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Mutuality Of Collateral Estoppel In Multistate Litigation: An Evaluation Of The Restatement (Second) Of Conflict Of Laws

MUTUALITY OF COLLATERAL ESTOPPEL IN MULTI-STATE LITIGATION: AN EVALUATION OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS

When the laws and interests of two or more jurisdictions conflict, courts often must adjust these interests to preserve comity between the jurisdictions.[1] Conflict of laws rules preserve comity in such situations by determining which jurisdiction's interest shall prevail.[2] Courts must confront a significant conflict of laws problem when deciding what effect a judgment of one jurisdiction will have on subsequent litigation in another jurisdiction. Although all jurisdictions recognize judgments of sister jurisdictions,[3] some attach the precondition that both parties in the subsequent litigation be bound by the prior judgment.[4] Because many jurisdictions do not require this precondition of "mutuality",[5] a court considering the collateral estoppel effect of a foreign judgment faces the troubling conflicts question of whether to apply its own mutuality requirement or to defer to the requirement of the rendering jurisdiction.

Under the concept of collateral estoppel,[6] a valid and final judgment is conclusive in any subsequent litigation between the parties as to all essential issues of fact actually litigated in a prior proceeding.[7] Collateral estop-

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[1] Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330, 330 (1944).

[2] Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 [hereinafter cited as Currie, *Conflict of Laws*]. *See generally* A. EHRENZWEIG, CONFLICT OF LAWS (1962) [hereinafter cited as EHRENZWEIG]; H. GOODRICH & E. SCOLES, CONFLICT OF LAWS (4th ed. 1964) [hereinafter cited as GOODRICH & SCOLES].

[3] Recognition of the judgments of a sister jurisdiction is required by the "full faith and credit" clause of the Constitution. U.S. CONST. art. IV, §1; *see* text accompanying notes 32-34 *infra*.

[4] *See* text accompanying notes 16-18 *infra*.

[5] Many jurisdictions abandoning the requirement of mutuality have replaced mutuality with a "full and fair opportunity" test. *See* text accompanying notes 23 & 24 *infra*.

[6] Courts and commentators use the term "issue preclusion" synonymously with "collateral estoppel" to identify the doctrine that precludes relitigation of essential issues of fact decided in a prior proceeding. *See, e.g.*, Engelhardt v. Bell & Howell Co., 327 F.2d 30, 31 (8th Cir. 1964); Vestal, *Preclusion / Res Judicata Variables : Parties*, 50 IOWA L. REV. 27, 28 (1964) [hereinafter cited as Vestal, *Preclusion*]; RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

[7] Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876); *see* RESTATEMENT OF JUDGMENTS § 68 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). *See generally* Polasky, *Collateral Estoppel - Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954) [hereinafter cited as Polasky].

Collateral estoppel first received application in Cromwell v. County of Sac, 94 U.S. 351 (1876). In *Cromwell*, the plaintiff first brought an action to recover on interest coupons due on bonds issued by the defendant. The district court rendered judgment for the defendant, holding that issuance of the bonds was fraudulently induced. *Id.* at 359. Upon maturity of the bonds, the plaintiff sued to recover the principal. The Supreme Court rejected the defendant's contention that the prior judgment operated to estop the plaintiff. The Court noted that the question whether the plaintiff paid value for the bonds did not come up in the prior action and held that where a second suit is brought upon a different cause of action, the prior judgment operates as an estoppel only to issues "actually litigated and determined in the

pel precludes relitigation of those essential issues regardless of whether the prior judgment was based upon the same cause of action as the second suit.[8] Collateral estoppel is distinguishable from res judicata[9] in that with collateral estoppel, the issues and facts actually litigated, rather than the prior judgment, stand as a barrier to relitigation.[10] Nevertheless, both res judicata and collateral estoppel are rules of justice and fairness,[11] designed to add certainty and stability to the judicial system by generating public respect for the courts and by conserving judicial time and resources.[12] In addition, by reducing litigation expenses, harassing lawsuits, and opportunities for conflicting judicial declarations, res judicata and collateral estoppel serve private interests.[13]

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original action, not what might have been litigated and determined." *Id.* at 352-53; *see* 1B MOORE'S FEDERAL PRACTICE ¶ 0.441 (1974); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3-4 (1942) [hereinafter cited as Scott].

[8] Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); *see* Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521 (1976) [hereinafter cited as *Collateral Estoppel*]. *See generally Developments in the Law - Res Judicata*, 65 HARV. L. REV. 818 (1952).

[9] Res judicata, or "claim preclusion", prevents the same parties or their privies from relitigating the same cause of action and thus precludes all issues previously decided. In addition, res judicata normally bars every matter that might have been raised in the first suit. *See* Heiser v. Woodruff, 327 U.S. 726 (1946); Lovely v. Laliberte, 498 F.2d 1261 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974); RESTATEMENT OF JUDGMENTS § 45 (1942); Vestal, *Preclusion*, *supra* note 6; *Collateral Estoppel*, *supra* note 8, at 52. Res judicata reflects the refusal of courts to tolerate needless litigation. The doctrine serves to accomplish this public policy by insuring that when one appears in court, fully litigates the contested issue and the court decides the issue against him, he should not renew the litigation in another court. Angel v. Bullington, 330 U.S. 183, 192-93 (1947); Heiser v. Woodruff, 327 U.S. 726, 733 (1946).

[10] *See* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573 (1974); Stevenson v. International Paper Co., 516 F.2d 103, 109-10 (5th Cir. 1975). *See generally* Cromwell v. County of Sac, 94 U.S. 351 (1876); Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964); *Collateral Estoppel*, *supra* note 8, at 521.

[11] Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 437 (1808); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir.), *cert. denied*, 98 S. Ct. 117 (1977); Hinchey v. Sellers, 7 N.Y.2d 287, 294, 165 N.E.2d 156, 159, 197 N.Y.S.2d 129, 134 (1959).

[12] *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1457 n.2 (1968) [hereinafter cited as Semmel]; Vestal, *Res Judicata / Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968) [hereinafter cited as Vestal, *Federal Courts*]; Comment, *Nonparties and Preclusion by Judgment, The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098, 1098-99 (1968) [hereinafter cited as *Privity Rule*].

Application of res judicata principles preserves the finality of court resolutions. Without such finality, court determinations would be relegated to the status of advisory opinions, destroying much of the law's utility as a stabilizing social influence. *See* Vestal, *Preclusion/ Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 858 (1966); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 31-34 (1964); *Privity Rule*, *supra*, at 1099. In addition, to the extent that application of res judicata prevents repetitive litigation, savings in judicial time and resources result. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308 (1961) [hereinafter cited as Moore & Currier]; Vestal, *Federal Courts*, *supra*, at 1723; von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929); *Privity Rule*, *supra*, at 1099.

[13] Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977); Vestal, *Federal Courts*, *supra* note 12, at 1723; *Privity Rule*, *supra* note 12, at 1098-99. Conclusive determinations in law suits provide a basis for planning future conduct. *See* G.

Application of collateral estoppel principles generally requires an identity of issues and a full and fair opportunity to litigate those issues in the prior action.[14] Moreover, the determination of the issues must have been essential to the prior judgment.[15] Many jurisdictions also require satisfaction of the mutuality requirement before operation of collateral estoppel principles.[16] Requiring mutuality prior to invoking collateral estoppel principles demands that one who asserts a previously contested issue as conclusive of an issue raised in subsequent litigation must have been a party or his privy in the prior suit.[17] Thus, mutuality prevents a litigant who is not bound by a prior judgment from employing that judgment to determine an issue in a second action.[18] Precluding the use of a prior judgment in these situations rests on the equitable concept that when a right or remedy is unavailable to one party, the law should deny the corresponding right or remedy to his adversary.[19] In recent years, however, widespread dissatis-

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BOWER, THE DOCTRINE OF RES JUDICATA 4 (1924); *Privity Rule, supra* note 12, at 1098-99. In addition, conclusive determinations protect a litigant from harassment by repeated litigation of the same claim by a contentious adversary. Vestal, *Federal Courts, supra* note 12, at 1723; *Privity Rule, supra* note 12, at 1099.

[14] *See* Cromwell v. County of Sac, 94 U.S. 351 (1876); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458 (5th Cir.), *cert. denied,* 404 U.S. 940 (1971); 1B MOORE'S FEDERAL PRACTICE ¶0.433 (1974); *cf.* United Shoe Mach. Co. v. United States, 258 U.S. 451 (1922) (exclusive leases not violative of the Sherman Act were violative of the Clayton Act because the two causes of action involved different issues).

[15] James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir. 1971); *see* Cromwell v. County of Sac, 94 U.S. 351 (1876). If the judgment could have been based upon one of several alternative issues and does not rely on any one of them expressly, then the litigation of the issues will not operate as an estoppel in subsequent litigation. *See* 1B MOORE'S FEDERAL PRACTICE ¶0.443[5] (1974).

[16] *See, e.g.,* Cowan v. Insurance Co. of N. Am., 22 Ill. App. 3d 883, 890, 318 N.E.2d 315, 321 (App. Ct. 1974); Wright v. Holt, 18 N.C.App. 661, 662, 197 S.E.2d 811, 812 (Ct.App.), *cert. denied,* 283 N.C. 759, 198 S.E.2d 729 (1973); Armstrong v. Miller, 200 N.W.2d 282, 284-85 (N.D. 1972); Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 113-14, 254 N.E.2d 10, 15 (1969). *See generally* Currie, *Civil Procedure: The Tempest Brews,* 53 CAL. L. REV. 25, 38-46 (1965) [hereinafter cited as Currie, *Tempest*]. Many of these jurisdictions recognize several exceptions to the requirement of mutuality. For example, a judgment exonerating a party who is primarily liable may preclude relitigation of the liability issue against a party who is secondarily or derivatively liable. *See* Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965); 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.411, 0.412 (1974); Semmel, *supra* note 12, at 1462-63; *Collateral Estoppel, supra* note 8, at 523.

[17] Hansberry v. Lee, 311 U.S. 32, 40 (1940); Graves v. Associated Transp., Inc., 344 F.2d 894, 896 (4th Cir 1965). *See generally* Moore & Currier, *supra* note 12; Semmel, *supra* note 12, at 1459. Privity is a mutual or successive relationship to the same rights of property. BLACK'S LAW DICTIONARY 1361 (rev. 4th ed. 1968). Privity exists when "the relationship between one who is a party on the record and another is close enough to include that other within the res adjudicata." Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied,* 340 U.S. 865 (1950); *see* Vestal, *Preclusion, supra* note 6, at 45. *See generally Privity Rule, supra* note 12, at 1100-02.

[18] *See* Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965).

[19] *See id.*; Semmel, *supra* note 12, at 1461. Reciprocity of preclusion is not the sole factor warranting mutuality requirements. The inherently personal nature of in personam judgments and the fairness of insuring that one has an opportunity to face his adversaries directly also justify mutuality. Moore & Currier, *supra* note 12, at 308-10; *Collateral Estoppel, supra*

faction among state and federal courts with the mutuality test has led several courts to abandon the requirement.[20] These courts premise their rejection of mutuality upon the need to improve judicial efficiency by reducing litigation of previously resolved issues.[21] Arguably, retention of mutuality strains judicial resources by permitting an individual to relitigate an issue as many times as he has adversaries.[22] Most courts that reject mutuality thus have adopted the general principle that when a party receives a "full and fair opportunity" to litigate the issues in a prior action, he subsequently may not relitigate those issues decided against him, regardless of the identity of his adversary.[23] In a subsequent action, the trial

note 8, at 527. Additional justifications of the mutuality requirement include the fallibility of the jury system, Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F.2d 143, 145 (3d Cir. 1943), the danger of a sympathetic plaintiff, Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957) [hereinafter cited as Currie, *Mutuality*], compromise verdicts, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 542 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), incompetent counsel in the prior suit, Graves v. Associated Transp. Inc., 344 F.2d 894, 901 (4th Cir. 1965), and the discovery of new evidence, United States v. United Air Lines, Inc., 216 F. Supp. 709, 728 (D. Nev. 1962), *aff'd sub nom.*, United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). *See Collateral Estoppel*, *supra* note 12, at 1461-66; Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590, 1596-97 (1968) [hereinafter cited as *Multistate Litigation*].

[20] *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971); Bernhard v. Bank of America Nat. Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). *See generally* Currie, *Tempest*, *supra* note 16, at 38-46. Moreover, the increasing recognition of exceptions to the requirement may evidence dissatisfaction among courts that still require mutuality. *See* note 16 *supra*.

[21] *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971). In *Blonder-Tongue*, the Supreme Court conducted an extensive analysis of the economic consequences of adhering to the requirement of mutuality in patent cases. The Court concluded that the interests of judicial effeciency warranted abandonment of the mutuality requirement. *Id.* at 334-48.

Opponents of the mutuality requirement point out that the concept of mutuality is ancient in origin and that there is no satisfactory explanation for continued adherence other than some unfounded principle of "natural fairness". 35 YALE L.J. 607, 608 (1926). In addition, critics attack the mutuality requirement as "destitute of any semblance of reason and as 'a maxim which one would suppose to have found its way from the gaming table to the bench'. . . ." Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), *quoting*, 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827); *see* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 322-23 (1971).

[22] *See* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971); *Collateral Estoppel*, *supra* note 8, at 528.

[23] *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Brown v. DeLayo, 498 F.2d 1173, 1175 (10th Cir. 1974); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965).

Courts that have adopted the "full and fair opportunity" test justify the test by the orderliness and time savings in judicial administration that result from its application. Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); *see* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 334-48 (1971).

Proponents of mutuality recognize the public advantage in the reduction of litigation that would accompany an abolition of the requirement. The proponents argue, however, that the "public advantage" also would be served "if there were no litigation at all" and state that

judge determines whether a party received a full and fair opportunity to litigate the contested issues in the prior suit.[24] As a result of this trend toward abandonment of the mutuality requirement, the application of mutuality by different jurisdictions may vary greatly.[25]

Because mutuality is not yet a "dead letter"[26] in every jurisdiction,[27] a court considering the collateral estoppel effect of an issue litigated in another state must determine which state's mutuality requirement applies. According to the Restatement (Second) of Conflict of Laws, the law of the state rendering the judgment determines the preclusionary effect of a valid foreign judgment,[28] subject to constitutional limitations.[29] Although the Restatement reflects the weight of authority,[30] several jurisdictions do not defer to the mutuality requirement of the rendering jurisdiction.[31] The inconsistent practices of different jurisdictions thus create a dilemma for the multi-state litigant who faces conflicting mutuality requirements but

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"the question is, at what point does the public interest in reducing litigation yield to the interest in fair procedure." Currie, *Mutuality, supra* note 19, at 288; *see* Polasky, *supra* note 7, at 219. In Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950), the plaintiff argued, in effect, that failure to require mutuality made the application of collateral estoppel asymmetrical. *Id.* at 421. The *Bruszewski* court rejected the plaintiff's argument, noting that "the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata." *Id.; see* Butler v. Stover Bros. Trucking Co., 546 F.2d 544 (7th Cir. 1977).

[24] *See* Butler v. Stover Bros. Trucking Co., 546 F.2d 544 (7th Cir. 1977); Currie, *Mutuality, supra* note 19, at 296; Polasky, *supra* note 7, at 219; *Collateral Estoppel, supra* note 8, at 544-45. In "mass tort" situations, judicial implementation of the "full and fair opportunity" test is desirable. The severe consequences of allowing subsequent plaintiffs to assert a prior judgment as collateral estoppel in later suits make the need to assess carefully whether a defendant received a full and fair opportunity especially pressing. *See* Currie, Mutuality, supra note 19, at 285-88; 57 HARV. L. REV. 98, 105 (1943); note 57 *infra.*

[25] *See* Currie, *Tempest, supra* note 16, at 38-46.

[26] *See* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967)(the doctrine of mutuality is a "dead letter" in the state of New York).

[27] *See* text accompanying notes 16 & 20 *supra.*

[28] Section 94 of the Restatement states: "What persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered," while §95 states: "What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§94, 95 (1971).

[29] When state privity rules conflict with the due process requirements of the Constitution, the privity rules are void and the judgment does not affect persons covered by the rule either in a sister state or in the state of rendition. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 94, Comment b (1971).

[30] *See* EHRENZWEIG, *supra* note 2, at § 66; GOODRICH & SCOLES, *supra* note 2, at § 217; *see, e.g.,* Riley v. New York Trust Co., 315 U.S. 343 (1941); Hansberry v. Lee, 311 U.S. 32 (1940).

[31] *See, e.g.,* Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810 (1966). *See also* Carrington, *Collateral Estoppel and Foreign Judgments,* 24 OHIO ST. L.J. 381, 381-82 (1963) [hereinafter cited as Carrington]; *Multistate Litigation, supra* note 19, at 1601. The jurisdictions employing their own mutuality rules generally consider the preclusive effect of foreign judgments a subject particulary appropriate for individual choice by each state. *Multistate Litigation,* supra note 19, at 1601.

desires to predict the extent to which a court should recognize the judgments of sister jurisdictions.

The United States Constitution commands recognition of sister state judgments by requiring that courts afford "Full Faith and Credit" to the records and judicial proceedings of every other state.[32] Pursuant to its authority to prescribe the manner of proof for such records and proceedings,[33] Congress enacted the Act of May 26, 1790, which provides that the records and proceedings of any state shall have the same full faith and credit within every court as they have in the rendering state.[34] Recorded debates from the Constitutional Convention, however, provide little guidance as to the intended purpose and meaning of the full faith and credit clause of the Constitution.[35] Evidently, the framers of the clause and implementing statute intended to alter the status of the states as independent sovereigns and to restrain the freedom of a state to ignore the judicial proceedings of a sister state.[36] By requiring all states to respect judicial proceedings regardless of the state of origin, the framers hoped to make the states integral parts of a unified national system.[37]

Although a literal reading of the implementing statute supports the Restatement's position requiring deference to the collateral estoppel principles of the rendering state, critics of the Restatement position contend

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[32] U.S. CONST. art. IV, § 1, provides:

> 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.

[33] *Id.*

[34] The Act of May 26, 1790, ch. 11, 1 Stat. 122, implemented the full faith and credit clause of the Constitution. The Act is codified currently at 28 U.S.C. §1738 (1970), and provides:

> 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.

This statutory provision has remained virtually unchanged since 1790. *See* Johnson v. Muelberger, 340 U.S. 581, 584 (1951); Milwaukee County v. M. E. White Co., 296 U.S. 268, 273 (1935).

[35] Johnson v. Muelberger, 340 U.S. 581, 584 (1951). *See generally* 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 Federal Legislation,* 4 COLUM. L. REV. 470, 472 (1904) [hereinafter cited as Costigan].

[36] Prior to the adoption of the Constitution, individual states were free to exercise their independant status by ignoring the judicial proceedings and declarations of sister states. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943); Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935).

[37] *See* Johnson v. Muelberger, 340 U.S. 581, 584 (1951); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943); Corwin, *The "Full Faith and Credit" Clause,* 81 U. PA. L. REV. 371, 388 (1933) [hereinafter cited as Corwin]. In addition to promoting national unity, the history of the adoption of the full faith and credit clause implies that the framers included the full faith and credit provision in the Constitution to favor state and territorial judgments over judgments rendered by foreign nations. Costigan, *supra* note 35, at 484-85.

that the statute should receive a flexible interpretation.[38] These critics assert that the statute is vastly oversimplified and was drafted only to insure that simple money judgments could be enforced in any state.[39] Critics contend that an examination of the fundamental principles underlying the Constitution discloses that the framers desired to promote the principal advantages of a centralized government while preserving the independent status and dignity of each state.[40] Thus, to preserve the individuality of the states, critics assert that national policy interests should submit to the interests of the individual states except where such submision severely threatens the preservation of a centralized government.[41] In addition, crit-

[38] Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363, 1365 (1967) [hereinafter cited as Rodgers & Rodgers]; *see* text accompanying note 46 *infra*.

[39] Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 90 [hereinafter cited as Currie, *Judgments*].

The earliest cases to arise under the full faith and credit clause were actions brought on money judgments rendered in a sister state. Corwin, *supra* note 37, at 376. The first Supreme Court case interpreting the full faith and credit clause was Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). Francis Scott Key argued for the appellant that a foreign judgment of nil debet (action of debt on a simple contract) was admissible only as evidence in the sister state. The Court, however, held that the foreign judgment was final and conclusive on the parties. *Id.* at 484; *see* Hampton v. McConnel, 16 U.S. (3 Wheat.) 234, 235 (1818); Jackson, *Full Faith and Credit - The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 7 (1945). *See generally* Rashid, *The Full Faith and Credit Clause: Collateral Attack of Jurisdiction Issues*, 36 GEO. L.J. 154, 154 (1948) [hereinafter cited as Rashid]; Note, *Full Fatih and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CAL. L. REV. 282, 283 (1966) [hereinafter cited as *Law and Reason*.].

Courts have condoned many exceptions to a literal interpretation of the statute. *See, e.g.*, Durfee v. Duke, 375 U.S. 106 (1963)(state decree that land is located in one state is not conclusive in determination of same issue in the competing state); Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935) (enforcement of foreign tax claim); Alaska Packer's Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935)(refusing to require full faith and credit to all sister state statutory law). Exceptions to the letter of the full faith and credit clause are permitted when the result of strict adherence is not within the spirit of the clause. Exceptions generally include such matters that the Constitution plainly leaves to the sole power of an individual state. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In addition, courts recognize an exception to strict adherence to full faith and credit when such adherence jeopardizes a superior state interest. *See, e.g.*, Durfee v. Duke, 375 U.S. 106 (1963); Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935). Formulation of exceptions to the full faith and credit clause, however, requires extreme caution to insure that the exceptions neither conflict with the needs of federal unity nor provide a basis for the eventual destruction of the clause itself. Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 178-79 (1949)[hereinafter cited as Reese & Johnson]. *See generally* Carrington, *supra* note 31, at 382; Rodgers & Rodgers, *supra* note 38, at 1592 n.14; *Law and Reason, supra*, at 1595; *Collateral Estoppel, supra* note 8, at 540.

[40] *See* Reese & Johnson, *supra* note 39, at 163.

[41] *See id.* at 164. *See generally* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 133 (1912)(full faith and credit clause has effect of putting foreign judgment upon the plane of domestic judgment with respect to conclusiveness as to facts adjudged).

The "unmistakable language" test compliments the argument for preserving state individuality because adherence to the "unmistakable language" test would mean that no judgment would receive full faith and credit outside the jurisdiction of rendition absent an explicit declaration by the rendering court that the judgment shall be conclusive beyond the rendering

ics of the Restatement rule contend that the rule departs from the normal tendency in conflicts decisions to apply the law of the forum state, including conflicts law.[42] Because of differing concepts of the full and fair opportunity test that result from the discretion exercised by trial judges,[43] the critics contend that subsequent courts should not be saddled with the difficult task of "thinking with the minds of others" in determining what courts of the rendering state would do.[44]

Although critics of the Restatement rule are at times persuasive, the greater weight of reasoned authority supports the Restatement principle of deference to the rendering state's mutuality requirement.[45] The full faith and credit clause is simple and precise in its demand that a state court determination of an issue be given the same effect in the courts of another state as that determination would receive in the state of rendition. Nothing short of the same effect would be *full* faith and credit.[46] The traditional practice of courts to consider the collateral estoppel effect of a judgment as part of the judgment for purposes of full faith and credit analysis provides additional support for the Restatement position.[47] Furthermore, if

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jurisdiction's borders. *See* Industrial Comm'n v. McCartin, 330 U.S. 622 (1947). *See generally* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943)(Stone, J., dissenting). The "unmistakable language" test should be rejected, however, because full faith and credit is a national rather than a state policy. *See* text accompanying notes 32-37 *supra*. Because its purpose is to create a unified nation by altering the status of otherwise independent states, federal law, not state law, should proscribe the effect given to sister state judgments. *See* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948); Morris v. Jones, 329 U.S. 545, 552 (1947); text accompanying notes 36 & 37 *supra*.

[42] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); Currie, *Conflict of Laws, supra* note 2, at 178; Ehrenzweig, *The Lex Fori - Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133 (1943). One function of the law of the forum, the lex fori, is to determine when and how the forum will adopt foreign law. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). For example, if a court trying a contract case determines that the law of the place of contracting will control, the lex fori will determine what constitutes the place of contracting. *See* Bowen v. New York Life Ins. Co., 33 F. Supp. 705 (E.D.Mo. 1940), *aff'd*, 117 F.2d 298 (8th Cir.), *cert. denied*, 313 U.S. 583 (1941). When a suit requires application of the law of a party's domicile, the lex fori determines the fact of domicile. Prudential Ins. Co. v. Lewis, 306 F. Supp. 1177 (N.D.Ala. 1969). In addition, the lex fori determines whether a matter is substantive or procedural. *See* Central Vt. Ry. v. White, 238 U.S. 507 (1915); Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971).

[43] *See* text accompanying note 24 *supra*.

[44] Carrington, *supra* note 31, at 385; *Collateral Estoppel, supra* note 8, at 540-41.

[45] *See, e.g.*, Riley v. New York Trust Co., 315 U.S. 343 (1941); EHRENZWEIG, *supra* note 2, at §66; GOODRICH & SCOLES, *supra* note 2, at §217.

[46] *See* Tindle v. Celebrezze, 210 F. Supp. 912, 915 (S. D.Cal. 1962); note 32 *supra*. *See generally* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961); Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942); Costigan, *supra* note 35, at 478; Rashid, *supra* note 39, at 155. The second court to consider the issue has no discretion; the entire body of law as developed in the rendering state concerning the preclusive effect of judgments is applicable. Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 38 (1963)[hereinafter cited as Vestal, *Res Judicata*].

[47] *Multistate Litigation, supra* note 19, at 1592 n.14.

individual states can ignore the judicial determination of issues made by sister states, the goal of a unified national system underlying the full faith and credit clause will be frustrated.[48]

The implementing statute of the full faith and credit clause lends additional credence to the Restatement position. The statute amplifies the constitutional mandate by requiring that the full faith and credit afforded the judicial proceedings of another state must be the "same" as such proceedings would receive in the state of rendition.[49] Thus, rather than merely mimic the constitutional language, the legislature sought to quantify explicitly the extent of the full faith and credit requirement.[50] Finally, although Restatement critics emphasize the dangers of forcing courts to apply the laws of other states, courts frequently must interpret foreign laws in other contexts.[51]

In further support of the Restatement rule of deference to the rendering state's mutuality requirement, the rule operates simply and fairly by making the effects of a judgment foreseeable. When a court renders a decision

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[48] *See* text accompanying note 37 *supra*. Because conflicts are infrequent, the interest of each state in controlling its internal affairs will not be hindered severely by honoring a sister state's mutuality requirements. Therefore, the state interest hardly suffices to thwart the national interest in preserving a unified judicial network in which the integrity of state court proceedings remains intact. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 441 (1943).

In the rare cases in which the interests of the state are actually superior to the national policy of uniformity, the Restatement allows deference to the state's interest. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §103 (1971), provides:

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

Although the precise extent of acceptable exceptions is not clear, this section of the Restatement has an extremely narrow scope of application. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §103, Comment a (1971). Under one such exception, State *A* need not recognize a sister state injunction against suit in State *A*'s courts on the ground that State *A* is an inconvenient forum. *See* Cunningham v. Cunningham, 25 Conn. Sup. 221, 200 A.2d 734 (1964). In addition, a state may religitate issues in a sister state custody case on the ground that a court should be free to inquire into the best interests of a child. *See* Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866 (1956). Full faith and credit, however, requires recognition of previously decided issues even though the public policy of the rendering state is contrary to the policy of the forum state. *See, e.g.,* Williams v. North Carolina, 317 U.S. 287 (1942) (state interest in determining marital status of domiciliary); Yarborough v. Yarborough, 290 U.S. 202 (1933)(state interest in requiring parent to support child domiciled within the state); Fauntleroy v. Lum, 210 U.S. 230 (1908)(state interest in preventing gambling in the state).

[49] The implementing statute, 28 U.S.C. §1738 (1970), provides 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 were taken. . . ." (emphasis supplied). *See* note 34 *supra*.

[50] *See generally* Costigan, *supra* note 35, at 478; Rashid, *supra* note 39, at 155.

[51] Courts frequently must interpret foreign laws in actions based on torts committed in another state. Matters of substance pertaining to a right of action in tort may be governed by the law of the place of the wrong, the *lex loci delicti*. *See* Wallan v. Rankin 173 F.2d 488 (9th Cir. 1949); Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810 (Sup.Ct. 1969). A court that tries an action based on a tort committed in another state thus may be called upon to interpret the law of that jurisdiction.

on a specific issue, the affected parties can have a clear understanding of the judgment's ramifications only if subsequent courts that consider the litigated issues defer to the rendering forum's mutuality requirement.[52] If subsequent courts ignore the Restatement position and a litigated issue arises in subsequent foreign litigation, the preclusive effect of the initial judgment on that issue could vary with each jurisdiction. Under the Restatement rule, the parties in the initial suit would be aware of the preclusive effect of the litigated issues because the mutuality requirement of the state in which the initial court sits will control all subsequent litigation. Thus, the foreseeability of the consequences will allow an intelligent determination of trial strategy.[53] In addition, when litigants can anticipate the consequences of litigation, forum shopping and collusion in multi-state litigation will be reduced.[54]

When the judgment state requires mutuality and the subsequent forum state does not, the issue becomes the desirability of allowing a sister state to give *greater* full faith and credit to the judgment than that judgment would receive in the rendering state. Under the Restatement rule, the litigated issues would receive only the respect demanded by the rendering state.[55] Critics of the Restatement rule contend that nothing in the full faith and credit clause should operate to prevent the forum state from giving broader effect to a foreign judgment than that judgment would have

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[52] *See* Carrington, *supra* note 31, at 385; *Multistate Litigation, supra* note 18, at 1599.

[53] *See* Graves v. Associated Transp., Inc., 344 F.2d 894, 901 (4th Cir. 1965). The importance of foreseeability to trial strategy is obvious in mass tort situations where a defendant faces many tort suits arising out of a single accident. If subsequent courts follow the Restatement rule, the defendant enters each suit with a full understanding of whether non-parties to the action may use litigated issues to their advantage in subsequent suits. With this knowledge, the defendant can determine appropriate expenditures of resources depending on the extent to which he will be bound by the litigated issues in later suits. If subsequent courts do not follow the Restatement rule, a defendant must put forward his best defense in each suit because he can never be sure of the ramifications of the litigated issues.

In these mass tort situations, the argument for requiring the rendering court to demand strict mutuality is convincing. For example, if a defendant faces thirty tort suits arising out of a single accident, the first twenty injured plaintiffs may lose their individual suits against the defendant. If mutuality is not required and the twenty-first plaintiff wins a judgment, the remaining nine plaintiffs may be able to claim a collateral estoppel effect from the twenty-first judgment. In such a situation, the defendant has everything to lose and little to gain in each suit. Currie, *Mutuality, supra* note 19, at 285-89; *see* In re Air Crash Disaster, 350 F. Supp. 757, 765 (S.D.Ohio 1972), *rev'd sub nom.*, Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *Mulitstate Litigation, supra* note 19, at 1597 n.48; 57 HARV. L. REV. 98, 105 (1943). If the rendering court required mutuality, the defendant would enter each suit with knowledge of his potential losses. With such knowledge the defendant may litigate more strenously those cases where several plaintiffs join together and potential losses are greater than in a suit brought by a single plaintiff.

[54] Carrington, *supra* note 31, at 385; *see* Graves v. Associated Transp., Inc., 344 F.2d 894, 901 (4th Cir. 1965). *But see Collateral Estoppel, supra* note 8, at 541. Absent the Restatement rule, persons who were not parties to the initial suit may attempt to bring subsequent actions in jurisdictions that do not require mutuality and thus enjoy the benefits of collateral estoppel. *See* Graves v. Associated Transp., Inc., 344 F.2d 894, 901 (4th Cir. 1965).

[55] The Restatement rule determines what persons and issues are bound by a valid judgment according to the law of the rendering state. *See* note 28 *supra*.

in the rendering forum.[56] The critics aver that the Constitution requires subsequent jurisdictions to accept the rendering state's concept of preclusion as a *minimum* standard.[57] Where that view is adopted, the precluded party receives a full and fair opportunity to litigate the issue in the original case.[58] Furthermore, Restatement critics contend that the foreign judgment thereby has broad effect in a manner which is not degrading to the rendering forum.[59] Nevertheless, permitting an out-of-state court to give greater effect to a judgment than that judgment would receive in the rendering state violates the latter state's integrity.[60] The implementing statute requires that foreign judgments receive the *same* full faith and credit,[61] no less and no more.[62] In addition, fairness demands that a party contemplating litigation be able to foresee the consequences of a judgment.[63] A party can predict the consequences of a judgment only by realiz-

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[56] *See* Carrington, *supra* note 31, at 383; *Multistate Litigation, supra* note 19, at 1593; *Collateral Estoppel, supra* note 8, at 540; *see, e.g.*, Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810 (Sup.Ct. 1969).

[57] *See* Vestal, *Res Judicata, supra* note 46, at 41.

[58] *See id.;* text accompanying notes 23 & 24 *supra.* When the forum court's mutuality requirement is less restrictive than that of the rendering state, critics contend that the requirements of due process should be the only limit on the preclusive effect that the forum accords litigated issues. *See id. See generally* Vestal, *Res Judicata, supra* note 46, at 47-53.

[59] *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 133 (1912); Carrington, *surpa* note 31, at 383. In effect, critics argue that giving broader effect to a judgment than that judgment would receive in the rendering forum should be construed as a demonstration of confidence in the competency of the rendering forum. For support of the proposition that a subsequent court may give greater effect to a judgment than the judgment would receive in the rendering jurisdiction, Restatement critics rely on *Bigelow, supra,* where the court stated that "[t]he effect of the implementing statute is to put the judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged." 225 U.S. at 133. These critics, however, neglect the *Bigelow* Court's view that the "general effect of a judgment of a court of one State when relied upon as an estoppel in the courts of another State is that which it has, by law or usage, in the courts of the State from which it comes." *Id.* at 135.

[60] Situations in which a sister state attempts to give effect to issues adjudicated but not yet finalized or validated according to the more stringent requirements of the forum demonstrate the potential for violation of the rendering state integrity because a yet invalid judgment remains subject to alteration or withdrawl. *See* Carrington, *supra* note 31, at 383-84. In addition, giving effect to invalid sister state judgments comes dangerously close to violating due process when the rendering state lacks jurisdiction. Halvey v. Halvey, 330 U.S. 610, 614 (1947); GOODRICH & SCOLES, *supra* note 2, at §209; Scott, *supra* note 7, at 18-22. In Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 133 (1912), the Court recognized that according collateral estoppel effect to issues litigated by a court lacking jurisdiction denies the precluded party his day in court. The Court thus concluded that "the full faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced." *Id.* at 135.

[61] 28 U.S.C. §1738 (1970); *see* note 34 *supra.*

[62] *See* Halvey v. Halvey, 330 U.S. 610, 614 (1947); Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 529 (1873). *But see Collateral Estoppel, supra* note 8, at 539-40.

[63] *See* Carrington, *supra* note 31, at 385.

ing the extent of applicable mutuality requirements before trial.[64]

The Restatement rule also applies to federal courts, although additional considerations are involved when a federal court considers a previously litigated issue. If both federal and state systems employ the same rules regarding mutuality of estoppel, the application of collateral estoppel produces no significant differences.[65] Federal courts, however, have demonstrated a greater willingness to abolish the requirement of mutuality than have state courts.[66] Rather than retaining the mechanical requirements of mutuality, federal courts consider whether the party against whom collateral estoppel is asserted had a full and fair opportunity for judicial resolution of the issue.[67] Federal courts justify the demise of mutuality by noting

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[64] *See id. See also* Zdanok v. Glidden Co., 327 F.2d 944, 955-56 (2d Cir. 1964); Currie, *Mutuality, supra* note 19, at 285-89; note 53 *supra.*

[65] *See* Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two,* 51 CORNELL L.Q. 96, 106 (1965)[hereinafter cited as *Res Judicata in the Federal Courts*]. Where neither the rendering state court nor the federal court considering the issue in subsequent litigation require mutuality, the result is the same whether the federal court defers to the rendering state requirement or employs its own. *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 541 (2d Cir. 1965)(where state and federal courts follow the same rule, no difference in result).

[66] *See* Humphreys v. Tann, 487 F.2d 666, 668-70 (6th Cir. 1973); *Collateral Estoppel, supra* note 8, at 541. *But see Res Judicata in the Federal Courts, supra* note 65, at 106-07. Although the first significant judicial rejection of the mutuality requirement came from a state court in Bernhard v. Bank of America Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942), the federal courts soon followed suit. In Davis v. McKinnon & Mooney, 266 F.2d 870 (6th Cir. 1959), a federal circuit court precluded a plaintiff from relitigating an issue against one defendant after losing on that issue against another defendant in a prior suit. In Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313 (1971), the Supreme Court rejected the requirement of mutuality after engaging in an extensive analysis of the economic ramifications of relitigating patent infringement cases. The court in United States v. United Airlines, Inc., 216 F. Supp. 709 (D.Nev. 1962), succinctly summed up the prevailing federal position as follows:

> While it is true that the general rule requires that there be identity of parties to invoke the doctrine of *res judicata,* nevertheless, the Courts, increasingly so in the last 20 years, have not adhered to that doctrine, and have held no constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and did actually litigate it.*

216 F. Supp. at 725-26, *quoted in* Humphreys v. Tann, 487 F.2d 666, 670 (6th Cir. 1973)(emphasis in original).

[67] Bricker v. Crane, 468 F.2d 1228, 1231 n.3 (1st Cir. 1972); Zdanok v. Glidden Co., 327 F.2d 944, 954-55 (2d Cir. 1964). When a subsequent court determines whether the party against whom collateral estoppel is asserted received a full and fair opportunity for judicial resolution in the prior suit, the subsequent court should consider the choice of forum and the party's incentive to litigate in the previous action. *See* note 53 *supra.* In addition, the subsequent court should consider whether the prior court understood the complexities of the case or deprived a party of presenting crucial evidence, and whether the prior judgment was the probable result of a compromise verdict. *See* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 333 (1971); Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964). Proper rulings on estoppel pleas rest on the trial court's sense of justice and equity. Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 333-34 (1971). *See generally* James Talcott, Inc., v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir. 1971);

the resultant orderliness and time savings in judicial administration.[68] The federal courts recognize, however, that overriding considerations of fairness to a litigant occasionally may warrant a different result.[69] In addition, the federal judiciary long has held that under appropriate circumstances, a court may employ collateral estoppel to bind a non-party to the original suit when that individual's interests were protected adequately under the theory of "virtual representation" in the original suit.[70]

Because the same conflicts between mutuality rules exist between state and federal courts as exist between courts of different states, a federal court considering issues that were litigated previously in a state court must decide whether to use the federal mutuality requirement or the requirement of the rendering state. Federal courts accept the Restatement view that courts considering previously litigated issues should defer to the mutuality requirement of the rendering state.[71] Whenever possible, federal courts have looked to the mutuality requirement of the rendering court.[72] Furthermore, federal courts hearing diversity cases have demonstrated this preference by adopting the Restatement rule when state law fails to indicate whether state courts must adopt the rendering state's mutuality requirement.[73]

RESTATEMENT (SECOND) OF JUDGMENTS §68 (Tent. Draft No. 4, 1977); RESTATEMENT OF JUDGMENTS §68 (1942); Scott, *supra* note 7, at 4-5.

[68] *See* Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950). State courts as well as federal courts assert the resulting judicial economy to justify rejection of mutuality. *See* Bernhard v. Bank of America Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[69] *See* Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950). When a defendant faces lawsuits instituted by many plaintiffs, overriding considerations of fairness may warrant a court to require mutuality. *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 541 (2d Cir. 1965); 57 HARV. L. REV. 98, 105 (1943); note 53 *supra*.

[70] "Virtual representation" is an exception to the general rule that only those individuals who stand in privity with a party are bound by a judgment. Under the rule of virtual representation, a person who is not a party may be bound by a judgment if his interests align so closely with the interests of a party that the non-party's interests were asserted adequately at the trial. Chicago Rock Is. & Pac. Ry. v. Schendel, 270 U.S. 611, 618-19 (1926); Southwest Airlines Co. v. Texas Int'l Airlines Inc., 546 F.2d 84, 95 (5th Cir. 1977). Virtual representation is a question of fact to be decided by the trial court. Astron Indus. Assoc. v. Chrysler Motors Corp., 405 F.2d 958, 961 (5th Cir. 1968).

[71] *See* note 28 *supra*.

[72] *See* Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); United States v. Silliman, 167 F.2d 607, 620 (3d Cir. 1948).

[73] *See* Breeland v. Security Ins. Co., 421 F.2d 918, 921 (5th Cir. 1969); Behrens v. Skelly, 173 F.2d 715, 717 (3d Cir.), *cert. denied*, 338 U.S. 821 (1949). After Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and its progeny, federal courts sitting in diversity must apply the law of the state in which the court sits if the law is substantive or outcome determinative. Hence, most federal courts have applied the mutuality requirement of the state in which the court sits on the assumption that the mutuality requirement is outcome determinative. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Pallen v. Allied Van Lines, Inc., 223 F. Supp. 394 (S.D.N.Y. 1963); text accompanying notes 77-81 *infra*. Although federal court adoption of the Restatement rule in the absence of applicable state decisions implies a federal court preference for the Restatement rule, federal application of state law may be unwarranted because of the inapplicability of the *Erie* analysis to res judicata rulings. *See* text accompanying notes 82-84 *infra*.

Although the Restatement does not specifically address all possible situations involving federal courts,[74] the Restatement policy of deferring to the mutuality requirement of the rendering jurisdiction applies in all federal court situations. When determining the collateral estoppel effect of state-litigated issues, the federal courts should defer to the law of the rendering state regardless of whether the federal court sits in the same state as the rendering court[75] and irrespective of the grounds of federal jurisdiction.[76] Nevertheless, most federal courts exercising diversity jurisdiction engage in an *Erie* analysis[77] to determine their choice of mutuality requirement.[78] These courts consider the application of collateral estoppel to be "outcome determinative" under the Rules of Decision Act[79] as construed in *Erie R.R. v. Tompkins.*[80] Because the application of collateral estoppel is outcome determinative, these federal courts apply the collateral estoppel rules of the state in which they sit, including that state's mutuality requirement.[81] The Rules of Decision Act, however, requires that state law supply the rule of decision in federal courts "except where . . . Acts of Congress otherwise require or provide."[82] Since Congress explicitly provided otherwise in the implementing statute of the full faith and credit clause,[83] an *Erie* analysis is misplaced in considerations of collateral estoppel.[84] As in the case of a subsequent state court action, the Constitution

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[74] The Restatement specifically addresses only situations in which a state court rendered the initial judgment. *See* note 28 *supra.*

[75] *See* Degnan, *Federalized Res Judicata,* 85 YALE L.J. 741, 750-55 (1976) [hereinafter cited as Degnan]; *Res Judicata in the Federal Courts, supra* note 65, at 96-99; *see, e.g.,* Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978).

[76] *See* Degnan, *supra* note 75, at 750-55; *Res Judicata in the Federal Courts, supra* note 65, at 96-99; *see, e.g.,* Angel v. Bullington, 330 U.S. 183 (1947); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978).

[77] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); note 73 *supra.*

[78] *See, e.g.,* Gerrard v. Larsen, 517 F.2d 1127, 1131-32 (8th Cir. 1975); Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973). For an extensive listing of federal cases relying on the *Erie* approach, see Degnan, *supra* note 75, at 753 n.49.

[79] 28 U.S.C. §1652 (1970).

[80] *See, e.g.,* Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1181 (3d Cir. 1972); Pallen v. Allied Van Lines, Inc., 223 F. Supp. 394, 395 (S.D.N.Y. 1963). Noting that "the application of either the state or federal doctrine to a given case could be 'outcome-determinative'," the Lynne Carol court concluded that "*Guaranty Trust Co.* would seem to require application of the state rule." 453 F.2d at 1181; *see* text accompanying note 73 *supra.*

[81] *See, e.g.,* Pallen v. Allied Van Lines, Inc., 223 F. Supp. 394 (S.D.N.Y. 1963). The *Pallen* court reasoned that the determination of which law would govern mutuality turned on whether the law would be outcome determinative and whether a strong federal interest would warrant application of federal law. *Id.* at 395. Concluding that the law of collateral estoppel was outcome determinative and that there was no overriding federal interest, the *Pallen* court turned to state law. *Id. See also* Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L. REV. 657, 666 (1959)[hereinafter cited as Traynor].

[82] 28 U.S.C. §1652 (1970).

[83] *See* text accompanying notes 33 & 34 *supra.*

[84] 28 U.S.C. §1738 (1970). *See generally* Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine,* 85 YALE L.J. 678 (1976).

and implementing statute require that courts afford foreign judicial records and proceedings the same full faith and credit as they have in the state of rendition.[85] Although the Constitution does not state expressly that federal courts must follow the full faith and credit mandate,[86] these courts uniformly follow the constitutional requirement.[87] Furthermore, the implementing statute addresses itself to "every court within the United States".[88] The implementing statute, drafted contemporaneously with the adoption of the Constitution, enlarged the application of the full faith and credit clause by replacing the reference to "States" with "every court within the United States".[89] Thus, Congress may have intended to bring the federal courts within the statute's focus.[90]

The Restatement rule of deference to the mutuality requirement of the rendering state clearly does not address situations involving subsequent litigation of issues which were decided previously in a federal court. Never-

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Reference to the conflicts law of the forum state is harmless when a state court of the forum rendered the prior judgment. *See, e.g.,* Priest v. American Smelting & Refining Co., 409 F.2d 1229, 1231 (9th Cir. 1969); Graves v. Associated Transp. Inc., 344 F.2d 894, 896 (4th Cir. 1965); Behrens v. Skelly, 173 F.2d 715, 717 (3d Cir. 1949). When the federal court considers a judgment of a state other than the forum, however, the *Erie* analysis permits deference to the rendering state's mutuality requirement only if the forum state would so defer. *See* Degnan, *supra* note 75, at 750-55. Thus, even when these federal courts correctly turn to the mutuality rule of the rendering state, they do so not by the direct authority of the full faith and credit clause, but indirectly, by way of the forum state's conflicts law. *See id.* Moreover, when the conflicts law of the forum state does not compel deference to the mutuality requirement of the rendering state, the result does not comport with the constitutional mandate of full faith and credit. *See* text accompanying note 46 *supra.*

Many federal courts sitting in diversity apply the res judicata rules of the forum state on the ground that they are sitting merely as another court of the state. *See, e.g.,* St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583, 585 (4th Cir. 1973); Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973); Priest v. American Smelting & Refining Co., 409 F.2d 1229, 1231 (9th Cir. 1969); Blum v. William Goldman Theatres, 174 F.2d 914, 915 (3d Cir. 1949). These courts base their decisions either on a misapplication of *Erie* or on the authority of Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), which required a federal court sitting in diversity to apply the conflicts law of the forum state. *Id.* at 496-97. While the *Kaxon* Court addressed a conflicts issue in light of *Erie,* the issue was a conflict over which state's substantive law regarding manditory interest should apply rather than a situation calling for full faith and credit for a state judgment. *See id.* Of course, when diversity does not exist, courts generally do not consider the forum state law. *See, e.g.,* Holmberg v. Armbrecht, 327 U.S. 392 (1946).

[85] 28 U.S.C. §1738 (1970); *see* Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978); Mitchell v. National Broadcasting Co., 553 F.2d 265, 274 (2d Cir. 1977); text accompanying notes 32-34 & 46-50 *supra.*

[86] *See* U.S. CONST. art. IV, §1; Degnan, *supra* note 75, at 741; *Res Judicata in the Federal Courts, supra* note 65, at 97.

[87] *See Res Judicata in the Federal Courts, supra* note 65, at 97; *see, e.g.,* Huron Holding Corp. v. Lincoln Mine Oper. Co., 312 U.S. 183 (1941)(federal court must afford full faith and credit to state attachment proceedings); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813)(full faith and credit clause requires state court decision to have same faith and credit in "every" other court).

[88] 28 U.S.C. §1738 (1970); *see* Degnan, *supra* note 75, at 743.

[89] *See* Degnan, *supra* note 75, at 743.

[90] *See id.*

theless, deference to the rendering jurisdiction's mutuality requirement is sound policy even when a federal court renders a judgment and a state court subsequently considers the litigated issues.[91] Although neither the full faith and credit clause nor the implementing statute specifically requires deference to federal courts, the Supreme Court has stated repeatedly that the rule applies to federal court judgments.[92] Moreover, the importance of preserving the integrity of federal court judgments requires deference to the federal court mutuality requirement.[93] Out of respect for the federal courts[94] and to further the policy of deterring endless relitiga-

[91] *See id.* at 755; *Res Judicata in the Federal Courts, supra* note 65, at 107-10.

[92] *See* Stoll v. Gottlieb, 305 U.S. 165, 170 (1938); Embry v. Palmer, 107 U.S. 3, 9-11 (1882); Vestal, *Res Judicata, supra* note 46, at 35-36. The requirement that state courts apply full faith and credit to federally litigated issues follows from the expansion of full faith and credit beyond the explicit constitutional language. The implementing statute expands the constitutional mandate by requiring federal courts to recognize state judgments and by extending application of full faith and credit to the courts of United States possessions and territories. *See* Huron Holding Corp. v. Lincoln Mine Oper. Co., 312 U.S. 183 (1941); Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 n.1 (5th Cir. 1974); text accompanying notes 86-90 *supra.* Thus, courts have read into the implementing statute "a requirement that state courts extend full respect to the judgments of federal judicial tribunals within the states, in the absence of any such statutory command." Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 n.1 (5th Cir. 1974).

[93] Failure to require deference to the federal court mutuality requirement would allow subsequent state trial courts the power to disregard the conclusive effect of federally litigated issues if the state mutuality requirement so permits. *See* Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975). Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810 (Sup.Ct. 1969) provides an example of state court disregard of federally litigated issues. In *Hart,* a New York court employed its own mutuality rules to determine the effect of a judgment rendered by a federal district court in Texas. *See generally Multistate Litigation, supra* note 19. The *Hart* court reasoned that it had a duty to protect New York residents from "anacronistic" treatment of other jurisdictions. 61 Misc.2d at 44, 304 N.Y.S.2d at 813. Furthermore, the court reasoned that Texas had no legitimate interest in imposing its rules of collateral estoppel on New York residents. *Id.* The New York court considered the defendant's reliance on full faith and credit misplaced because the constitutional clause applied only to enforcement of judgments. *Id.*

The *Hart* court, however, failed to recognize several important considerations. First, although the initial judgment came from the state of Texas, a federal court rendered it. *See* American Airlines, Inc. v. United States, 418 F.2d 180 (5th Cir. 1969). Arguably, preservation of the integrity of a federal court judgment outweighs the questionable interest of a state in playing favorites with its residents. *See* Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 90 (5th Cir. 1977). Moreover, many courts consider res judicata effect to be part of a judgment, and the Supreme Court's application of full faith and credit to federal judgments clearly controls the issue. *See* Stoll v. Gottlieb, 305 U.S. 165 (1938); Embrey v. Palmer, 107 U.S. 3 (1882); *Multistate Litigation, supra* note 19, at 1592 n.14; *cf.* Vestal, *Res Judicata, supra* note 46, at 35-36 (res judicata principles rather than full faith and credit require subsequent state court to honor all res judicata rules of the rendering federal court). *But see* note 48 *supra.*

[94] Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir. 1975)(preserving the integrity of federal court judgments is important federal goal); Degnan, *supra* note 75, at 769. Whenever the interests of the United States and a state conflict, the state interest is always subordinate to the paramount United States interest. *See* Florida v. Mellon, 273 U.S. 12 (1927); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818); U.S. CONST. art. VI.

tion,[95] state courts must defer to the mutuality requirement of the rendering federal court. If state courts could alter the effect of federal court judgments by imposing their own mutuality requirements, federal courts would be an unreliable forum for final adjudication of issues.[96]

At present, federal courts have not settled the question of which mutuality requirement applies when a federal court litigant asserts a previously litigated issue from another federal court. When both federal courts acquire jurisdiction by reason of a federal question,[97] the mutuality requirement of the rendering federal court applies.[98] Rather than rationalizing this practice by full faith and credit law or principles of res judicata, the operation of the federal mutuality requirement enjoys legitimacy because both courts are arms of the same sovereignty.[99] When federal courts consider federal issues, no state can claim an interest sufficient to warrant frustration of national uniformity among federal courts.[100] The importance of uniform administration of federal courts,[101] however, justifies the application of the federal mutuality requirement regardless of how the federal

[95] Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 90 (5th Cir. 1977); Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir. 1975). *See generally* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

[96] Providing a reliable forum for final adjudication of claims benefits the diversity litigant who seeks to avoid any bias that might result from his out-of-state status. Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945); Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816). If a state court ignores a federal diversity judgment, such disregard would defeat the purpose of the diversity jurisdiction to have issues decided without regard to a litigant's domiciliary status. Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 n.6 (5th Cir. 1975).

[97] 28 U.S.C. §1331 (1970).

[98] *See, e.g.*, Artrip v. Califano, 569 F.2d 1298 (4th Cir. 1978); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3d Cir. 1950); Mathews v. New York Racing Ass'n, 193 F. Supp. 293 (S.D.N.Y. 1961). *See also* Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir. 1975). In effect, federal courts considering a federal question will apply their own rules of res judicata and collateral estoppel, which do not include a mutuality requirement. *See* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) (federal courts will apply their own rules of res judicata); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir. 1975) (federal law governs question whether prior federal court judgment based on federal question jurisdiction is res judicata in second federal court); text accompanying notes 67-73 *supra*.

[99] *See* Vestal, *Res Judicata, supra* note 46, at 36-37. In Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941), the defendant attempted to raise the same issue that he had raised unsuccessfully in previous federal litigation. The court reasoned that

> . . .the matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as head of the judicial system of the United States would compel it to do so because "they are many members yet but one body".

Id. at 86.

[100] *See* text accompanying notes 94 & 95 *supra*. *See also* Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir. 1975); La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1275 (2d Cir. 1974); In re Air Crash Disaster, 350 F. Supp. 757, 760-61 (S.D.Ohio 1972); *cf.* Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962)(determining the scope of its own judgments is one of a court's strongest policies).

[101] *See* text accompanying notes 37 & 99 *supra*.

courts acquire jurisdiction.[102] Two grounds exist for complying with the federal mutuality requirement when the rendering court sits in diversity. First, the full faith and credit clause demands that subsequent courts recognize prior judgments.[103] Moreover, because collateral estoppel rules comprise part of the judgment,[104] the applicable mutuality requirement fuses into the judgment.[105] Thus, the federal mutuality requirement necessarily accompanies a federal judgment. Alternatively, the federal interests in preserving the uniformity in administration and integrity of federal courts overrides the need for federal diversity courts to reach the same outcome as the courts of the forum state.[106] Under either the full faith and credit clause or the superior federal interest analysis, a federal court should apply federal collateral estoppel rules, including the mutuality requirement, to prior federal judgments whether the rendering court sat in diversity or considered a federal question.

Whether federal or state courts are involved, the position taken by the Restatement (Second) of Conflict of Laws, that a court considering previously litigated issues should defer to the rendering court's mutuality requirement[107] exemplifies sound policy. If a state court renders the first judgment, subsequent state and federal courts should apply the mutuality requirement of the rendering state court.[108] When the rendering court is federal, subsequent state and federal courts should heed the federal mutuality requirement regardless of the grounds on which the rendering court acquired jurisdiction.[109] Because assessing the legitimate interests of competing sovereignties is essentially a political function, resolution of the mutuality conflict deserves legislative attention.[110] Nevertheless, until all

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[102] Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977); In re Air Crash Disaster, 350 F. Supp. 757, 760-61 (S.D.Ohio 1972).

[103] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970); text accompanying notes 46 & 84-89 *supra*; *see* American Mannex Corp. v. Rozands, 462 F.2d 688, 689 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) (application of full faith and credit governed by federal law). *See also* text accompanying notes 39-44 *supra*.

[104] *See Multistate Litigation*, *supra* note 19, at 1592 n.14.

[105] *See* text accompanying note 47 *supra*. *See also* Eckerson v. Tanney, 235 F. 415 (S.D.N.Y. 1916), *aff'd mem.* 243 F. 1007 (2d Cir. 1917).

[106] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), provides strong support for the proposition that the federal interest in preserving the uniformity in administration and integrity of federal courts overrides the need for federal diversity courts to reach the same outcome as the courts of the forum state. *Id.* at 537; *see* American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir. 1972); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962); *Res Judicata in the Federal Courts*, *supra* note 65, at 100-02. *See generally* Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 449 (1962). Determining the preclusive effect of federally adjudicated issues on the basis of various state mutuality requirements thwarts the important federal interest in uniformity in the federal judiciary, *see* text accompanying notes 37 & 99 *supra*, and threatens federal court integrity by subjecting federal judgments to state court control. *See* text accompanying note 93 *supra*.

[107] *See* text accompanying note 28 *supra*.

[108] *See* text accompanying notes 45, 60, 75 & 76 *supra*.

[109] *See* text accompanying notes 91, 97 & 102 *supra*.

[110] *See* Currie, *Conflict of Laws*, *supra* note 2, at 176; Currie, *Judgments*, *supra* note 39,

jurisdictions abolish mutuality requirements,[111] or until Congress takes action, the federal courts should set an example that state courts may emulate by giving previously litigated issues the same effect that those issues would receive in the rendering jurisdiction.[112]

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at 90. To better represent all situations, Professor Degnan has suggested the following language for possible legislative action:

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

Degnan, *supra* note 75, at 773.

[111] *See* text accompanying note 20 *supra* (trend toward abolition of mutuality). *But see* text accompanying note 53 *supra* (desirability of mutuality in mass tort situations).

[112] *See* Traynor, *supra* note 81, at 667.