shipping company and the Port Commission based on injuries he sustained while employed by the shipping company. _Id._ at 1185. These suits were brought in both New Jersey and Pennsylvania district courts. _Id._ Third party complaints and joinder motions which were filed resulted in the plaintiff suing the insurance carrier of the Port Commission in both actions. _Id._ The New Jersey court was the first to render its decision. _Id._
166. _Id._ at 1187.
The district court weighed the policies supporting both alternatives before applying its own rules and stated that the Full Faith and Credit Statute does not prohibit a court from affording the first judgment a greater preclusive effect than would be afforded by the laws of the first forum state.168

Similarly, in Finley, an Illinois appellate court held that it may apply its own rules, which did not require mutuality.169 The first forum continued to require mutuality and, thus, the judgment was given a greater preclusive effect than it would have received in the first forum.170 In support of its conclusion, the court reasoned that the full faith and credit clause does not compel courts of one state to subordinate local policies to the policies and laws of another state.171 Moreover, the court stated that while the Constitution does not require a court to give a judgment a greater effect in a second action than it had in the first, a second court may choose to give the judgment such effect.172 Consequently, the court, in effect, held that once the minimum requirement of the full faith and credit clause was satisfied, a court could apply its own rules of issue preclusion.173

Apart from the notion that full faith and credit is a minimum requirement, at least one court has chosen an analysis which treats forum interests as paramount when deciding which set of preclusion rules to apply. In Hart v. American Airlines, Inc.,174 the court chose to apply its

167. Id. at 1188 (choice of law would not be significant but for prior rendering court’s adherence to mutuality).
168. Id. at 1189. The court further held that when a court has a substantial interest, like the multiplicity of actions arising from a single event, it should be able to decide for itself whether greater preclusionary effect may be given to a prior judgment. Id. at 1189-90.
169. Finley, 105 Ill. App. 3d at 10, 433 N.E.2d at 1119.
170. Id. at 6-7, 433 N.E.2d at 1116-17. The plaintiff had previously been a party to an Indiana divorce action, a state requiring mutuality. Id. at 2, 433 N.E.2d at 1114. In the prior action, the plaintiff testified as to the ownership of stock certificates, and it was decided that the ownership of certain stock certificates would be divided among his wife, children and himself. Id. In the subsequent action in Illinois, a state which had abandoned the mutuality requirement, plaintiff attempted to claim ownership of his children’s stock. Id. Moreover, plaintiff stated that because the children were strangers to the initial action, full faith and credit required the application of Indiana’s mutuality rule, thereby preventing the children from asserting the property right as found in the prior action. Id. at 5-6, 443 N.E.2d at 1116. Thus, the plaintiff could relitigate the issue. Id.
171. Id. at 7, 443 N.E.2d at 1117.
172. Id. The court also concluded that the applicability of preclusive law is always subject to the public policy of the forum state. Id. at 8, 443 N.E.2d at 1118.
173. Id. at 7, 443 N.E.2d at 1117. The court applied its rules rather than those of Indiana and gave the Indiana judgment a greater effect than would have been given in Indiana. Id. at 10, 443 N.E.2d at 1119.
rules of preclusion to a prior judgment based on its superior interest in
the action. Hart arose from a mid-air plane collision which caused
the deaths of most of the passengers of the two planes. Subse-
sequently, a number of actions were filed against American Airlines, with
an action in Texas as the first to reach judgment. Texas state courts
required mutuality for the application of collateral estoppel.

Soon after the Texas court judgment, a plaintiff in a New York ac-
tion filed for summary judgment claiming that the New York court
should give full faith and credit to the Texas judgment which found
American Airlines liable for the crash. New York had abandoned the
mutuality requirement prior to this action, and under New York law the
plaintiff could offensively use the Texas court judgment to prevent
American Airlines from relitigating the issue of its liability. American
Airlines agreed that the court was bound by the full faith and credit doc-
trine, but argued that the New York court was also bound to apply the
preclusive rules of Texas, which required mutuality, in evaluating the
effect to be given to the prior judgment. The New York court re-
jected the defendant’s argument and granted summary judgment for the
plaintiff.

Supporting its decision, the court stated that because the plaintiff
and his decedent were New York domiciliaries, New York’s interest in
the case was superior to that of Texas. Moreover, the court held that
this case involved a clear policy determination of the courts of New
York, and that it would enforce this policy decision. Therefore, the
court held that the Texas preclusive rules were inapplicable in the
case.

---

175. Id. at 44, 304 N.Y.S.2d at 813.
176. Id. at 41, 304 N.Y.S.2d at 811. The airplane crashed en route to Ken-
tucky from New York, and 58 of its 62 passengers died in the crash. Id.
177. Id. at 41-42, 304 N.Y.S.2d at 811.
178. Id. at 43-44, 304 N.Y.S.2d at 813.
179. Id. at 42, 304 N.Y.S.2d at 812.
180. Id. at 43, 304 N.Y.S.2d at 812-13.
181. Id.
182. Id. at 46, 304 N.Y.S.2d at 815.
183. Id. at 44, 304 N.Y.S.2d at 813. The court further stated that this was
not a situation where a judgment of a Texas court was sought to be enforced,
and therefore reliance on the full faith and credit doctrine was misplaced. Id.
184. Id. at 44, 304 N.Y.S.2d at 813-14. The policy involved in this case was
that “[o]ne who has had his day in court should not be permitted to litigate the
question anew.” Id. (quoting B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 144, 225
N.E.2d 195, 197, 278 N.Y.S.2d 596, 599 (1967)). The court also stated that New
York’s policy of refusing to tolerate the possibility of inconsistent judgments was
a deciding issue in this case. Id. at 44, 304 N.Y.S.2d at 814.
185. Id. at 44, 304 N.Y.S.2d at 813. The court stated, “The state of Texas
has no legitimate interest in imposing its rules of collateral estoppel upon these
New York residents and a holding that permits such result would indeed consti-
tute . . . ‘anachronistic treatment.’” Id.; Hinchey v. Sellers, 7 N.Y.2d 287, 294,

Published by Villanova University Charles Widger School of Law Digital Repository, 1990
The majority approach to the choice of preclusive rules is to interpret full faith and credit as mandating that preclusive laws merge with a prior judgment and to mechanically apply the preclusive rules of the rendering jurisdiction. The minority approach is subjective and weighs the interests of both forums, while meeting the minimum full faith and credit requirement of giving at least the same effect to a prior judgment.

V. Full Faith and Credit—Its Applicability to Issue Preclusion and "Greater Effect"

When a state court is faced with the question of which parties are bound by a prior state court judgment, it is not necessary to follow a strict majority or minority analysis. It is suggested that the court should take an approach which considers a number of factors, including both forum interests and full faith and credit. While such an approach lacks the certainty of a rigid rule which always applies one forum's law, it does provide predictability in most cases and flexibility where the subsequent forum has an overriding interest in the litigation or litigants.

**STEP 1:** Determine the issue preclusion laws of both the sitting forum (F-2) and those of the prior rendering state (F-1).

**STEP 2:** When a conflict exists between the rules of F-1 and F-2: (a) where F-1 requires mutuality and F-2 allows for non-mutual issue preclusion, determine whether F-2 has a legitimate interest in the litigation or the litigants, and, if it does, apply F-2 rules; (b) where F-1 allows for non-mutual issue preclusion and F-2 requires mutuality, apply F-1 rules to fulfill the minimum requirement of full faith and credit.

Application of these steps necessarily leads to a greater preclusive effect being given to the prior judgment when an important interest is involved, but allows the application of the first forum's laws of preclusivity where such an interest does not exist. In cases where the second forum's preclusive rules would bind more parties to the adjudicated issue than the initial forum, mutuality requirements should be disregarded whenever the second forum has an interest in applying its issue preclusion laws.

Important state interests that would entitle a forum to apply its own preclusive laws rather than those of the prior rendering state would include: (1) an interest in the parties to the dispute; (2) an interest in the subject matter of the litigation; and (3) a strong local policy in favor of using issue preclusion to enhance judicial economy and unburden congested dockets. Binding a greater number of parties to a prior judgment is justified as the full faith and credit doctrine mandates that a sister state accord at least as much preclusive effect to a prior judgment as the

rendering state. Moreover, in cases where the preclusive laws of the second forum would apply the adjudicated issue to fewer parties than the initial forum, the minimum full faith and credit should be applied.

Further, this extension neither offends nor contradicts the policies supporting full faith and credit. The policy of uniformity, which is the heart of full faith and credit, is not abrogated by providing a greater effect to issue preclusion, whether asserted offensively or defensively, because, at a minimum, the rendering jurisdiction's judgment will be given the same effect. Nor does extending the scope of issue preclusion to bind a greater number of parties to a judgment threaten the integrity of the rendering state's procedural law. No purpose or policy has been articulated which arguably should prevent one court from extending a greater effect to the judgment than the rendering court as long as the party to be bound had a full and fair opportunity to litigate the claim in the prior action.\footnote{186} The extension of issue preclusion's effect beyond a rendering court's scope will not subvert the integrity of the prior judgment which is final and recorded, endanger the finality of the prior court's determination, nor inhibit the policy of national uniformity. Moreover, sufficient flexibility exists under the full faith and credit doctrine to extend a prior judgment greater preclusive effect because the doctrine requires only a minimum effect be given.\footnote{187}

Conversely, a second forum's decision to bind less parties than those bound to the original action both subverts the integrity of the final judgment and fails to recognize the judgment as a whole. In such an instance, a reviewing forum should look to the preclusivity rules of the first forum to give the judgment its full and intended effect.

A. Flexibility of the Full Faith and Credit Clause and Statute to Interstate Laws of Issue Preclusion

Generally, the purpose of both the full faith and credit clause and statute is to ensure that the judgment of one state be accorded equal dignity in all other courts, thereby preserving the integrity of that judgment.\footnote{188} This recognition by sister states promotes the finality of judgments throughout the nation and preserves judicially established rights and obligations.\footnote{189} These policies involve those principles of claim pre-
clusion necessary for the operation of a federal system.\textsuperscript{190} The Full Faith and Credit Statute applies only when needed to protect these concerns.

Issue preclusion, however, is a judicially created doctrine aimed at the conservation of the resources of courts and litigants and is vested within the discretion of each particular jurisdiction.\textsuperscript{191} State supreme courts are free to choose between a variety of rules\textsuperscript{192} based on the local policies of their jurisdiction.\textsuperscript{193} Consequently, these jurisdictional rules of issue preclusion consider the forum state policy rather than considerations of state sovereignty or dignity of foreign judgments.\textsuperscript{194}

A principal consideration in determining whether offensive issue preclusion rules will be broad (non-mutual) or narrow (mutual) is the jurisdictional attitude concerning the relitigation of issues.\textsuperscript{195} A court may choose to abandon the mutuality requirement for the application of offensive issue preclusion to alleviate the burden on its court docket.\textsuperscript{196} Accordingly, if a state court had to apply the preclusive law of a jurisdiction adhering to the mutuality requirement, it would burden its courts with an issue previously decided by another court.\textsuperscript{197} In essence, the forum of the first court would be imposing its policy regarding relitigation upon a court which has decided to construe issue preclusion more broadly. Because the second forum is the one which will have to relitigate the issue, it should use its local rules reflecting its policies on litigation rather than those of another jurisdiction. Therefore, the full faith and credit clause and statute should not be construed to bar the state's freedom of choice on the issue by forcing it to apply the preclusive law.

cessitates at a minimum the importation and utilization of the [first forum's] law of res judicata insofar as it is needed to protect that concern.” \textit{Id.} (footnote omitted). Another commentator has stated, “Finality, repose and reliance are often centered on a colloquial sense of the ‘rights’ established by a judgment that can be expressed only through a binding determination of issues that cannot be reexamined merely because a new claim or cause of action can be identified.” \textit{Federal Practice}, \textit{supra} note 80, \textsection 4467, at 632-33.

\textsuperscript{190} For a discussion of the policies supporting claim preclusion, see \textit{supra} notes 16-18 and accompanying text.

\textsuperscript{191} For a discussion of the policies supporting issue preclusion, see \textit{supra} notes 23-46 and accompanying text.

\textsuperscript{192} A court may choose mutuality as a requirement for issue preclusion, or it may reject mutuality providing a further choice of permitting both defensive and offensive issue preclusion, or limiting its use to defensive settings only.

\textsuperscript{193} For a discussion of the state court local policies, see \textit{supra} notes 33-56 and accompanying text.

\textsuperscript{194} For a discussion of the dignity to be accorded to foreign judgments under the full faith and credit doctrine, see \textit{supra} notes 84-100 and accompanying text.

\textsuperscript{195} For a discussion of the mutuality requirement, see \textit{supra} notes 23-66 and accompanying text.

\textsuperscript{196} \textit{See Note}, \textit{supra} note 104, at 1601.

\textsuperscript{197} \textit{Id.} at 1600.
of another jurisdiction.\textsuperscript{198}

Full faith and credit can be limited to apply to only those rules of preclusion that ensure effective stability and enforcement of interstate judgments.\textsuperscript{199} Because jurisdictional preclusion laws arguably are not attributes of the judgment at all, but are simply matters of local procedural law, other courts should be free to reject those issue preclusion rules of the first forum in the same way that they may choose domestic over foreign law outside the realm of judgments.\textsuperscript{200} Therefore, a forum state should be able to widen the effect given to a judgment to an extent that is greater than it would be in the rendering state because the local rules of preclusion prevail over those of a sister state.\textsuperscript{201} The full faith and credit doctrine, in effect, becomes a constitutional minimum below which a state may not question the judgment of another state.\textsuperscript{202}

**B. Necessary Results of a Greater Effect**

The forum state does not offend principles of full faith and credit when a nonparty to a prior judgment asserts a judgment offensively against a party bound by the prior action, even though the rendering jurisdiction requires mutuality for the application of issue preclusion.\textsuperscript{203} First, the conclusiveness of the judgment will still be preserved by giving a judgment a greater effect than would have been given in the prior rendering jurisdiction.\textsuperscript{204} In addition, the same judgment is recognized by the sister state court to a greater extent than would the prior rendering court, and therefore, the judgment is binding on more parties than in

\textsuperscript{198} This assertion was aptly stated by Justice Stone in his dissent in Yarborough v. Yarborough, 290 U.S. 202 (1933):

"In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other." *Id.* at 215 (Stone, J., dissenting). It is suggested that the local policy decision of choosing preclusion laws is such a policy determination which, in circumstances involving offensive issue preclusion, should not be encroached upon by another state.

\textsuperscript{199} See *Federal Practice*, *supra* note 80, § 4467, at 637.

\textsuperscript{200} Id.

\textsuperscript{201} See *Lewis*, *supra* note 86, at 369. But see *Overton*, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 Tenn. L. Rev. 927, 948 (1977) (giving judgment more effect than would be given by rendering state appears to violate full faith and credit statute as much as would giving it less effect); *Restatement (Second) of Conflicts of Laws* § 94 (1969) (persons bound by valid judgment determined by local law of state where judgment was rendered).

\textsuperscript{202} See *Note*, *supra* note 104, at 1595.


the jurisdiction where the initial decision was rendered. Consequently, rather than subjecting a previously decided issue to a reexamination by another court which is what the full faith and credit clause and statute guard against, this act shows great deference to the prior rendering forum.

Similarly, the finality of the initial judgment will be preserved. The second forum is not modifying the final judgment, but applying it to the present action in its entirety as it was rendered by the initial court. By applying local rules of issue preclusion which allow non-parties to be bound by a judgment when the prior state jurisdiction requires mutuality simply treats the judgment as “final” to a broader scope of parties than would be recognized in the first forum. Therefore, the judgment’s finality is in no way altered by the subsequent court, and consequently does not offend the objectives of full faith and credit.

In addition, the preservation of judicially established rights and obligations necessitates only that the minimum amount of preclusive effect be imported from the first forum. This concern does not require that the entire body of preclusive rules of the first forum be applied in the second action. However, this concern does mandate that sister state courts recognize the rights and obligations that were necessarily established by the initial judgment. Accordingly, when a court gives the prior judgment a greater effect than was warranted under the preclusive rules of the first forum, it is acknowledging these rights and applying them in a heightened rather than a diminished manner.

Finally, the prestige and integrity of the first forum judgment would remain intact by giving a judgment a greater effect. The integrity of the judgment is enhanced through its broadly construed application. Therefore, the policy of maintaining the integrity of a prior judgment is supported here as well.

VI. Conclusion

Because the full faith and credit doctrine requires only that a second court must recognize the minimum effects of the first court so that integrity and finality of judgments and the rights and obligations of the parties will be preserved, it should be constitutionally permissible to allow a court to give a prior judgment a “greater effect” by applying the...
subsequent forum’s laws of preclusion rather than those of the rendering jurisdiction.\textsuperscript{208}

\textit{Gregory S. Getschow}

\textsuperscript{208} This, however, does not appear to be the case if a situation arises where the first forum has abandoned mutuality and the second requires mutuality for the assertion of issue preclusion. It is arguable that in this situation full faith and credit would direct the state forum to apply the preclusive rules of the prior rendering state in order to achieve at least the same effect the judgment would receive in the rendering jurisdiction. Therefore, the second forum cannot choose to give a prior state court judgment a “lesser effect.”