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. Conflict of laws rules preserve comity in such situations by determining which jurisdiction's interest shall prevail. 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, some attach the precondition that both parties in the subsequent litigation be bound by the prior judgment. Because many jurisdictions do not require this precondition of "mutuality," 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, a valid and final judgment is conclusive as to all essential issues of fact actually litigated in a prior proceeding. Collateral estoppel first received application in 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. Collateral estoppel is distinguishable from res judicatal in that with
collateral estoppel, the issues and facts actually litigated, rather than the
prior judgment, stand as a barrier to
relitigation. Nevertheless, both res
judicata and collateral estoppel are rules of justice and
fairness, designed
to add certainty and stability to the judicial system by generating public
respect for the courts and by conserving judicial time and resources.
In addition, by reducing litigation expenses, harassing lawsuits, and opportunities for conflicting judicial declarations, res judicata and collateral estoppel serve private interests.

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, 488 F.2d 1281 (1st Cir.), cert. denied, 419 U.S. 1038 (1974); RESTATEMENT OF
JUDICIAL CONFLICTS § 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.

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.

Conclusive determinations in law suits provide a basis for planning future conduct. See
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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. Moreover, the determination of the issues must have been essential to the prior judgment. Many jurisdictions also require satisfaction of the mutuality requirement before operation of collateral estoppel principles. 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. 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. 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. In recent years, however, widespread dissatis-
faction among state and federal courts with the mutuality test has led several courts to abandon the requirement. These courts premise their rejection of mutuality upon the need to improve judicial efficiency by reducing litigation of previously resolved issues. Arguably, retention of mutuality strains judicial resources by permitting an individual to relitigate an issue as many times as he has adversaries. 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.


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 efficiency 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).

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

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. Bruzowski 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. As a result of this trend toward abandonment of the mutuality requirement, the application of mutuality by different jurisdictions may vary greatly.

Because mutuality is not yet a "dead letter" in every jurisdiction, 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, subject to constitutional limitations. Although the Restatement reflects the weight of authority, several jurisdictions do not defer to the mutuality requirement of the rendering jurisdiction. The inconsistent practices of different jurisdictions thus create a dilemma for the multi-state litigant who faces conflicting mutuality requirements but...
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. Pursuant to its authority to prescribe the manner of proof for such records and proceedings, 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. 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. 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. 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.

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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21 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.

22 Id.

23 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. Muehlberger, 340 U.S. 581, 584 (1951); Milwaukee County v. M. E. White Co., 296 U.S. 268, 273 (1935).

24 Johnson v. Muehlberger, 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].

25 Prior to the adoption of the Constitution, individual states were free to exercise their independent 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).

26 See Johnson v. Muehlberger, 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. These critics assert that the statute is vastly oversimplified and was drafted only to ensure that simple money judgments could be enforced in any state. 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. 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 submission severely threatens the preservation of a centralized government. In addition, crit-
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, includ-
ing conflicts law. \textsuperscript{2} Because of differing concepts of the full and fair oppor-
tunity test that result from the discretion exercised by trial judges,\textsuperscript{3} 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. \textsuperscript{4}

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. \textsuperscript{5} 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 \textit{full} faith and credit. \textsuperscript{6} 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 pro-
vides additional support for the Restatement position. \textsuperscript{7} Furthermore, if

\textsuperscript{2} See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941); Currie, \textit{Conflict of Laws}, supra note 2, at 178; Ehrenzweig, \textit{The Lex Fori - Basic Rule in the Conflict of Laws}, 58 Mich. L. Rev. 637 (1960); Hancock, \textit{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 substan-
tive or procedural. See Central Vt. Ry. v. White, 238 U.S. 507 (1915); Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971).

\textsuperscript{3} See text accompanying note 24 supra.

\textsuperscript{4} See Carrington, supra note 31, at 385; \textit{Collateral Estoppel}, supra note 8, at 540-41.

\textsuperscript{5} See, e.g., Riley v. New York Trust Co., 315 U.S. 343 (1941); Ehrenzweig, supra note 2, at §66; Goodrich & Scolnik, supra note 2, at §217.

\textsuperscript{6} See Tindel v. Celebrezze, 210 F. Supp. 912, 915 (S. D.Cal. 1962); note 32 supra. See \textit{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 165. The second court to consider the issue has no discretion; the entire body of law as
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 states 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 relitigate 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 865 (1959). 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 Wallin 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. 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. In addition, when litigants can anticipate the consequences of litigation, forum shopping and collusion in multi-state litigation will be reduced.

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. 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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2 See Carrington, supra note 31, at 385; Multistate Litigation, supra note 18, at 1599.
3 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); Multistate 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 strenuously those cases where several plaintiffs join together and potential losses are greater than in a suit brought by a single plaintiff.

4 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).
5 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. The critics aver that the Constitution requires subsequent jurisdictions to accept the rendering state's concept of preclusion as a minimum standard. Where that view is adopted, the precluded party receives a full and fair opportunity to litigate the issue in the original case. Furthermore, Restatement critics contend that the foreign judgment thereby has broad effect in a manner which is not degrading to the rendering forum. 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. The implementing statute requires that foreign judgments receive the same full faith and credit, "no less and no more." In addition, fairness demands that a party contemplating litigation be able to foresee the consequences of a judgment. A party can predict the consequences of a judgment only by realiz-

58 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.
56 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.
55 See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 133 (1912); Carrington, supra 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 withdrawal. 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 1029; 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.
45 See Carrington, supra note 31, at 385.
ing the extent of applicable mutuality requirements before trial.\textsuperscript{44}

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.\textsuperscript{45} Federal courts, however, have demonstrated a greater willingness to abolish the requirement of mutuality than have state courts.\textsuperscript{46} 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.\textsuperscript{47} Federal courts justify the demise of mutuality by noting

\textsuperscript{44} See id. See also Zdanok v. Glidden Co., 327 F.2d 944, 955-56 (2d Cir. 1964); Currie, \textit{Mutuality}, supra note 19, at 285-89; note 53 supra.

\textsuperscript{45} See Comment, \textit{Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two}, 51 \textit{CORNELL L.Q.} 96, 106 (1965)[hereinafter cited as \textit{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).


While it is true that the general rule requires that there be identity of parties to invoke the doctrine of \textit{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).

\textsuperscript{47} 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).

the resultant orderliness and time savings in judicial administration. The federal courts recognize, however, that overriding considerations of fairness to a litigant occasionally may warrant a different result. 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.

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. Whenever possible, federal courts have looked to the mutuality requirement of the rendering court. 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.

Restatement (Second) of Judgments §68 (Tent. Draft No. 4, 1977); Restatement of Judgments §68 (1942); Scott, supra note 7, at 4-5.


7 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.

7 “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.


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, 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 and irrespective of the grounds of federal jurisdiction. Nevertheless, most federal courts exercising diversity jurisdiction engage in an *Erie* analysis to determine their choice of mutuality requirement. These courts consider the application of collateral estoppel to be "outcome determinative" under the Rules of Decision Act as construed in *Erie R.R. v. Tompkins.* 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. 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." Since Congress explicitly provided otherwise in the implementing statute of the full faith and credit clause, an *Erie* analysis is misplaced in considerations of collateral estoppel. As in the case of a subsequent state court action, the Constitution

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


9 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. Levine, 574 F.2d 46 (2d Cir. 1978).


11 See, e.g., Gerard 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.


13 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 the "*Guaranty Trust Co. would seem to require application of the state rule.*" 453 F.2d at 1181; see text accompanying note 73 supra.

14 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 Texas L. Rev. 657, 666 (1959) [hereinafter cited as Traynor].


16 See text accompanying notes 33 & 34 supra.

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. Although the Constitution does not state expressly that federal courts must follow the full faith and credit mandate, these courts uniformly follow the constitutional requirement. Furthermore, the implementing statute addresses itself to “every court within the United States”\textsuperscript{8}. 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”\textsuperscript{9}. Thus, Congress may have intended to bring the federal courts within the statute’s focus.\textsuperscript{10}

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-

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 \textit{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 \textit{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 Klaxon Court addressed a conflicts issue in light of \textit{Erie}, the issue was a conflict over which state’s substantive law regarding mandatory 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. Armbrrecht, 327 U.S. 392 (1946).

\textsuperscript{10} See id.

\textsuperscript{11} See id.

\textsuperscript{12} See id.

\textsuperscript{13} 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. 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. Moreover, the importance of preserving the integrity of federal court judgments requires deference to the federal court mutuality requirement. Out of respect for the federal courts and to further the policy of deterring endless relitiga-

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1 See id. at 755; Res Judicata in the Federal Courts, supra note 65, at 107-10.
2 See Stoll v. Gottlieb, 305 U.S. 165, 170 (1938); Embrey 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).
3 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 "anachronistic" 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.
4 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 1892 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).
5 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. 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, 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.

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, the mutuality requirement of the rendering federal court applies. 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. When federal courts consider federal issues, no state can claim an interest sufficient to warrant frustration of national uniformity among federal courts. The importance of uniform administration of federal courts, however, justifies the application of the federal mutuality requirement regardless of how the federal

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10 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). See 28 U.S.C. §1331 (1970).

11 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.

12 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.

13 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, 1276 (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).

14 See text accompanying notes 37 & 99 supra.
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. Moreover, because collateral estoppel rules comprise part of the judgment, the applicable mutuality requirement fuses into the judgment. 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. 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 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. 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. Because assessing the legitimate interests of competing sovereignties is essentially a political function, resolution of the mutuality conflict deserves legislative attention. Nevertheless, until all

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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 1582 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. Hotinger, 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, 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.

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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.

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).

See Traynor, supra note 81, at 667.