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GENE R. SHREVE

Judgments From a Choice-of-Law Perspective

Case developments in the judgments area most likely to interest the conflicts community concern the preclusive effect of state judgments in sister-state and federal courts. They involve questions whether a state court may give greater force to a sister-state judgment than it would have where rendered, and whether state proceedings have preclusive weight in certain federal cases. Before examining developments, some background might be useful.

Just as laws from different jurisdictions may conflict on points of tort or contract, so may they conflict on points within the law of judgments. For example, state jurisdictions are divided on whether to permit nonmutual issue preclusion, and on whether claim preclusion should prevent successive lawsuits for property damage and personal injury claims arising out of the same accident (claim splitting). In one important respect, however, the dynamics of decision regarding judgments differ from those for choice-of-law generally. Far more often, federal law denies courts the authority to choose between conflicting preclusion laws. The following situations illustrate this difference.

First consider a choice-of-law setting uncomplicated by a prior adjudication. A state judge's choice between, say, the tort law of her own state and that of a sister state will often be unrestrained by federal law.¹ The judge is thus free to honor an affirmative defense drawn from her own state's law to limit the ability of a local manufacturer. But change the situation to one involving a conflict of preclusion rules and the judge often loses flexibility. In this setting,

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1. Federal constitutional and statutory law is unlikely to restrain our judge here, so long as neither choice imposes unfair surprise and both states bear the minimal relationship to the parties and controversy necessary to make them interested in having their laws applied. See Weinberg, "Choice of Law and Minimal Scrutiny," 49 *U. Chi. L. Rev.* 440 (1982); Shreve, "Interest Analysis as Constitutional Law," 48 *Ohio St. L.J.* 51 (1987). Whether state courts should or will retain so much autonomy in the future has become a popular subject for speculation. E.g., Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 *Colum. L. Rev.* 249 (1992); Trautman, "Toward Federalizing Choice of Law," 70 *Tex. L. Rev.* 1715 (1992); Shreve, "Conflicts Law—State or Federal?," 68 *Ind. L. J.* — (1993) (forthcoming).

federal full faith and credit law² has long been read to require states to give as much force to sister-state judgments as they would have where rendered.³

An example would be where plaintiff sues in State Y for personal injury, and defendant bases an affirmative defense of claim preclusion on a prior judgment from State X. Assume that plaintiff's suit against defendant in State X arose from the same accident, but was for property damage only. Assume further that State Y law permits plaintiff to split property and personal injury claims into two lawsuits, but the claim preclusion law of State X blocks the second suit. The force of federal full faith and credit law is such that, even if plaintiff is a citizen of State Y (or for some other reason the forum has an interest in providing the plaintiff with an opportunity to litigate the personal injury claim), a Y state court may not aid plaintiff through local preclusion law. The rule is that State Y must be as aggressive in enforcing a judgment of State X as a court of State X would be.

The converse of this situation raises a different and less settled question: whether a state court may give a sister-state judgment *greater* preclusive effect than it would have where rendered. For example, if a state court would use one of its own judgments to bar a successive action for personal injury, may it do the same with a judgment from a sister state that permits successive actions? Or may a court give the nonmutual, issue-preclusive effect customary under local law to a judgment from a state still adhering to the mutuality doctrine?⁴

Jurisdictions (a large majority) that have enhanced the effect of their own judgments by abolishing the mutuality doctrine (or by barring claim splitting) clearly have an interest in applying their own preclusion doctrine even to judgments originating in other states. The stimulus for such greater preclusion is in part to conserve the forum's judicial resources. Wherever the source of the judgment, litigation permitted in the forum through relaxation of local preclusion doctrine dissipates those resources.

Yet federal law arguably limits the power of state judges to favor more preclusive local doctrine when enforcing a sister-state

2. U.S. Const. art. IV, sec. 1 (Full Faith and Credit Clause); 28 U.S.C. sec. 1738 (Full Faith and Credit Statute). Since both bear upon state litigation, and in about the same way, the two provisions usually can be collapsed into "the full faith and credit requirement." Casad, "Intersystem Issue Preclusion and the Restatement (Second) of Judgments," 66 *Cornell L. Rev.* 510, 520 (1981).

3. See, e.g., *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691 (1982).

4. The reasoning of the mutuality doctrine is that, because strangers to the original action ran no risk of being bound by it, they cannot use it to bind original parties. Nonmutual issue preclusion rejects the mutuality doctrine. See generally G. Shreve & P. Raven-Hansen, *Understanding Civil Procedure* sec. 113[B] (1989).

judgment. It has been suggested that, in some cases at least, the application of preclusion law different from that where judgment was rendered might subject one of the original parties to prejudicial surprise in violation of due process.⁵ Of broader application may be the suggestion that the obligation on states under federal full faith and credit law is not merely to give as much preclusive effect to sister-state judgments as they would have where rendered but to give as much *and no more*.

The greater-preclusion question has attracted attention within the legal academy,⁶ but it has not arisen in many reported cases. The leading decisions for the proposition that the enforcement forum can substitute its own more expansive preclusion doctrine are *Finley v. Kesling*⁷ and *Hart v. American Airlines*.⁸ An Illinois appellate court in *Finley* used Illinois doctrine to enlarge the preclusive effect of an Indiana judgment. (Illinois permitted nonmutual issue preclusion, while Indiana adhered to the mutuality doctrine.) Federal full faith and credit law did not require greater preclusive effect under local doctrine, reasoned *Finley*, but it did not prevent it either. Treating a Texas federal diversity judgment as the equivalent of one from a Texas state court, *Hart* observed: "the state of Texas has no legitimate interest in imposing its rules on collateral estoppel upon these New York residents . . ."⁹ *Finley* and *Hart* both stressed the importance to the forum of benefits secured through abolition of the mutuality doctrine. Neither court was willing to sacrifice them by deferring to the preclusion law of the place where judgment was rendered.

Recently, however, state decisions in Delaware and New York have moved in the opposite direction. In *Columbia Casualty Co. v. Playtex, Inc.*,¹⁰ and in *Harvey v. Amateur Hockey Ass'n of the United States*,¹¹ courts refused to augment by local doctrine the preclusive effect of judgments rendered elsewhere. *Columbia* is significant because the Delaware Supreme Court flatly rejected the premise upon which *Finley* rests.¹² *Harvey* did not refer to full-

5. E.g., Atwood, "State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit," 58 *Ind. L.J.* 59, 70 (1982).

6. E.g., D. Vernon, W. Weinberg, W. Reynolds, & W. Richman, *Conflict of Laws: Materials and Problems* 587-592 (1990).

7. 433 N.E.2d 1112 (Ill. App. 1982).

8. 304 N.Y.S.2d 810 (App. Special Term 1969).

9. 304 N.Y.S.2d at 813.

10. 584 A.2d 1214 (Del. Supr. Ct. 1991).

11. 567 N.Y.2d 44 (A. D. 1 Dept. 1991).

12. To the extent . . . that the mutuality requirement may be viewed as having its origin in Kansas decisional law, the interpretation of the full faith and credit clause advanced by *Columbia* would result in Delaware giving the judgments of a sister state greater preclusive effect than they would have in the rendering jurisdiction. * * * This result is clearly at variance with the purpose and spirit of the full faith and credit clause.

faith-and-credit law; yet, in applying Michigan law to limit the preclusive effect of a Michigan judgment, *Harvey* may have undercut *Hart* (another intermediate New York appellate decision).

Whatever doubts still attend the issue in state court, it now seems the *federal* judges may not give greater preclusive effect to state judgments than they would have where rendered.¹³ But, if the compulsion on federal judges to honor state judgments is stronger in this respect, it is potentially weaker in another. Congressional power to relax a state's duty to honor sister-state judgments may be limited because that duty rests in part on the Full Faith and Credit Clause of the Constitution. In contrast, the Constitution places little if any obligation on federal courts to honor state judgments. In given situations, then, Congress can use its authority to shield federal litigation from the preclusive effect of state proceedings—by suspending the Federal Full Faith and Credit Statute (section 1738),¹⁴ and by preempting authority the federal judiciary might otherwise use to give state determinations preclusive effect under federal doctrine.¹⁵

This is why inquiries about the preclusive effect of state proceedings on subsequent federal litigation are dominated by specific examinations of statutory text and legislative history. Two recent Supreme Court decisions offer examples. In *Astoria Federal Savings v. Solimino*,¹⁶ the Court held that a state administrative finding

Columbia, 584 A.2d at 1218.

13. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 383, 386 (1985); *Parsons Steel v. First Alabama Bank*, 474 U.S. 518, 525 (1986). Both decisions base this duty on the Federal Full Faith and Credit Statute, 28 U.S.C. 1738. For extended discussion of *Marrese* and the greater-preclusion question in general, see Shreve, "Preclusion and Federal Choice of Law," 64 *Tex. L. Rev.* 1209 (1986). Since state judges too are subject to this statute, *Marrese* and *Parsons Steel* raise some doubt about the continuing authority of *Finley* and *Hart*. However, the Supreme Court has not settled the matter. L. Teply & R. Whitten, *Civil Procedure* 705 (1991).

14. An example frequently cited is federal district court relief under the habeas corpus statute. Currie, "Res Judicata: The Neglected Defense," 45 *U. Chi. L. Ref.* 317, 330, 333 (1978); P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *The Federal Courts and the Federal System* 1487 (3rd ed. 1988). One commentator sees the current focus on express or implied statutory exceptions to sec. 1738 as misplaced, and would assign a greater role in the process to federal common law. Burbank, "Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach," 71 *Cornell L. Rev.* 733 830 (1986).

15. See *University of Tennessee v. Elliot*, 478 U.S. 788 (1986). The Supreme Court began by ruling that sec. 1738 did not make state administrative determinations issue-preclusive in federal litigation. The Court then ruled that federal doctrine could give the determinations preclusive effect regarding some of plaintiff's statutory claims, but not plaintiff's claim under Title VII. Concerning the latter, Congress had not left as much room for the play of federal preclusion doctrine. An illuminating discussion of this case appears in Silver, "In Lieu of Preclusion: Recounselling Administrative Decisionmaking and Federal Civil Rights Claims," 65 *Ind. L. J.* 367 (1990).

16. 111 S. Ct. 2166 (1991).

of no discrimination did not preclude plaintiff from litigating the same issue in a federal case brought under the Federal Age Discrimination in Employment Act. State administrative rulings were not covered by section 1738, stated the Court, and the Age Act provided an unsuitable environment for supplementing section 1738 with federal common law.¹⁷ On the other hand, the Bankruptcy Code posed no obstacle to the Court in *Grogan v. Gardner*.¹⁸ It held that prior fraud adjudications had issue-preclusive effect on fraud dischargeability issues in federal bankruptcy proceedings.¹⁹

So far in this decade, there have been fewer concrete developments on two other fronts: choice of preclusion law for federal diversity judgments and for foreign-country judgments. The Supreme Court has continued to leave open the question whether the effect of federal diversity judgments is to be measured by state or federal law, and cases still go both ways.²⁰ Sources of law for determining the force of foreign-country judgments also remain uncertain.²¹

17. Refusal to give issue preclusive effect to the state administrative determination "comports with the broader scheme of the Age Act and the provisions for its enforcement." 111 S. Ct. at 2172.

18. 111 S. Ct. 654 (1991).

19. "We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to sec. 523(a)." 111 S. Ct. at 658 n.11. Since the prior fraud adjudications were in federal court, the Court had no occasion to refer to sec. 1738. Presumably, sec. 1738 would function to make fraud adjudications from state courts as eligible for issue-preclusion treatment. See Markell, 1 *Bankruptcy Briefs* 4 (Spring, 1991).

20. E.g., compare *American Motorists Ins. Co. v. Gen. Hoist Corp.*, 59 U.S.L.W. 2648 (U.S. Ct. Ap. 10th Cir. 1991), *Phoenix Canada Oil Co. v. Texaco, Inc.*, 749 F. Supp. 525 (S.D.N.Y. 1990) (favoring federal doctrine with *Lane v. Sullivan*, 900 F.2d 1247 (8th Cir. 1990), cert. den. 111 S. Ct. 134 (1991); *Trepanier v. Getting Oragnized, Inc.*, 583 A.2d 583 (Vt. 1990) (favoring state doctrine).

21. Tepley & Whitten, *supra* n.13, at 718-719. Cf. G. Born & D. Westin, *International Civil Litigation in United States Courts* 564 (1989) ("There is presently no uniform national standard governing the enforcement of judgments rendered by foreign courts in the United States."). See generally Brand, "Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance," 67 *Notre Dame L. Rev.* 253 (1991).