CIVIL PROCEDURE

CASES, PROBLEMS, AND EXERCISES

Fourth Edition

CHAPTER 13

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CHAPTER 13

THE EFFECT OF A JUDGMENT

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A. ENFORCING A JUDGMENT

In your very first case after being sworn in as an attorney, you represent a party who writes custom computer software for business clients. Your client claims it wrote a special program for D, designed to meet D's specific needs. D, however, has refused to pay for the software, prompting your suit. After a hard-fought trial, you are delighted when the court enters judgment in your client's favor.

So what happens next? The answer turns in part on the nature of the judgment. If the court entered an order of specific performance, or any other form of equitable remedy, there is little you need to do. An equitable order is a direct command to the defendant to do or refrain from doing something. If the defendant fails to comply, you can ask the court to hold the defendant in contempt for failing to comply with the court order.

But what if the judgment is for money damages? Unlike an equitable order, an adjudication of damages does not order the defendant to pay. Instead, it simply represents a finding by the court that, in our example, D owes your client $100,000. But you already *knew* that when you brought the case. What good does it do you to have the judge agree with your assessment?

The value of a money judgment is that it enables you to enlist the power of government to help you collect the debt. Most states provide a number of ways in which a judgment victor can enlist the help of the state to collect what he or she is owed. The three most important methods of collection are execution, garnishment, and the judgment lien.

Execution involves a state official—typically the sheriff—seizing certain property of the judgment loser and selling it at a judicial sale. The proceeds of that sale are then paid first to creditors with mortgages, security interests, or other priority claims on the property, and then to the judgment victor in satisfaction of the judgment. The excess, if any, is returned to the judgment loser. However, not all property is subject to execution. State law provides for certain *exemptions*. For example, in most states the debtor is entitled to keep a certain amount of personal clothing, and may be entitled to keep all or part of the value of her car and principal residence.

Garnishment is in some ways analogous to execution. The main difference is that the property being seized is a debt owed to the judgment loser. A judgment victor can use garnishment to seize wages, as well as bank and other accounts. The victor effects the garnishment by serving it on the person who owes the debt, after which the person served is obligated to pay the debt to the victor rather than the judgment loser. As with execution, however, the law limits what the judgment victor can obtain. Federal law, for example, places strict limits on the percentage of an employee's wages which may be garnished.

In most states, entry of a judgment creates a *judgment lien* on all real property located in the county where the rendering court sits. The judgment lien is not a collection device in and of itself, but works in conjunction with the process of execution. This lien gives the judgment victor an interest analogous to a mortgage in that property. Therefore, if the defendant tries to convey or mortgage that real property to someone else, the judgment victor can demand that his claim be satisfied. Similarly, if the judgment victor later executes on that real property, the victor is entitled to have his claim satisfied from the proceeds of the sale prior to the claims of most creditors who acquired an interest in the property after the judgment lien was created. However, mortgagees and other secured creditors who recorded their interests prior to the judgment generally get paid before the judgment victor.

Federal Rule 62(a) generally requires a judgment victor to wait 14 days until she attempts to enforce her judgment. The Rule applies not only to execution and garnishment, but also to attempts to enforce equitable orders such as specific performance. The delay gives the losing party a chance to move for a new trial or judgment as a matter of law, or to appeal. However, as a party has 28 days to move for new trial or judgment as a matter of law, and 30 days to appeal, it is possible collection efforts will begin before the judgment loser files the motion or appeal. Rule 62(b) accordingly allows the court to stay efforts to enforce the judgment.

What happens if the judgment victor wants to use a judgment to execute on property or garnish a debt located in a different state? That situation presents additional complications, and is discussed in Part F of this Chapter.

E. PARTIES AFFECTED BY CLAIM AND ISSUE PRECLUSION

To this juncture, our discussion of claim preclusion and issue preclusion has assumed the parties in Case One and Case Two are the same. This section abandons that assumption, and explores the extent to which preclusion can apply when at least one of the parties was not in Case One. The analysis differs significantly depending on whether the non-party

in Case One is the person to be *bound* by preclusion, or whether that non-party is trying to take advantage of a victory in Case One.

INTRODUCTORY PROBLEM

Greasy Spoon operates a restaurant in the Southpark Mall. The lease for the store allows Landlord to charge Greasy for the cost of all "maintenance" made necessary by Greasy's operations. Because Greasy specializes in high-fat, deep-fried food, its kitchen emits a great deal of smoke and grease spatters. Several customers have complained about the cloud of smoke and the slippery floors. Landlord finds it must clean the mall space near Greasy's store at least once a week.

When Landlord sends Greasy a bill for this cleanup, Greasy refuses to pay. Landlord therefore sues Greasy in state court for the cleanup costs. Greasy argues that because cleaning is not "maintenance," the maintenance cost clause does not apply. The jury renders a general verdict for Landlord.

Shortly after this lawsuit, Greasy assigns the lease to Splatterin' Suet, a national chain of restaurants. Splatterin' commences operations in the space. Because Splatterin's cooking methods are remarkably like those employed by Greasy, Landlord finds weekly cleanups are still necessary. When Splatterin' refuses to pay, Landlord commences another lawsuit against the new tenant.

Like Greasy before it, Splatterin' argues cleaning is not maintenance. Landlord argues Splatterin' is precluded by the earlier case from making this argument. Is Landlord correct?

1. WHO IS BOUND BY AN ADVERSE JUDGMENT?

Litigation between two people can affect the rights of third parties. Impairment is often practical in nature, such as the effect on residents of a neighborhood when litigation between two parties results in an order requiring changes to roads or other infrastructure. Is it also possible for a judgment to effect a *legal* impairment of a non-party's rights, by precluding that party from litigating claims or issues resolved in the first case? As the following case indicates, the answer is "no" . . . with one important, but somewhat amorphous, exception.

RICHARDS V. JEFFERSON COUNTY

517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)

JUSTICE STEVENS delivered the opinion of the Court. . . .

I

Jason Richards and Fannie Hill (petitioners) are privately employed in Jefferson County, Alabama. In 1991 they filed a complaint in the Federal District Court challenging the validity of the occupation tax imposed by Jefferson County Ordinance 1120, which had been adopted in 1987. That

action was dismissed as barred by the Tax Injunction Act, 28 U.S.C. § 1341. They then commenced this action in the Circuit Court of Jefferson County.

Petitioners represent a class of all nonfederal employees subject to the county's tax. Petitioners alleged that the tax, which contains a lengthy list of exemptions, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and similar provisions of the Alabama Constitution. . . .

The county moved for summary judgment on the ground that petitioners' claims were barred by a prior adjudication of the tax in an earlier action brought by the acting director of finance for the city of Birmingham and the city itself. That earlier action had been consolidated for trial with a separate suit brought by three county taxpayers, and the Supreme Court of Alabama upheld the tax in the resulting appeal. See *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988). After examining the course of this prior litigation, the trial court granted the county's motion for summary judgment as to the state constitutional claims, but refused to do so as to the federal claims because they had not been decided by either the trial court or the Alabama Supreme Court in *Bedingfield*.

On appeal, the county argued that the federal claims as well as the state claims were barred by the adjudication in Bedingfield. The Alabama Supreme Court agreed. The majority opinion noted that in Alabama, as in most States, a prior judgment on the merits rendered by a court of competent jurisdiction precludes the relitigation of a claim if there is a "substantial identity of the parties" and if the "same cause of action" is presented in both suits. 662 So.2d 1127, 1128 (1995). Moreover, the court explained, the prior judgment is generally " 'res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.' " Ibid.

The Alabama Supreme Court concluded that even though the opinion in *Bedingfield* did not mention any federal issue, the judgment in that case met these requirements. The court gave three reasons for this conclusion: (1) The complaints in the earlier case had alleged that the county tax violated the Equal Protection Clause of the Fourteenth Amendment and an equal protection issue had been argued in the appellate briefs; (2) the taxpayers in *Bedingfield* adequately represented petitioners because their respective interests were "essentially identical"; and (3) in pledging tax revenues and issuing bonds in 1989, the county and the intervenor "could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the Bedingfield plaintiffs," 662 So.2d, at 1130. . . .

We now conclude that the State Supreme Court's holding that petitioners are bound by the adjudication in *Bedingfield* deprived them of the due process of law guaranteed by the Fourteenth Amendment.

II

State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475 (1918). We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is "fundamental in character." *Id.*, at 476.

The limits on a state court's power to develop estoppel rules reflect the general consensus " 'in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). . . . This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' " *Martin v. Wilks*, 490 U.S. 755, 761–762 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.*, at 762.

Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust. Moreover, although there are clearly constitutional limits on the "privity" exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.

In addition, as we explained in *Wilks*:

> We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry v. Lee*, 311 U.S. 32 (1940) "class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same); *Montana v. United States*, 440 U.S. 147, 154–155 (1979) (control of litigation on behalf of one of the parties in the litigation). . . .

Here, the Alabama Supreme Court concluded that res judicata applied because petitioners were adequately represented in the *Bedingfield* action. We now consider the propriety of that determination.

III

We begin by noting that the parties to the *Bedingfield* case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights. That failure is troubling because, as we explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id*., at 314. Nevertheless, respondents ask us to excuse the lack of notice on the ground that petitioners, as the Alabama Supreme Court concluded, were adequately represented in *Bedingfield*.[5]

Our answer is informed by our decision in *Hansberry v. Lee*, 311 U.S., at 40–41. [As *Hansberry* is set out in Chapter 8 of these electronic materials, the Court's discussion of the case is omitted.] . . . [We concluded] that because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the doctrine of representation of absent parties in a class suit could not support the decree.

Even assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice, it may not be read to permit the application of res judicata here. Our opinion explained that a prior proceeding, to have binding effect on absent parties, would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." 311 U.S., at 43. It is plain that the *Bedingfield* action, like the prior proceeding in *Hansberry* itself, does not fit such a description.

The Alabama Supreme Court concluded that the "*taxpayers* in the *Bedingfield* action adequately represented the interests of the taxpayers here," 662 So.2d, at 1130 (emphasis added), but the three county taxpayers who were parties in *Bedingfield* did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties. That the acting director of finance for the city of Birmingham also sued in his capacity as both an individual taxpayer and a public official does not change the analysis. Even if we were to assume, as the Alabama Supreme Court did not, that by suing in his official capacity, the finance director intended to represent the pecuniary interests of all city taxpayers, and not simply the corporate interests of the city itself, he did not purport to represent the pecuniary interests of county taxpayers like petitioners.[6]

---

[5] Of course, mere notice may not suffice to preserve one's right to be heard in a case such as the one before us. The general rule is that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934).

[6] We need not decide here whether public officials are always constitutionally adequate representatives of all persons over whom they have jurisdiction when, as here, the underlying right is personal in nature.

As a result, there is no reason to suppose that the *Bedingfield* court took care to protect the interests of petitioners in the manner suggested in *Hansberry*. Nor is there any reason to suppose that the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in *Bedingfield* somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be "to attribute to them a power that it cannot be said that they had assumed to exercise." *Hansberry*, 311 U.S., at 46.

Because petitioners and the *Bedingfield* litigants are best described as mere "strangers" to one another, we are unable to conclude that the *Bedingfield* plaintiffs provided representation sufficient to make up for the fact that petitioners neither participated in, see *Montana v. United States*, 440 U.S. 147 (1979), nor had the opportunity to participate in, the *Bedingfield* action. Accordingly, due process prevents the former from being bound by the latter's judgment. . . .

V

Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property. Accordingly, the judgment of the Alabama Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Privity

As the Court in *Richards* acknowledges, it has long been recognized that a judgment in a case may bind a non-party who is in privity with one of the named parties to that case. If a person is in privity, both claim and issue preclusion apply in full, just as if the person had been a party to Case One. Privity survives the sort of due process challenge involved in *Richards* as long as the person's interests were adequately represented by one of the parties in the earlier case.

But what does the Court mean by "interest" and "adequate representation?" In a proper class action, it is easy to see how the parties are in privity. The legal claims of all members of the class are actually presented to the court, and the court directly rules on each claim. What other sorts of relationships can result in privity? On this question there are basically two camps: courts that adhere to the *traditional* view, and those that follow a *functional* view.

Traditional view. The traditional view recognizes privity only when the party in Case Two is litigating essentially the same legal right as was

litigated in Case One. At a minimum, there must be a legal relationship between the parties, such as a contract or guardianship. However, not all legal relationships will satisfy the test. Two people are in privity under the traditional approach only if they have *mutual* or *successive* interests in the same legal right.

Successive interests are relatively easy to identify. Suppose X sues Y for a missed payment on a note. X loses. If X conveys the note to Z, Z will also be bound by claim preclusion from suing Y on that payment, as X and Z have successive interests. Moreover, although Z is not barred by claim preclusion from suing for later payments, any issues decided by the court in the first case that are also relevant in the second (for example, a finding that the note is invalid) will also be binding on Z. In fact, the real property concept of easements and other interests "running with the land" is at its core grounded in notions of "successive interest" privity.

Mutual interests are more difficult to define. Here, the key is to look for a shared interest in the same thing. A landlord and a tenant have a mutual interest in the leased premises, and will therefore be in privity with respect to two cases involving that leased premises. Co-owners of property, however, do *not* have a mutual interest. Each co-owner owns a specific (even if undivided) separate share of the property. Similarly, partners in a partnership do not have a mutual interest in partnership property.

The Eighth Circuit's opinion in *Williams v. Marlar*, 267 F.3d 749 (8th Cir. 2001), provides a good example of how the traditional rule operates. In that case, a debtor transferred real estate to his son for ten dollars plus the "love and affection" between the two. During divorce proceedings, the debtor's soon-to-be ex-wife challenged the sale as a fraudulent conveyance (a fraudulent conveyance is a transfer of property by a debtor with the intent to prevent creditors from obtaining the property). The court found for the debtor. After this judgment, the debtor was forced into bankruptcy. The debtor owed money to several creditors, including his ex-wife. The trustee in bankruptcy sought to recover the same property, arguing that the conveyance to the son was a fraudulent conveyance.

Applying Arkansas law, the court held that the trustee in bankruptcy and the ex-wife had a *successive* relationship. The trustee serves as agent of the creditors, and succeeds to the creditors' rights to recover property. Had the ex-wife been the only creditor, the fraudulent conveyance claim would have been precluded. However, the debtor had two other creditors—a lender and the debtor's divorce attorney. The court held that the ex-wife (Davis) was *not* in privity with these other creditors (Farm Credit Services and Bradshaw):

> "Privity of parties within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right." "[P]rivity denotes mutual or successive relationship to the same right of property." *Curry v. Hanna*, 228

> Ark. 280, 307 S.W.2d 77, 79 (Ark. 1957). Although the three creditors may now share a common interest in setting aside the transfer, the unsecured claims of Bradshaw and Farm Credit Services derive from completely different transactions. They had no interest in the divorce proceedings that gave rise to Davis's claim, and the reason Davis lost her state court action—her prior notice of the transfer to [the son] . . . in 1986—does not apply to subsequent creditors such as Bradshaw and Farm Credit Services.

Id. at 754. Because the trustee took over the claim of these creditors too, he could exercise their rights and recover the transferred property.

Functional view. Many courts have abandoned the traditional view in favor of the more flexible functional view. Unlike the highly formalistic traditional view, which asks whether the "same legal right" is at stake in both cases, the functional view asks if the rights of the non-party were "fully and fairly represented" in the first action. The Ninth Circuit's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 322 F.3d 1064 (9th Cir. 2003) illustrates the functional approach. In this case, the court held that under federal preclusion law, a prior suit by an association barred later suits against the same defendant by members of the association:

> Even when the parties are not identical, privity may exist if "there is 'substantial identity' between parties, that is, when there is sufficient commonality of interest." *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir.1983). We made clear, in *In re Schimmels* [127 F.3d 875 (9th Cir. 1997)], that privity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases:
>
> > Federal courts have deemed several relationships "sufficiently close" to justify a finding of "privity" and, therefore, preclusion under the doctrine of res judicata: "First, a non-party who has succeeded to a party's interest in property is bound by any prior judgment against the party. Second, a non-party who controlled the original suit will be bound by the resulting judgment. Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit." In addition, "privity" has been found where there is a "substantial identity" between the party and nonparty, where the nonparty "had a significant interest and participated in the prior action," and where the interests of the nonparty and party are "so closely aligned as to be virtually representative." Finally, a relationship of privity can be said to exist when there is an "express or implied legal relationship by which

> parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues."
>
> *Schimmels*, 127 F.3d at 881; *see also Alpert's Newspaper Delivery Inc. v. N.Y. Times Co.*, 876 F.2d 266, 270 (2d Cir.1989) ("The issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis."); *ITT Rayonier*, 627 F.2d at 1003 ("Courts are no longer bound by rigid definitions of parties or their privies for purposes of applying collateral estoppel or res judicata.").
>
> One of the relationships that has been deemed "sufficiently close" to justify a finding of privity is that of an organization or unincorporated association filing suit on behalf of its members. Of course, the organization must adequately represent the interests of its individual members if its representation is to satisfy the due process concerns articulated in *Hansberry v. Lee*, 311 U.S. 32, 40–43 (1940). . . .
>
> In this case, all of the remaining individual plaintiffs are members of the Association, and given the history and nature of this litigation, their membership in and close relationship with the Association is sufficient to bind them as parties in privity for res judicata purposes. . . .

322 F.2d at 1081–82.

Another way to view the functional approach is to ask whether the party in Case One, by looking out for her own personal interests, also by default fully protected the interests of the non-party.

NOTES AND QUESTIONS

1. In *Andrews v. Daw*, 201 F.3d 521 (4th Cir. 2000), a driver sued a state police officer in the officer's official capacity. By suing the officer in his official capacity, the driver hoped the state would pay any judgment. However, the court dismissed the action based on the officer's Eleventh Amendment immunity. The driver then brought an action against the same officer, this time suing the officer in his *individual* capacity. Although the driver could not recover against the state by suing the officer individually, the Eleventh Amendment would not bar the case. The court of appeals found claim preclusion did not apply because there was no privity between the defendants in the two cases. How can someone not be in privity with *himself*? Or is that question too simplistic?

2. Now turn to *Richards*. Before considering the finer details of the Supreme Court's opinion, try to reconstruct the argument of the Alabama courts. Why did the state courts consider it proper to bar the plaintiffs' claims with a judgment in a suit in which they were not named parties? Is the

Alabama court applying one of the privity tests described above? Or was its reasoning based on general notions of fairness?

3. What effect does *Richards* have on the functional view of privity?

4. Might *Richards* even pose a threat to some situations in which the courts would find privity under the traditional rule? Consider the case of successive interests in land. Is a buyer of land bound by an earlier judgment concerning that land? Note that *Richards* focuses on *notice* to the non-party. How can you give notice to everyone who might later decide to buy the land?

5. The *Restatement* does not attempt to define privity. Instead, eschewing that term altogether, the *Restatement* simply lists a number of situations in which non-parties may be bound by the judgment in a case. *See* RESTATEMENT OF THE LAW (SECOND): JUDGMENTS §§ 36 to 61. Overall, however, the *Restatement* approach closely resembles the functional view.

6. *Control*. Even absent any sort of formal legal relationship between a non-party and a party, a non-party can be bound by a judgment if she effectively controlled how one party litigated Case One. *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (United States bound by issue preclusion where it both financed and directed course of litigation on behalf of a private party); RESTATEMENT OF THE LAW (SECOND): JUDGMENTS § 39.

2. WHO CAN TAKE ADVANTAGE OF A JUDGMENT?

As the prior section indicates, the due process clause places significant limits on a state's ability to use a judgment to preclude a non-party from later litigating a claim or issue. But does anything preclude a non-party from taking *advantage* of a favorable ruling in an earlier case? For example, suppose Diner recovers a judgment against Restaurant for food poisoning. Can Diner 2, who ate at the same restaurant the same evening, take advantage of that judgment in her own food poisoning suit against Restaurant? Due process is not a bar, because the party to be bound—Restaurant—has already had a full and fair opportunity to protect itself. Nevertheless, is there something unfair about letting Diner 2 ride on Diner 1's coattails?

PARKLANE HOSIERY CO., INC. V. SHORE

439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)

MR. JUSTICE SWEWART delivered the opinion of the Court.

This case presents the question whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party.

The respondent brought this stockholder's class action against the petitioners in a Federal District Court. The complaint alleged that the

petitioners, Parklane Hosiery Co., Inc. (Parklane), and 13 of its officers, directors, and stockholders, had issued a materially false and misleading proxy statement in connection with a merger. . . . The complaint sought damages, rescission of the merger, and recovery of costs.

Before this action came to trial, the SEC filed suit against the same defendants in the Federal District Court, alleging that the proxy statement that had been issued by Parklane was materially false and misleading in essentially the same respects as those that had been alleged in the respondent's complaint. Injunctive relief was requested. After a 4-day trial, the District Court found that the proxy statement was materially false and misleading in the respects alleged, and entered a declaratory judgment to that effect. The Court of Appeals for the Second Circuit affirmed this judgment.

The respondent in the present case then moved for partial summary judgment against the petitioners, asserting that the petitioners were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC. The District Court denied the motion on the ground that such an application of collateral estoppel would deny the petitioners their Seventh Amendment right to a jury trial. The Court of Appeals for the Second Circuit reversed, holding that a party who has had issues of fact determined against him after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact. The appellate court concluded that "the Seventh Amendment preserves the right to jury trial only with respect to issues of fact, [and] once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury." . . .

I

The threshold question to be considered is whether, quite apart from the right to a jury trial under the Seventh Amendment, the petitioners can be precluded from relitigating facts resolved adversely to them in a prior equitable proceeding with another party under the general law of collateral estoppel. Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the earlier proceeding.

A

Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328–329. Until relatively recently, however, the scope of collateral estoppel was limited by

the doctrine of mutuality of parties. Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. Based on the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound,[7] the mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

By failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost, the mutuality requirement was criticized almost from its inception. Recognizing the validity of this criticism, the Court in *Blonder-Tongue* abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid. The "broader question" before the Court, however, was "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S., at 328. The Court strongly suggested a negative answer to that question:

> "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. . . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Id.*, at 329.

B

The *Blonder-Tongue* case involved defensive use of collateral estoppel—a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. The present case, by contrast, involves offensive use of collateral estoppel—a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff. In both the offensive and defensive use situations, the party against whom estoppel

[7] It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329; *Hansberry v. Lee*, 311 U. S. 32, 40.

is asserted has litigated and lost in an earlier action. Nevertheless, several reasons have been advanced why the two situations should be treated differently.

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.[14] Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[15]

C

We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of

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[14] In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

[15] If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action.

offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired. Similarly, there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result.[19]

We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading. . . .

[The Court also held that giving issue preclusion effect to the SEC proceeding—where there was no right to a jury—did not violate the Seventh Amendment, even though in the case at bar the defendant would otherwise have been entitled to a jury on the precluded issues.]

[The dissenting opinion of JUSTICE REHNQUIST is omitted.]

NOTES AND QUESTIONS

1. Historically, courts required full mutuality for both claim and issue preclusion. The trend to relax the mutuality requirement has mainly affected only issue preclusion. Although courts have occasionally suggested that mutuality should be abandoned for all types of preclusion, most courts still require mutuality in claim preclusion. Do you see why?

2. Privity is an exception to the mutuality rule. If X and Y are in privity, Y is not only bound by any judgment against X, but can also take advantage of any victory for X.

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[19] It is true, of course, that the petitioners in the present action would be entitled to a jury trial of the issues bearing on whether the proxy statement was materially false and misleading had the SEC action never been brought. . . . But the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum.

3. Most courts allow defensive use of non-mutual issue preclusion with few limits. However, like the Supreme Court in *Parklane*, they are more wary of offensive use. There are two basic arguments against offensive use. What are these arguments? Do you find them convincing? Why do these arguments not also apply to defensive use?

4. Note that the labels "offensive" and "defensive" are important only where *non-mutual* use of issue preclusion is involved. If the same parties (or their privies) are involved in both cases, it makes no difference whether the person is trying to use issue preclusion offensively or defensively.

5. Although *Parklane* technically only established the federal law governing mutuality, the Court's reasoning has had a tremendous influence on the state courts. Most states allow offensive non-mutual use along the lines established in *Parklane*. *See, e.g.*, *Hossler v. Barry*, 403 A.2d 762 (Me. 1979) (adopts similar rule for Maine, relying heavily on *Parklane*.)

6. Non-mutual issue preclusion may not be used against the United States government. *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Because the federal government deals with the public at large, and litigates a large number of cases every year, the Court in *Mendoza* indicated that allowing non-mutual use would force the government to seek appellate review of every unfavorable decision. 464 U.S. at 163.

7. The marriage of two modern doctrines—the abandonment of mutuality and the tort doctrine of comparative fault—creates some interesting problems. Suppose several passengers are injured in a bus crash. P1, one of the passengers, sues D, the bus operator, for her injuries. The court finds D 30 percent at fault, and the manufacturer of the bus 70 percent at fault. Then another passenger, P2, sues D. Can D argue it is less than 30 percent at fault? Is P2 precluded from trying to prove D is *more* than 30 percent at fault? Can D argue P2 was also responsible for his injuries, thereby rendering D's percentage less than 30?

PROBLEMS

1. P is injured in an automobile accident. The other vehicle was driven by D and owned by O. P sues D for negligence. In a bench trial, the court enters judgment for D, specifically finding P 100% at fault. P then sues O for the same injuries, arguing O failed to maintain the brakes on the vehicle. O argues the claim is barred by claim preclusion. Is O correct?

2. Same facts as Problem 1, except that O argues that issue preclusion, not claim preclusion, prevents P from recovering. Is O correct?

3. Same facts as Problem 1, except that the court rules for D because it found that D was not negligent. D is O's employee. In P's suit against O, P argues O is vicariously liable for D's careless driving. If the court does not apply preclusion, what problem may O encounter?

4. P1 and P2 are partners in a general partnership. P1 sues D, alleging D misappropriated valuable partnership trade secrets. D prevails. P2 then

sues D, alleging the same claim. D argues P2's case is barred by claim and issue preclusion. P2 argues she cannot be barred because she was not a party in the first case. Who is correct?

5. Same facts as Problem 4, except assume P1 prevailed in his action against D. When P2 sues D, D alleges the case is barred by claim preclusion. P2 argues both that claim preclusion does not apply, and that issue preclusion bars *D* from arguing he did not misappropriate the secrets. Who is correct?

F. APPLYING PRECLUSION ACROSS STATE LINES

INTRODUCTORY PROBLEM

Dan Debtor deeply regrets his recent purchase of aluminum siding. Dan was pressured into buying the siding from Carol Creditor, a door-to-door aluminum siding salesperson. Carol stopped by unannounced at Dan's house in the state of Dakota, and won Dan over with her high-pressure sales techniques. Dan eventually signed a contract to purchase siding and pay for it in installments. As soon as Carol left with the signed contract, however, Dan wanted out of the deal. Unfortunately for Dan, the contract did not allow for cancellation.

Two months later, Dan regrets his decision even more. The aluminum siding that Carol installed blocks all mobile phone signals into Dan's home. Deprived of his daily ritual of checking Facebook posts on his phone, Dan refuses to pay the remaining installments.

Carol immediately sues Dan in a state court in the state of Carolina, Carol's home state. Dan's answer denies liability, invoking the Dakota Consumer Protection Act. The Dakota act reflects Dakota's strong public policy of protecting innocent consumers, especially in their own home. Under the act, all contracts made pursuant to door-to-door sales are void unless they contain a clause explicitly giving the buyer a right to cancel the contract within 10 days. Because the Carol-Dan contract contained no such clause, it is clearly invalid under the Dakota act.

The Carolina court, however, rejects Dan's defense. It instead concludes that *Carolina* law governs the contract between Carol and Dan. This ruling is clearly incorrect as a matter of Carolina choice of law rules, and may even be unconstitutional. Nevertheless, because Carolina law does not have a consumer protection statute, the court enters summary judgment for Carol on her breach of contract claim.

Of course, Dan has no assets in Carolina. Carol therefore brings a new suit in a Dakota court, hoping to obtain a judgment and thereby seize Dan's Dakota assets. In this second action, Carol argues that claim and issue preclusion bar Dan from relitigating the merits of the case in the Dakota court. Is Carol correct?

Governing Law: United States Constitution, art. IV, sec. 1; 28 U.S.C. § 1738.

To this point we have been dealing with how preclusion applies within a given court system. Do the same rules apply when Case One and Case Two are in different jurisdictions? If a state was free to ignore judgments rendered by the courts of other states, the resulting multiplicity of cases would not only be inefficient, but would also threaten to weaken the United States federal system. Anticipating the possibility that states might choose to ignore judgments of other states, the framers of the Constitution included Article IV, § 1:

> 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.

There is some debate as to exactly what this clause was meant to accomplish. One scholar, in an exhaustive historical study, concluded that it is simply a rule of *evidence* requiring courts to admit written judgments as evidence without further authentication. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735 (1981). Although Professor Whitten may well be correct, the courts have uniformly interpreted the "full faith and credit" clause as a command to give a certain degree of preclusive effect to sister-state judgments, as the following case demonstrates.

SENTINEL ACCEPTANCE LTD., L.P. V. HODSON AUTO SALES & LEASING, INC.

45 S.W.3d 464 (Mo. App. 2001)

BRECKENRIDGE, JUDGE.

Sentinel Acceptance, Ltd., L.P., appeals the trial court's judgment quashing the registration of its California judgment against Janet R. Hodson. On appeal, Sentinel argues that the trial court quashed the registration of its judgment on an improper ground. . . .

Factual and Procedural Background

On March 8, 1999, the Superior Court for the State of California, County of San Diego, entered a judgment confirming an arbitration award in the amount of $16,052.11 in favor of Sentinel and against Hodson Auto Sales & Leasing, Inc., and Ms. Hodson, who was president of Hodson Auto Sales. In June 1999, the attorney for Sentinel filed an affidavit for registration of the California judgment in the Circuit Court of Clay County,

Missouri. On April 6, 2000, Sentinel requested that a garnishment order be issued against Hodson Auto Sales and Ms. Hodson to satisfy the judgment.

Ms. Hodson's bank notified Ms. Hodson of the garnishment order on April 14, 2000. On April 20, 2000, Ms. Hodson filed a motion to quash registration of the foreign judgment, executions, and garnishments. Ms. Hodson alleged in her motion that the California judgment was not entitled to full faith and credit because the California court lacked personal jurisdiction over her, and she received no notice of the California proceedings. . . . Ms. Hodson later filed a motion for relief from the California judgment in which she argued that the registration of the California judgment should be set aside under Rule 74.06(b)(1) on the basis of surprise. Specifically, Ms. Hodson alleged that the arbitration and confirmation proceedings in California were a "complete and total surprise" to her, as was the registration of the California judgment in Clay County. Alternatively, Ms. Hodson argued that the judgment should be set aside under Rule 74.06(b)(1) on the basis of excusable neglect, because her California counsel abandoned her.

At the subsequent hearing on Ms. Hodson's motions, she testified that she was the president of Hodson Auto Sales. Ms. Hodson allowed her husband, William E. Hodson, to handle the day-to-day details of running the corporation. Ms. Hodson was employed as a realtor, and maintained an office at a different location than Hodson Auto Sales.

Ms. Hodson testified that she was never personally served with any documents relating to the California arbitration or confirmation proceedings. In fact, she testified that she was completely unaware of both proceedings, despite the fact that attorneys in California entered their appearance on her behalf and filed a response to Sentinel's petition to confirm the arbitration award, which contained a supporting affidavit from Ms. Hodson's husband. Ms. Hodson testified that her husband never told her she had been named in a lawsuit in California. She claimed that she never hired the attorneys in California to represent her, nor did she have any knowledge that the attorneys had been retained to represent her. In support of her testimony, Ms. Hodson offered the affidavit of one of the California attorneys, in which he averred that his only contact regarding the proceedings in California was with Mr. Hodson and Mr. Hodson's Kansas City attorney, and that his first contact with Ms. Hodson was on April 21, 2000.

On May 9, 2000, the trial court entered a judgment sustaining Ms. Hodson's motion to quash the registration of the California judgment. The court found that Rule 74.14, which pertains to the uniform enforcement of foreign judgments, provides that once a foreign judgment is filed in Missouri, it "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying" as a

judgment entered in Missouri. The court then ruled that a party could obtain relief from the judgment on one of the grounds set forth in Rule 74.06(b), which was surprise.

On the issue of surprise, the court found that although the filing of the foreign judgment complied with the requirements of Rule 74.14, the underlying claim was unknown to Ms. Hodson because she was not served with process in the California confirmation proceeding, and all actions purportedly taken on her behalf and in her name in California were "wholly undertaken without her knowledge, consent or authority." Because it found that Ms. Hodson suffered a legal injury as to which she was totally free of neglect or lack of prudence, the court quashed the registration of the California judgment against her. Sentinel filed this appeal. . . .

Surprise is Improper Ground for Refusing to Register a Foreign Judgment

In its sole point on appeal, Sentinel argues that the trial court erred in quashing registration of the California judgment because surprise is not a proper ground for refusing to give full faith and credit to a foreign judgment. To qualify for registration in Missouri, a foreign judgment must be "entitled to full faith and credit under the Full Faith and Credit Clause of the Federal Constitution, Art. 4, § 1." *Campbell v. Campbell*, 780 S.W.2d 89, 91 (Mo.App.1989). The Full Faith and Credit Clause provides that, "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Legal historians have inferred that the Constitutional Framers' purpose of including the Full Faith and Credit Clause in the Constitution was to "impose [ ] mandatory comity on the states in the hope that treating the judicial proceedings of other states with appropriate deference would lessen friction among the states in the new and fragile union." William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L.REV. 412, 413 (1994) (footnotes omitted). Indeed, the United States Supreme Court "has held that the Full Faith and Credit Clause demands rigorous obedience." *Id*.

There are only a few recognized exceptions to this long-standing Constitutional requirement of according full faith and credit to judgments of sister states. . . . [T]he Missouri Supreme Court recently reiterated those exceptions. In *Phillips v. Fallen*, 6 S.W.3d 862, 864 (Mo. banc 1999), the Court stated that "Missouri is obligated to give full faith and credit to a judgment of a sister state unless that judgment is void for lack of jurisdiction over the person or over the subject matter, or is obtained by fraud."

Rather than denying full faith and credit on any of these recognized exceptions, however, the trial court in this case quashed registration of the California judgment on the basis of surprise under Rule 74.06(b). To do so, the trial court relied on the statement in Rule 74.14(b) that a foreign

judgment registered in Missouri "is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a circuit court of this state." The trial court reasoned that since parties may obtain relief from Missouri judgments on any of the grounds listed in Rule 74.06, parties can also obtain relief from foreign judgments on any of these grounds.

The statement in Rule 74.14 that a foreign judgment registered in Missouri is subject to the same defenses as a judgment entered in Missouri refers only to the Missouri judgment registering the foreign judgment, however, and not to the actual judgment entered in the foreign state. To find otherwise, as the trial court did, would significantly broaden the exceptions to the Full Faith and Credit Clause. Under the trial court's interpretation of Rule 74.14, a Missouri court could refuse to register a foreign judgment if it finds mistake, inadvertence, surprise, excusable neglect, intrinsic or extrinsic fraud, misrepresentation, or misconduct of an adverse party; or that the judgment is irregular, void, or has been satisfied, released, or discharged, or that a prior judgment upon which it is based has been reversed or vacated; or it is no longer equitable that the judgment remain in force. Rule 74.06(b).

Broadening the exceptions to the registering of a foreign judgment to include all of the grounds for obtaining relief under Rule 74.06 is not compatible with Missouri Supreme Court case law applying the deeply-rooted Constitutional principle that courts of this state are obligated to give full faith and credit to a foreign judgment unless the judgment is void for lack of personal or subject matter jurisdiction, or it was obtained by fraud. Furthermore, this court notes that *Phillips*, the Missouri Supreme Court's most recent pronouncement of the exceptions to giving full faith and credit to foreign judgments, was decided eleven years after the effective date of Rules 74.06 and 74.14. The Court in *Phillips* did not recognize surprise, or any of the grounds listed in Rule 74.06, as a basis for refusing to register a foreign judgment. Therefore, this court finds that the trial court erred in quashing registration of the California judgment on the basis of surprise.

In her brief, however, Ms. Hodson contends that this court should affirm the trial court's judgment anyway because she was not properly served with process in the California proceeding and, therefore, the California judgment was void for lack of personal jurisdiction over her. . . .

[E]ven if this court were to find that Ms. Hodson did not abandon her claim that the California judgment was void for lack of personal jurisdiction, the issue of personal jurisdiction was adjudicated in the California proceeding. "However, when the party litigates the issue of jurisdiction in the initial court proceedings, that court's determination on the issue, right or wrong, is conclusive upon that party and entitled to full faith and credit." [*Williams v. Williams*, 997 S.W.2d 80, 83 (Mo.App.1999)].

NOTES AND QUESTIONS

1. *Sentinel Acceptance* deals with the situation where a party attempts to use a judgment from one forum (F1) in order to reach assets in another forum (F2). The F1 judgment is not itself enforceable in F2. Instead, the judgment victor must "domesticate" the judgment. Domestication involves using the F1 judgment as the basis for obtaining a new judgment from the courts of F2.

Historically, the only way to domesticate a judgment was to bring a new action in the courts of F2. Because this new action is a suit on the judgment rather than the underlying claim, it is not barred by claim preclusion. Moreover, to the extent full faith and credit applies, the judgment victor may use issue preclusion to avoid having to relitigate the case. The F2 case can often be resolved on the pleadings or by summary judgment.

Today, most states have enacted the Uniform Enforcement of Foreign Judgments Act. This act provides a process by which a judgment of one Uniform Act state can simply be registered in other Uniform Act states. Assuming the person complies with the filing and notice requirements, the registered judgment is treated as a new F2 judgment, and can be enforced accordingly in F2. This process saves the time and expense of prosecuting a new action in F2.

2. Nothing in the facts of *Sentinel Acceptance* suggests that Ms. Hodson received any sort of notice of the California proceeding. Nevertheless, the Missouri court holds it is bound by full faith and credit to enforce the California judgment. Is the command of full faith and credit so powerful that it overrides the fairness concerns inherent in due process? Is there *anything* Ms. Hodson can do to avoid having her assets garnished? Did she file her motion to reopen the judgment in the right court?

3. In *Sentinel Acceptance*, what if the judgment of the California court was patently incorrect? Could the Missouri court refuse to recognize it?

4. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908), demonstrates the power of the full faith and credit to judgments requirement. In that case, a party brought suit in a Missouri state court based on a gambling contract created in Mississippi. Under Mississippi law, the contract was illegal and therefore unenforceable. The Missouri court, however, refused to apply Mississippi law, and entered judgment for plaintiff. When plaintiff took that judgment to Mississippi to enforce it against defendant, the Mississippi courts refused to enforce it. The U.S. Supreme Court reversed, holding that full faith and credit required Mississippi to honor the judgment even though the Missouri court had refused to apply Mississippi law. As a result, the Mississippi courts had to allow plaintiff to use their courts to collect a debt that was clearly illegal in Mississippi.

5. If all this discussion of "enforcing judgments" sounds vaguely familiar, you should not be surprised. Full faith and credit also lies at the heart of the doctrine of personal jurisdiction in Chapter 3. In the watershed case of

Pennoyer v. Neff in that Chapter, the issue was whether one court had to enforce an earlier judgment of a court that did not have personal jurisdiction.

6. In *Sentinel Acceptance*, plaintiff won in F1. Full faith and credit also applies if plaintiff loses the first action. Thus, a plaintiff who loses a case in F1 is barred by full faith and credit and claim preclusion from filing that claim, or another claim arising from the same transaction or occurrence, in another state. In addition, because a plaintiff consents to jurisdiction by choosing the court, a plaintiff who loses in F1 will usually be unable to escape full faith and credit by arguing that F1 lacked personal jurisdiction.

7. *"Last in time" rule*. Suppose X sues Y for a tort in F1. X loses. X then sues Y for that same tort in F2. The F2 court wrongfully denies full faith and credit to the F1 judgment, and grants X a money judgment. X seeks to enforce that judgment against property in F3 by bringing a new action in F3. Which judgment is entitled to full faith and credit in F3—the first or second? Under the "last in time" rule, it is the *F2* judgment that receives full faith and credit. Although the F2 court clearly erred in failing to afford full faith and credit, Y's remedy is to appeal the F2 judgment, not to attack it collaterally in the F3 action.

8. In the situation posed in the prior note, suppose X takes his F2 judgment back to *F1* for enforcement. Is F1 relieved of its full faith and credit obligation when F2 ignored a F1 judgment? *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939) indicates there is no exception. Technically, *Treinies* is not controlling on the question posed in this note, for in that case the F2 courts held that the F1 courts lacked jurisdiction to render the first judgment. Nevertheless, it is generally accepted that the last in time rule applies even when the second court flatly refused to apply full faith and credit. Again, Y's remedy is to appeal the F2 judgment.

9. *Federal judgments*. Review the full faith and credit clause, set out at the outset of this section. Does the mandate apply to federal courts that are asked to enforce state judgments? Conversely, does the clause require state courts to enforce judgments rendered by federal courts? Because the clause as written applies only to state courts and state judgments, Congress enacted 28 U.S.C. § 1738. That statute extends the full faith and credit obligation to the federal courts. Congress's authority to enact the statute comes from Article IV itself, which gives Congress the power to legislate as to the "effect" of judgments.

Section 1738, however, does not deal with federal judgments. Although nothing in either Article IV or § 1738 requires state courts to enforce federal judgments, it is generally assumed that federal judgments are entitled to full faith and credit. When pressed for a reason, most courts cite the Supremacy Clause of Article VI of the Constitution. Read Article VI. Do you see why this argument is not particularly convincing?

10. The Canadian Constitution contains no full faith and credit provision. Nevertheless, in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, the Supreme Court of Canada held that basic

principles of federalism required one province to honor the judgments of another. Absent a certain level of co-operation between provinces, the Court reasoned, a federal state cannot survive. Are these federalism arguments a better way to deal with the problem of state courts enforcing federal judgments than the Supremacy Clause argument set out in the prior note?

While we are looking abroad, note that Article 26 of the Brussels-Lugano Convention (*EC EFTA Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, Lugano, 16 September 1988) requires member states of the European Union to enforce judgments rendered by other member states. However, under Article 27, one state need not recognize a judgment of another if that judgment is "contrary to public policy" in the enforcing state.

11. The preclusive effect of a judgment is measured initially by the law of the court that rendered the judgment, not the court that is asked to enforce that judgment. Therefore, F2 may be required to give claim or issue preclusion effect to an F1 judgment even if the law of F2 would not give any preclusive effect to a similar judgment from an F2 court. On the other hand, the law of the rendering state is only a floor, not a ceiling. F2 is free to apply claim or issue preclusion effect to a sister-state or federal judgment under the preclusion law of F2 even if the law of F1 would not give the judgment preclusive effect in F1 courts.

The rule differs when a state judgment is enforced in federal court. Although a federal court must give as much preclusive effect as the rendering state would give, it cannot give more. *Migra v. Warren City School Dist.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 384, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). In other words, if the rendering state's own courts would not apply claim or issue preclusion, neither will the federal courts.

12. The law that governs the preclusive effect of a *federal* judgment differs depending on the source of the claim being adjudicated. When a federal court hears a federal or constitutional claim, there is a uniform federal judge-made law of claim and issue preclusion. *Parklane Hosiery* represents an example of this federal preclusion law. When a federal court hears a state-law claim, by contrast, it will generally "borrow" the law of the state in which it sits. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).

13. Neither state nor federal courts need afford full faith and credit to *foreign* judgments. However, under the doctrine of "comity," United States courts will enforce foreign judgments if the procedure comports with basic notions of fairness and justice. *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Unlike full faith and credit, comity is not a constitutional requirement, and states are free to enforce foreign judgments as they see fit.

As the *Sentinel* case indicates, a court is not required to afford full faith and credit to a judgment if the court that rendered the judgment did not have jurisdiction. How broad is that exception? The next case explores the limits.

To understand *Durfee v. Duke*, you must understand the concept of a *quiet title* action in Property law. If you have taken the course in Property, you know that a quiet title action is a suit that adjudicates the rights of everyone in the world to a given parcel of property. The suit will name everyone who has a known claim to the property. However, the judgment ostensibly binds everyone, even those parties whose claim or identity is unknown.

DURFEE V. DUKE

375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963)

MR. JUSTICE STEWART delivered the opinion of the Court.

. . . In 1956 the petitioners brought an action against the respondent in a Nebraska court to quiet title to certain bottom land situated on the Missouri River. The main channel of that river forms the boundary between the States of Nebraska and Missouri. The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by avulsion or accretion. The respondent appeared in the Nebraska court and through counsel fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter of the controversy.[4] After a hearing the court found the issues in favor of the petitioners and ordered that title to the land be quieted in them. The respondent appealed, and the Supreme Court of Nebraska affirmed the judgment after a trial *de novo* on the record made in the lower court. The State Supreme Court specifically found that the rule of avulsion was applicable, that the land in question was in Nebraska, that the Nebraska courts therefore had jurisdiction of the subject matter of the litigation, and that title to the land was in the petitioners. *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W.2d 618. The respondent did not petition this Court for a writ of certiorari to review that judgment.

Two months later the respondent filed a suit against the petitioners in a Missouri court to quiet title to the same land. Her complaint alleged that the land was in Missouri. The suit was removed to a Federal District Court by reason of diversity of citizenship. The District Court after hearing evidence expressed the view that the land was in Missouri, but held that

[4] This is, therefore, not a case in which a party, although afforded an opportunity to contest subject-matter jurisdiction, did not litigate the issue. Cf. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371.

all the issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was res judicata and 'is now binding upon this court.' The Court of Appeals reversed, holding that the District Court was not required to give full faith and credit to the Nebraska judgment, and that normal res judicata principles were not applicable because the controversy involved land and a court in Missouri was therefore free to retry the question of the Nebraska court's jurisdiction over the subject matter. We granted certiorari to consider a question important to the administration of justice in our federal system. . . .

The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. . . .

It is not questioned that the Nebraska courts would give full *res judicata* effect to the Nebraska judgment quieting title in the petitioners. It is the respondent's position, however, that whatever effect the Nebraska courts might give to the Nebraska judgment, the federal court in Missouri was free independently to determine whether the Nebraska court in fact had jurisdiction over the subject matter, i.e., whether the land in question was actually in Nebraska.

In support of this position the respondent relies upon the many decisions of this Court which have held that a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment. . . .

However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

With respect to questions of jurisdiction over the person, this principle was unambiguously established in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that

question had been fully litigated in the Missouri forum. 'Public policy,' said the Court, 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.' 283 U.S., at 525–526.

Following the *Baldwin* case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties. . . .

To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. But no such overriding considerations are present here. While this Court has not before had occasion to consider the applicability of the rule . . . to a case involving real property, we can discern no reason why the rule should not be fully applicable.

It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.' *Sherrer v. Sherrer*, 334 U.S., at 349. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative.

It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there. Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary

between them, or as to their respective sovereignty over the land in question. Either State may at any time protect its interest by initiating independent judicial proceedings here.

For the reasons stated, we hold in this case that the federal court in Missouri had the power and, upon proper averments, the duty to inquire into the jurisdiction of the Nebraska courts to render the decree quieting title to the land in the petitioners. We further hold that when that inquiry disclosed, as it did, that the jurisdictional issues had been fully and fairly litigated by the parties and finally determined in the Nebraska courts, the federal court in Missouri was correct in ruling that further inquiry was precluded. Accordingly the judgment of the Court of Appeals is reversed, and that of the District Court is affirmed. It is so ordered.

MR. JUSTICE BLACK, concurring.

. . . I concur in today's reversal of the Court of Appeals' judgment, but with the understanding that we are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two States under Art. I, § 10, that the disputed tract is in Missouri.

NOTES AND QUESTIONS

1. In Chapters 3 and 4, you learned about both personal and subject-matter jurisdiction. Which type of jurisdiction is at issue in *Durfee*?

2. Is the Supreme Court saying that a state has the power to decide that a specific parcel of land lies within the borders of that state? Would it make a difference if the parcel was not on the border, but instead in the center of Missouri?

3. Suppose Deason also claims to own the land at issue in *Durfee v. Duke*. Deason received notice of the Nebraska action, but failed to appear in that action. Instead, after the Nebraska judgment, Deason brings her own quiet title action. Is Deason's suit barred by the Nebraska judgment? The answer depends on whether she brings her case in Nebraska or in Missouri. Do you see why the location of her case makes a difference?

4. If the hypothetical Deason can avoid the Nebraska judgment by suing in Missouri, why can *Duke* not avoid it in the same way? What is the key difference between Duke and Deason? Is Duke bound by claim preclusion (that is, is his "claim" to the property barred because it was presented in the Nebraska quiet title case) or by issue preclusion?

5. Although the Nebraska judgment in *Durfee* purported to be a quiet title action, does the judgment ultimately quiet title as against the world?

6. Suppose that after prevailing before the United States Supreme Court, Durfee returns to his land. Within a few weeks, he receives two property tax bills: one from Nebraska, the other from Missouri. Durfee challenges the

bills, arguing that it is legally impossible for the land to be in both states. If he sues in Nebraska, can he argue that the land is not in that state? What about the earlier Nebraska judgment? If he sues in Missouri, is Missouri bound by the earlier determination that the land was in Nebraska? Missouri did not appear in that case. If he cannot convince the Missouri court that the land is in Nebraska, is there any way for Durfee to avoid the double taxation?

7. *Equity and family law orders.* Equitable orders, as well as cases involving child custody and support orders, are by nature subject to modification. Therefore, although they are entitled to full faith and credit, F2 retains the ability to modify the order to reflect changed conditions. Congress has attempted to deal with some of the family law issues by statute. *See* 28 U.S.C. §§ 1738A (full faith and credit to child custody) and 1738B (full faith and credit to support orders). You will discuss these provisions in courses such as Family Law.

PROBLEMS

1. P sues D in F1 for breach of contract, and after a full trial recovers a judgment for $100,000. When D does not pay the judgment, P sues D in F2 based on the judgment. In this second action, D argues for the first time that the parties never entered into a contract. P argues D cannot raise this issue in F2. Is P correct?

2. Same facts as Problem 1, except that in the F2 case D argues the F1 court lacked personal jurisdiction over D. P argues that D cannot contest the F1 court's personal jurisdiction in the F2 courts. Is P correct?

3. Same facts as Problem 2, except assume that the F2 court holds (correctly or incorrectly) the F1 court lacked personal jurisdiction. The case goes to trial, and the F2 court enters judgment for D. P now sues in F3, seeking to collect on the *F1* judgment. D argues that the F2 judgment bars this new action. Is D correct?

4. P sues D in F1 and recovers a judgment. P then sues D in F2 on the F1 judgment. The F2 court respects the F1 judgment, and enters a new judgment for P. However, when P discovers that D has no non-exempt assets of note in F2, P brings a new action in F3, based on the F1 judgment. D argues that the F2 judgment bars this third case. Is D correct?

5. P1 sues D, a pilot, in F1 for injuries that P1 sustained in a rough airplane landing. P1 wins a judgment for $50,000. P2 then sues D in F2 for injuries that P2 sustained in the same landing. P2 correctly notes that under the preclusion law of F1, a plaintiff such as P2 could make non-mutual offensive use of the F1 judgment in the F1 courts to prevent D from relitigating the question of his negligence. Therefore, P2 argues, the F2 court should likewise allow P2 to use issue preclusion. However, D correctly notes that F2 preclusion law does *not* allow offensive non-mutual issue preclusion under any circumstances. Will the court allow P2 to use issue preclusion on the issue of D's negligence?

6. Same facts as Problem 5, except that the state's laws are reversed. That is, F1 law would not allow offensive non-mutual issue preclusion under any circumstances, while F2 would allow a party such as P2 to use issue preclusion offensively if the first judgment were also rendered by F2. Will the court allow P2 to use issue preclusion on the issue of D's negligence?

G. DOCTRINES SIMILAR TO PRECLUSION

INTRODUCTORY PROBLEM

Last year, Paul won a $150,000 judgment against Donna for injuries Paul sustained in an automobile collision. In that case, Donna asserted Paul was at least partly at fault because he had not repaired the brakes on his car. Paul denied there was any problem with the brakes. The court believed Paul, and rejected Donna's comparative fault argument.

Now, Paul has sued the state of Illiana under federal civil rights laws. Illiana licensing laws require an inspection by state officials. Paul had his vehicle inspected two days before his collision with Donna. Paul claims that in this inspection the officials failed to detect that his brake pads were seriously worn, eventually leading to the collision two days later. Paul claims that because the official's negligence deprived Paul of his property—namely, his automobile—the state is liable to Paul for the value of the car. Paul did not seek property damage in his prior suit against Donna.

Illiana moves to dismiss the case, arguing Paul should be precluded from claiming the brakes were defective, given that he had argued that the brakes were *not* defective in the prior case. Should Illiana prevail?

Claim and issue preclusion are the main—but by no means the only—ways in which what happens in one case can bind one or more of the parties in later litigation. Two other doctrines, *law of the case* and *judicial estoppel*, operate in a roughly similar way. Although these doctrines are sometimes confused with preclusion (even by the courts), there are significant differences in when they apply and who can invoke them. In addition, law of the case and judicial estoppel are more flexible doctrines than claim and issue preclusion, and courts sometimes refuse to invoke them out of a sense of fairness.

1. LAW OF THE CASE

Claim and issue preclusion begin to operate after the court in Case One renders a final judgment. The doctrine of law of the case, by contrast, gives preclusive effect to rulings that occur before Case One is complete. At its core, the doctrine represents the quite sensible notion that a court should not generally revisit its rulings on disputed issues without good reason. Thus, although a ruling obviously cannot bind a higher court, it

binds the court that rendered it, as well as the lower courts, for the course of a particular case. In other words, the ruling has become the "law of the case."

To illustrate, suppose P sues D for a novel claim. The trial court grants D's 12(b)(6) motion, concluding the claim is not recognized in that jurisdiction. P appeals, and the court of appeals reverses and remands, finding the claim valid. The appellate court's ruling binds the trial court on remand, of course. In addition, however, if P should prevail on the remand, the law of the case doctrine prevents D from asking the appellate court to change its mind as to whether the claim is recognized by law.

As its name implies, the law of the case applies only to the actual case in question. The court of appeals in the above example would be free to reverse its position in a later case, and reject the claim.

The law of the case doctrine is not always strictly applied. There are also some common exceptions. Most importantly, if, after the court of appeals rules, a higher court issues a contrary ruling on the same question of law in a different case, most courts will allow the parties to take advantage of the intervening higher court decision.

2. JUDICIAL ESTOPPEL

NEW HAMPSHIRE V. MAINE

532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)

JUSTICE GINSBURG delivered the opinion of the Court.

The Piscataqua River lies at the southeastern end of New Hampshire's boundary with Maine. The river begins at the headwaters of Salmon Falls and runs seaward into Portsmouth Harbor (also known as Piscataqua Harbor). On March 6, 2000, New Hampshire brought this original action against Maine, claiming that the Piscataqua River boundary runs along the Maine shore and that the entire river and all of Portsmouth Harbor belong to New Hampshire. Maine has filed a motion to dismiss on the ground that two prior proceedings—a 1740 boundary determination by King George II and a 1977 consent judgment entered by this Court—definitively fixed the Piscataqua River boundary at the middle of the river's main channel of navigation. . . .

I

. . . Twenty-five years ago, in a dispute between the two States over lobster fishing rights, this Court entered a consent judgment fixing the precise location of the "lateral marine boundary," i.e., the boundary in the marine waters off the coast of New Hampshire and Maine, from the closing line of Portsmouth Harbor five miles seaward to Gosport Harbor in the Isles of Shoals. *New Hampshire v. Maine*, 426 U.S. 363, 48 L. Ed. 2d 701,

96 S. Ct. 2113 (1976); *New Hampshire v. Maine*, 434 U.S. 1, 2, 54 L. Ed. 2d 1, 98 S. Ct. 42 (1977). This case concerns the location of the Maine-New Hampshire boundary along the inland stretch of the Piscataqua River, from the mouth of Portsmouth Harbor westward to the river's headwaters at Salmon Falls.

In the 1970's contest over the lateral marine boundary, we summarized the history of the interstate boundary in the Piscataqua River region. See *New Hampshire v. Maine*, 426 U.S. at 366–367. The boundary, we said, "was in fact fixed in 1740 by decree of King George II of England" as follows:

> 'That the Dividing Line shall pass up thro the Mouth of Piscataqua Harbour and up the Middle of the River. . . . And that the Dividing Line shall part the Isles of Shoals and run thro the Middle of the Harbour between the Islands to the Sea on the Southerly Side. . . .'

Id. at 366 (quoting the 1740 decree). [The Court then stated that the meaning of the phrase "Middle of the River" was crucial to determining the off-shore boundary between the states.] . . .

In the course of litigation, New Hampshire and Maine proposed a consent decree in which they agreed, *inter alia*, that the words "Middle of the River" in the 1740 decree refer to the middle of the Piscataqua River's main channel of navigation. The Special Master, upon reviewing pertinent history, rejected the States' interpretation. . . . This Court determined, however, that the States' interpretation "reasonably invested imprecise terms" with a definition not "wholly contrary to relevant evidence." *New Hampshire v. Maine*, 426 U.S. at 369. On that basis, the Court declined to adopt the Special Master's construction of "Middle of the River" and directed entry of the consent decree. The final decree, entered in 1977, defined "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." *New Hampshire v. Maine*, 434 U.S. at 2.

The 1977 consent judgment fixed only the lateral marine boundary and not the inland Piscataqua River boundary. In the instant action, New Hampshire contends that the inland river boundary "runs along the low water mark on the Maine shore," and asserts sovereignty over the entire river and all of Portsmouth Harbor, including the Portsmouth Naval Shipyard on Seavey Island located within the harbor just south of Kittery, Maine. Relying on various historical records, New Hampshire urges that "Middle of the River," as those words were used in 1740, denotes the main branch of the river, not a mid-channel boundary, and that New Hampshire, not Maine, exercised sole jurisdiction over shipping and military activities in Portsmouth Harbor during the decades before and after the 1740 decree.

While disagreeing with New Hampshire's understanding of history, Maine primarily contends that the 1740 decree and the 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation—a division that places Seavey Island within Maine's jurisdiction. Those earlier proceedings, according to Maine, bar New Hampshire's complaint under principles of claim and issue preclusion as well as judicial estoppel.

We pretermit the States' competing historical claims along with their arguments on the application *vel non* of the res judicata doctrines commonly called claim and issue preclusion. . . . In the unusual circumstances this case presents, we conclude that a discrete doctrine, judicial estoppel, best fits the controversy. Under that doctrine, we hold, New Hampshire is equitably barred from asserting—contrary to its position in the 1970's litigation—that the inland Piscataqua River boundary runs along the Maine shore.

II

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000); see . . . 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (hereinafter Wright).

Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (CA5 1993). See . . . *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts' " (quoting *Stretch v. Watson*, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine

invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (CA9 1990).

Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen*, 667 F.2d at 1166. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

New Hampshire's claim that the Piscataqua River boundary runs along the Maine shore is clearly inconsistent with its interpretation of the words "Middle of the River" during the 1970's litigation. As mentioned above, interpretation of those words was "necessary" to fixing the northern endpoint of the lateral marine boundary. New Hampshire offered two interpretations in the earlier proceeding—first agreeing with Maine in the proposed consent decree that "Middle of the River" means the middle of the main channel of navigation, and later agreeing with the Special Master that the words mean the geographic middle of the river. Both constructions located the "Middle of the River" somewhere other than the Maine shore of the Piscataqua River.

Moreover, the record of the 1970's dispute makes clear that this Court accepted New Hampshire's agreement with Maine that "Middle of the River" means middle of the main navigable channel, and that New Hampshire benefited from that interpretation. New Hampshire, it is true, preferred the interpretation of "Middle of the River" in the Special Master's report. But the consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the

River" in the 1970's litigation, that "compromise" enabled New Hampshire to settle the case on terms beneficial to both States. . . .

New Hampshire also contends that the 1977 consent decree was entered without "a searching historical inquiry into what that language ['Middle of the River'] meant." According to New Hampshire, had it known then what it knows now about the relevant history, it would not have entered into the decree. We do not question that it may be appropriate to resist application of judicial estoppel "when a party's prior position was based on inadvertence or mistake." *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 (CA4 1995). We are unpersuaded, however, that New Hamsphire's position in 1977 fairly may be regarded as a product of inadvertence or mistake.

The pleadings in the lateral marine boundary case show that New Hampshire did engage in "a searching historical inquiry" into the meaning of "Middle of the River." . . .

Nor can it be said that New Hampshire lacked the opportunity or incentive to locate the river boundary at Maine's shore. In its present complaint, New Hampshire relies on historical materials—primarily official documents and events from the colonial and postcolonial periods—that were no less available 25 years ago than they are today. And New Hampshire had every reason to consult those materials: A river boundary running along Maine's shore would have placed the northern terminus of the lateral marine boundary much closer to Maine, "resulting in hundreds if not thousands of additional acres of territory being in New Hampshire rather than Maine," Tr. of Oral Arg. 48 (rebuttal argument of Maine). . . .

In short, considerations of equity persuade us that application of judicial estoppel is appropriate in this case. Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the "risk of inconsistent court determinations," *C.I.T. Construction*, 944 F.2d at 259, would become a reality. We cannot interpret "Middle of the River" in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process.

Finally, notwithstanding the balance of equities, New Hampshire points to this Court's recognition that "ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states," *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369, 91 L. Ed. 348, 67 S. Ct. 340 (1946). Of course, "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests." 18 Wright § 4477, p. 784. But this is not a case where estoppel would compromise a governmental interest in enforcing the law. Nor is this

a case where the shift in the government's position is "the result of a change in public policy," *United States v. Owens*, 54 F.3d 271, 275 (CA6 1995); cf. *Commissioner v. Sunnen*, 333 U.S. 591, 601, 92 L. Ed. 898, 68 S. Ct. 715 (1948) (collateral estoppel does not apply to Commissioner where pertinent statutory provisions or Treasury regulations have changed between the first and second proceeding), or the result of a change in facts essential to the prior judgment. Instead, it is a case between two States, in which each owes the other a full measure of respect.

What has changed between 1976 and today is New Hampshire's interpretation of the historical evidence concerning the King's 1740 decree. New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself. Given Maine's countervailing interest in the location of the boundary, we are unable to discern any "broad interest of public policy," 18 Wright § 4477, p. 784, that gives New Hampshire the prerogative to construe "Middle of the River" differently today than it did 25 years ago.

For the reasons stated, we conclude that judicial estoppel bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore. Accordingly, we grant Maine's motion to dismiss the complaint.

JUSTICE SOUTER took no part in the consideration or decision of this case.

NOTES AND QUESTIONS

1. The United States Supreme Court sat as a trial court in this case. In cases involving a dispute between two states, both Article III, § 2 of the Constitution and 28 U.S.C. § 1251(a) give the Supreme Court original jurisdiction. However, the Justices rarely conduct the trial themselves. Instead, they assign the case to a special master, who hears the evidence and makes suggested findings to the Court. It was a special master who heard the actual trial between Maine and New Hampshire.

2. Claim and issue preclusion usually bind a party who *lost* an argument in the first case, and is trying to make that same (or a similar) argument again in the second case. By contrast, you should think in terms of judicial estoppel when a party *prevailed* on an argument in the first case, and is now taking a contrary stance. As *New Hampshire v. Maine* demonstrates, the doctrine is more concerned with issues of fairness and appearances than with any strictly formal logic.

3. Like law of the case, courts are not completely consistent in applying judicial estoppel. However, during the last twenty years courts have begun to invoke the doctrine more frequently, perhaps out of a sense of frustration with attorneys and parties who change their position whenever there is something to be gained from doing so.

4. Because of the need to allow government to establish policy, most courts do not apply judicial estoppel to a government entity that changes its view on a legal issue.

5. Judicial estoppel binds a party who takes inconsistent positions. Does it also bind people in privity with that party? *See Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004).