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Gary R. Cunningham

case. If the judge determines that the evidence is relevant, he can enter an order as to what part of the evidence may be introduced and the exact questions to be permitted. The same procedure should be followed when there are circumstances making specific acts of intercourse with others relevant. Determining these issues initially out of the hearing of the jury serves to insulate them from such prejudicial evidence in those cases where it is ultimately determined to be inadmissible. Such a procedure would more effectively enable Missouri courts to minimize psychological damage to the victim and maximize protection to the defendant.

JOEL WILSON

COLLATERAL ESTOPPEL: THE CHANGING ROLE OF THE RULE OF MUTUALITY

I. INTRODUCTION

The term res judicata traditionally refers to the effect given a prior judgment in a later action between the same parties on the same cause of action.[1] Professor Vestal has given this effect the more descriptive title of "claim preclusion."[2] As a general rule, the plea of res judicata or claim preclusion prevents the same parties or their privies from relitigating the same cause of action and bars not only all the issues previously decided, but also every matter which might have been offered and received to sustain or defeat the claim.[3]

The term collateral estoppel refers to the effect given a prior adjudication in a second action based upon a different claim or cause of action. Collateral estoppel is similar to res judicata in that its purpose is also the prevention of relitigation.[4] It is, however, more limited than res judicata because only those issues or facts actually litigated and determined in the previous suit are precluded.[5] Professor Vestal describes this effect as "issue preclusion."[6] At common law and in the majority of jurisdiction today, the doctrine of collateral estoppel also requires that the parties to the second action be the same as, or in privity with, the parties to the first

1. RESTATEMENT OF JUDGMENTS § 45 (1942).

2. Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 IOWA L. REV. 27 (1964) (hereinafter cited as Vestal).

3. *Accord,* Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974); Hauber v. Halls Levee Dist., 497 S.W.2d 175 (Mo. 1973). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973).

4. F. JAMES, CIVIL PROCEDURE § 11.18 (1965).

5. *See* Cromwell v. County of Sac, 94 U.S. 351 (1876); Stickle v. Link, 511 S.W.2d 848 (Mo. 1974). As a general rule, default judgments will not be given collateral estoppel effect. *Contra,* Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499 (E.D. Mich. 1974); Braxton v. Litchalk, 55 Mich. App. 708, 223 N.W.2d 316 (1974).

6. *See* Vestal, *supra* note 2, at 28.

action.[7] This requirement is generally denominated as the rule of mutuality. This comment will discuss the circumstances and factors that have led some courts to abandon the rule of mutuality.

II. MUTUALITY

Mutuality is often defined as requiring that a litigant will not be allowed to *benefit* from a prior adjudication, unless the facts are such that he would have been *bound* by the prior adjudication if it had been the other way.[8] Because only parties or their privies could be bound by a prior adjudication,[9] mutuality requires that only they may benefit from one.

Because the rule of mutuality focuses attention upon who may be bound by an adjudication, a general discussion of that subject is necessary. In general, persons who are named as parties to an action and properly brought before the court will be bound by the judgment and thus subject to the res judicata or collateral estoppel effects of that action. Similarly, persons in privity with named parties will be bound. Persons considered to be in privity are those who control an action although not a named party,[10] those whose interests are represented by a party to the action,[11] and successors in interest of a party.[12] Such persons are considered bound by the prior judgment and therefore a plea of res judicata or collateral estoppel may be asserted against them. Likewise, because they would be bound if the judgment is against their interest, they may reap the benefits of a favorable prior judgment in future litigation against other parties or privies. Two examples will illustrate the effect of this rule:

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7. *See, e.g.,* Orton v. Cheatham, 309 So. 2d 94 (Ala. 1975); Cowan v. Insurance Co. North America, 22 Ill. App. 3d 883, 318 N.E.2d 315 (1974); Keith v. Schiefen-Stockham Ins. Agency, 209 Kan. 537, 498 P.2d 265 (1972); Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Wright v. Holt, 18 N.C. App. 661, 197 S.E.2d 811 (1973); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972); Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969); Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. App. 1971); Lukacs v. Kluessner, 290 N.E.2d 125 (Ind. App. 1972); Stillpass v. Kenton Co. Airport Bd., 403 S.W.2d 46 (Ky. App. 1966); Trahan v. Liberty Mutual Ins., 303 So. 2d 606 (La. App. 1974); Booth v. Kirk, 381 S.W.2d 312 (Tenn. App. 1963). *See also* RESTATEMENT OF JUDGMENTS § 93 (1942); 1 FREEMAN, JUDGMENTS § 2428 (5th ed. 1925); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411 (1) (1965). Currie, *Civil Procedure: The Tempest Brews,* 53 CAL. L. REV. 25, 38-46 (1965).

8. *See* authorities cited note 7 *supra.*

9. Hansberry v. Lee, 311 U.S. 32, 40 (1940); Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n., 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942) (dictum).

10. *See* Wells v. Hartford Accident & Indem. Co., 459 S.W.2d 253 (Mo. En Banc 1970); RESTATEMENT OF JUDGMENTS § 84 (1942).

11. *Accord,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1901); United States v. Burlington Truck Line, Inc., 356 F. Supp. 582 (W.D. Mo. 1973); City of Montgomery v. Newson, 469 S.W.2d 54 (St. L. Mo. App. 1971); RESTATEMENT OF JUDGMENTS § 85 (1942).

12. *See generally* North Central Truck Lines, Inc. v. United States, 381 F. Supp. 1217 (W.D. Mo. 1974); Mathison v. Public Water Supply District, 401 S.W.2d 424 (Mo. 1966); F. JAMES, CIVIL PROCEDURE § 11.30 (1965); RESTATEMENT OF JUDGMENTS § 89 (1942).

(1) First action: Plaintiff v. Defendant—judgment for Plaintiff.
Second action: Plaintiff v. Z—because Z was not a party to the first action, and assuming he was not in privity with Defendant, due process[13] prohibits use of the prior judgment in the action against Z.
(2) First action: Plaintiff v. Defendant—judgment for Defendant.
Second action: Plaintiff v. Z—Z wants to use the prior judgment against Plaintiff as a defense. Strict application of the rule of mutuality prohibits Z from using the prior judgment, because Z would not have been bound if the judgment in the first action had been for Plaintiff (see example 1).

The law, however, could not tolerate a doctrine as rigid as mutuality, and a series of exceptions were soon recognized. One of the earliest exceptions arose where an initial action between a creditor and a principal debtor resulted in exoneration of the debtor on nonpersonal grounds. In the creditor's subsequent action against the surety, the surety, not a party to the first action, was allowed to use the judgment exonerating the principal debtor as a conclusive defense.[14] This avoids the anomalous possibility of a judgment against a surety who will either have no indemnity against his principal, or, if he has, then the principal will be directly subjected to a liability from which he has been legally discharged.

The courts have extended this exception to vicarious liability cases. Here, the liability of the master is totally dependent upon the culpability of his servant. If the servant has been exonerated in a prior suit by the same plaintiff and based upon the same facts, then the master can use the prior judgment as a bar to the suit against him.[15] The justification for the exception to mutuality is that one who is liable only for the acts of another should not be liable where the other has been legally exonerated. Accordingly, the plea is usually allowed in cases "where the relationship between the defendants in the two suits has been that of principal and agent, master and servant or indemnitor and indemnitee."[16]

The *Restatement of Judgments* recognizes these two exceptions,[17] but does not recognize an exception for the converse situation where an employee attempts to rely on a judgment exonerating his employer on the negligence issue. The *Restatement*'s position is based on the lack of reverse indemnification. Nevertheless, some courts have extended the exception to this situation in spite of the lack of indemnification.[18]

Where courts want to avoid the problem of mutuality and its excep-

13. *See* text accompanying notes 19-23 *infra*.
14. *See* Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765 (1904); Gill v. Morris, 58 Tenn. 500 (1872).
15. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).
16. *Id.* at 128.
17. RESTATEMENT OF JUDGMENTS §§ 96-97 (1942).
18. Davis v. Perryman, 225 Ark. 963, 286 S.W.2d 844 (1956); Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1932).

tions, they may embark on a judicial hunt for metaphysical privity.[19] This is seldom useful and often confusing because privity is ordinarily limited to non-parties who are bound by a judgment. The suggestion that a non-party, who would not otherwise be bound by a judgment, might still be in privity for the purpose of asserting a judgment gives the word different and confusing meanings.

The rule that only parties or their privies may be *bound* by a judgment is rooted in due process requirements. The United States Supreme Court has stated:

> The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. . . . The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. . . . So [a state] cannot, without disregarding the requirements of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.[20]

The notion that a person may not constitutionally be bound by a prior judgment to which he was neither a party nor a privity with a party appears to be firmly established. Several recent cases, however, appear not to accept this view, at least not without some limitation. In *Cauefield v. Fidelity and Casualty Company,*[21] a suit was brought in a Louisiana state court against the defendant for cemetery desecration. A judgment was rendered for the defendant. Subsequently, a different plaintiff filed suit in federal court against the same defendant, alleging the same cause of action based on the same facts. The district court sustained the plea of collateral estoppel on the issue of desecration. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, noting that the applicable state law did not require a finding of desecration of a particular grave, but only desecration of any part of the cemetery. The previous judgment had established that there was no desecration of any part of the cemetery and the second plaintiff was properly denied an opportunity to relitigate. The court of appeals also noted that both plaintiffs were represented by the same attorney, that the second plaintiff testified at the first trial, and that the second plaintiff admitted that no new evidence would be introduced at the second trial.

In *Roode v. Michaelian,*[22] a teacher claimed to have been dismissed because of union activity and filed a charge with the Westchester County Public Employment Relations Board (PERB). A hearing was held and

19. In Makariw v. Rinard, 222 F. Supp. 336 (E.D. Pa. 1963), privity was seemingly expanded to its constitutional limits when the court held an employee was in privity with his employer and therefore bound by an adverse judgment against his employer even though the employee's estate had never had an opportunity to litigate the issue of his negligence.

20. Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918).

21. 378 F.2d. 876 (5th Cir. 1967).

22. 373 F. Supp. 53 (S.D.N.Y. 1974).

the hearing examiner found that the plaintiff's charges were not supported by the evidence. However, an administrative review board found that the plaintiff was at least in part dismissed because of union activity. PERB issued an order directing that the plaintiff be reinstated with back pay, but the school district refused to comply. PERB then commenced a statutory action in a New York state court to enforce its order. The teacher sought leave to intervene. The court denied intervention and only allowed the teacher to file an *amicus curiae* brief. The state court refused to enforce PERB's order as unsupported by the evidence. No appeal was taken. The teacher then filed a civil rights suit in federal court, alleging that the defendant school district refused to rehire her because of union activities. The defendant pleaded the prior state court action (in which the plaintiff was denied intervention) as a bar to the plaintiff's federal court action. The district court allowed the plea, saying: "Having once had her day in court, plaintiff is not entitled to relitigate the factual issue determined against her before the hearing examiner and the [state court]."[23] It is difficult to determine which prior litigation was deemed to preclude the plaintiff from relitigating her dismissal. The hearing examiner who decided against her was reversed by the administrative review board, and she was denied intervention in the state court action. The court was probably not saying that the filing of the *amicus curiae* brief constitutes sufficient participation to be bound by a decision. The decision may be justified on the ground that the plaintiff was in privity with PERB, and PERB's suit adequately represented her interests in the state court. In such a case, the plaintiff was not unconstitutionally bound because of the privity relationship.

Gerrard v. Larsen[24] involved a two car collision in which one driver was killed. A passenger in decedent's automobile brought a personal injury action against the other driver, who in turn filed a third party complaint against decedent's administrator seeking contribution. The administrator filed a counterclaim for wrongful death which was severed for trial. The main action resulted in a finding that the decedent was negligent. When the severed counterclaim came to trial, it was dismissed due to the previous finding that decedent was negligent. The administrator represented the decedent's estate on the contribution claim, but represented the decedent's parents on the wrongful death counterclaim. The United States Court of Appeals for the Eighth Circuit noted that ordinarily only parties or their privies may be bound by a judgment and acknowledged that the parents were not parties or in privity with a party in the main action. However, the court, relying on the *Cauefield* decision, stated that in light of the changing applications of the concepts of res judicata and collateral estoppel, the question of who should be bound by a prior adjudication ought to be resolved on a case by case basis, rather than by relying solely upon the formal status of persons against whom an estoppel

23. *Id.* at 56.
24. 517 F.2d 1127 (8th Cir. 1975).

is asserted. The court reversed and remanded to the trial court for a determination whether the parents had participated sufficiently in the main action to be bound thereby, based on what the court referred to as "functional privity" with the decedent's estate.

These cases seem to be proceeding on a case by case analysis of the particular facts to determine if there is any equitable reason to allow an issue previously litigated, regardless of by whom, to be relitigated. On the other hand, similar results could have been obtained by applying an expansive interpretation to traditional privity concepts which some of these decisions may have covertly employed. By either approach, these three cases may be interpreted as a trend away from the mechanical due process requirement that only parties or persons traditionally defined as privies may be bound by a judgment. The Supreme Court itself has even indicated that a failure to intervene when it is convenient to do so may result in the decision being binding on the non-intervenor.[25]

It is essential to note, however, that two separate and distinct considerations present themselves when one is attempting to classify the effects of a valid judgment: (1) who is bound by the judgment? and (2) who may utilize the benefits of the judgment? Even if the answer to the first question is that a judgment is binding only on the parties and their privies because of due process, the answer to the second question is not necessarily the same. If the party against whom the plea is asserted was either a prior party or in privity, the question of who may assert the plea does not seem to involve due process questions. The person seeking to relitigate an issue has had his constitutionally-required day in court on that issue and lost. The person seeking preclusion is willing to forego his right to a day in court on the issue. Nevertheless, most courts have ignored this distinction and utilized the rule of mutuality to limit those persons who may assert the plea of collateral estoppel, as well as those persons against whom it may be asserted.

III. The Assault on Mutuality

In recent years widespread dissatisfaction with the rule of mutuality[26] has led several state courts[27] to abandon or modify it. Some federal courts have perhaps abandoned it, at least with regard to federal questions.[28]

25. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).

26. Jeremy Bentham, a nineteenth century utilitarian, criticized mutuality as unfounded in reason and a "maxim which one would suppose to have found its way from the gaming table to the bench." J. Bentham, *Rationale of Judicial Evidence,* in 7 Works of Jeremy Bentham 171 (Bowring ed. 1843).

27. *See, e.g.,* B. R. Dewitt, Inc. v. Hall, 225 N.E.2d 195, 19 N.Y.2d 141 (N.Y. App. 1967) (declaring mutuality a "dead letter" in New York); Spettigue v. Mahoney, 445 P.2d 557 (Ariz. App. 1968) (refusing to abolish mutuality where prior judgment used offensively).

28. Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 515 (E.D. Mich. 1974). *See also* Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964).

There does not appear to be a constitutional prohibition against allowing a prior judgment to be subsequently pleaded by a non-party to the initial action. Therefore, each state is free to retain or abolish the requirement of mutuality.[29]

The proponents of the rule of mutuality defend the rule as a reflection of the inherently personal nature of an in personam judgment.[30] This argument centers around the fact that at the heart of our judicial system is an understanding that litigation is essentially personal; the parties meet in court to resolve disputes. Our judicial system makes a distinction between actions in rem—designed and intended to be binding upon the whole world—and those actions in personam—personal and private between the parties and of no concern to the world at large.[31] To allow a person to reap the benefits of a personal judgment to which he was not a party would disrupt these traditional concepts. Parties to a lawsuit could no longer resolve differences between themselves presently without fear that future changed circumstances might turn victory into defeat at the hands of an unknown non-party lurking in the distance. A non-party would have the luxury of using a judgment from which he can benefit with the confidence that due process would not allow that judgment to be used against him.[32] If an individual is to be granted his day in court, fairness requires that he must know against whom he labors and that he be afforded the opportunity to confront personally those to whom he will be bound if he should lose. Additionally, even if a party is aware of the number of his potential adversaries, every lawsuit is unique as to startegy, tactics, admissible evidence, and the ever-present and unpredictable jury. Other arguments in favor of the rule of mutuality point to the fallibility of the jury system[33] and the dangers of a sympathetic plaintiff,[34] compromise verdicts,[35] incompetency of counsel in the previous action,[36] and newly-discovered evidence.[37]

29. Mackis v. Murray, 397 F.2d 74 (6th Cir. 1968); Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965).

30. Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TULANE L. REV. 301 (1961); Note, *Mutuality of Estoppel: McCourt v. Algiers in Context,* 1967 WIS. L. REV. 267.

31. RESTATEMENT OF JUDGMENTS, General Principles, ch. 1 (1942).

32. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties,* 68 COLUM. L. REV. 1457 (1968).

33. Spettigue v. Mahoney, 445 P.2d 557, 562 (Ariz. App. 1968); Hornstein v. Kramer Bros. Freight Lines, 133 F.2d 143, 145 (3rd Cir. 1943).

34. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957). Currie later withdrew his objections in *Civil Procedure, The Tempest Brews,* 53 CAL. L. REV. 25 (1965).

35. Bener v. British Commonwealth Pac. Airlines, 346 F.2d 532, 542 (2d Cir. 1965); Taylor v. Hawkinson, 47 Cal. 2d 893, 896, 306 P.2d 797, 799 (1957); Leipert v. Honold, 39 Cal. 2d 462, 468, 247 P.2d 324, 329 (1952).

36. *Contra,* Graves v. Associated Transport, Inc., 344 F.2d 894, 901 (4th Cir. 1965).

37. United States v. United Air Lines, Inc., 216 F. Supp. 709, 728 (D. Nev. 1962) (argument considered). *Contra,* Pat Perusse Realty Co. v. Lingo, 238 A.2d 100 (Md. App. 1968).

In addition, proponents of the rule allege that the policies underlying res judicata—*i.e.*, bringing an end to litigation[38] and preventing harrassing multiple suits,[39] would not be served if non-parties are allowed to make use of a prior judgment because: (1) If a party knows that non-parties will be able to use the judgment in a subsequent suit, it may increase litigation because he may litigate longer and more thoroughly than the issue initially warrants[40] and (2) there is no harrassment because the party faced with relitigation of an issue is the one who desires to relitigate the issue.[41] Also if the rule of mutuality is abandoned, interested persons may refuse to intervene in present actions, because they know if their adversary wins, the judgment may not be used against them, whereas if their adversary loses, they will be able to utilize the judgment later. Thus the abandonment of mutuality would encourage potential litigants to adopt a "wait and see" attitude.

The main argument against the rule of mutuality is the need to improve judicial efficiency by cutting down on the flood of cases now reaching the courts.[42] It is argued that a party who has had his day in court on an issue should not be entitled to relitigate that issue as many times as he may have adversaries. The opponents of mutuality also stress the rule's lack of a rational basis, in that the considerations involved in deciding who may be bound by a prior determination of an issue are completely unrelated to those considerations involved in deciding against whom a prior determination may be asserted. Additionally, due to the possibility of different results on identical facts, opponents contend that mutuality produces a loss of public respect for the judiciary.[43]

In *Bernhard v. Bank of America*,[44] the leading case abandoning the rule of mutuality, Chief Justice Traynor stated:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. . . .
>
> There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
>
> No satisfactory rationalization has been advanced for the requirement of mutuality. . . .
>
> In determining the validity of a plea of res judicata three ques-

38. *See* Tillman v. National City Bank, 118 F.2d 631 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941).

39. *See* Kithcart v. Metropolitan Life, 119 F.2d 497 (8th Cir. 1941).

40. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TULANE L. REV. 301 (1961); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968).

41. *See* Technograph Printed Circuits, Ltd. v. United States, 372 F.2d 969 (Ct. Cl. 1967); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). *Contra*, Bahler v. Fletcher, 474 P.2d 329, 335 (Ore. 1970).

> tions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[45]

Nearly all courts have expressly added a fourth requirement to Chief Justice Traynor's test—that the defendant (or person against whom the plea is asserted) has had a full and fair opportunity to litigate the issue in the first proceeding.[46] Technically, this fourth requirement is redundant, because issue preclusion has always incorporated this inquiry, even where the same parties are involved in both law suits.[47] Realistically, however, the fourth requirement is useful because it forces a court to examine carefully the facts that constitute a full and fair opportunity to litigate.

IV. A Full and Fair Opportunity To Litigate

The problem facing courts today is that mutuality is still being viewed as an all-or-nothing proposition; that is, either mutuality is always required or it is never required. This is unfortunate because there are certain situations where the requirement of mutuality no longer performs a useful function and may be patently unfair. However, there are also situations where the abolition of mutuality would work an unfair result upon a party. It is this writer's contention that mutuality should no longer be viewed as a condition precedent to allowing a plea of collateral estoppel by a non-party to the prior adjudication. Rather, courts should proceed on a case by case basis and consider the particular facts of each case in determining whether mutuality should be required. Most of the courts that have abandoned the rule of mutuality have established a "full and fair opportunity to litigate the issue in the first suit" as the standard for determining when to allow a plea of collateral estoppel by a non-party to the prior adjudication. The remainder of this section will address itself to the factors to be considered in deciding when a party has been afforded a full and fair opportunity to litigate an issue in the prior action.

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42. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

43. Berhard v. Bank of Am. Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

44. *Id.* In the first suit, a beneficiary of the decedent's estate objected to the omission in the executor's final account of a deposit of money in a certain California bank. The executor's defense was that the deposit was a gift to himself made by the decedent during her lifetime, and the finding of a gift was sustained. Later the beneficiary sued the bank for the unauthorized release of the deposit and the bank sought to use the probate court's judgment as conclusive on the issue of gift, although the bank was a non-party to that prior adjudication.

45. *Id.* at 894-95.

46. Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964); United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962).

47. F. James, Civil Procedure § 11.19 (1965).

There are basically four situations that will arise if mutuality is no longer considered an essential requirement in allowing a plea of collateral estoppel:

1. Losing plaintiff in first suit is plaintiff in second suit.
2. Losing defendant in first suit is plaintiff in second suit.
3. Losing plaintiff in first suit is defendant in second suit.
4. Losing defendant in first suit is defendant in second suit.

These four situations will be analyzed by examining the factors that should influence the courts in deciding whether mutuality should be required.

A. *Losing Plaintiff in First Suit Is Plaintiff in Second Suit*

This situation arises where a plaintiff sues a defendant in one suit, and the defendant is victorious. The same plaintiff subsequently sues a different defendant, alleging the same cause of action based on the same transaction as his prior suit. The second defendant pleads the prior judgment as a bar. The plea of collateral estoppel by the defendant in the second action is a defensive use of the first judgment to defeat plaintiff's attempt to change defendants and relitigate an issue found against him in the first action. This is the traditional situation where courts have found "exceptions" to the requirement of mutuality and is probably the easiest in which to justify allowing a plea of collateral estoppel by a nonparty to the prior litigation. The plaintiff initiated the first action against the defendant and presumably picked the most convenient forum and presented his best and most convicing evidence. It is also quite possible that the plaintiff could have joined the second defendant in the initial action and avoided the second suit completely. Absent extraordinary circumstances, there is little reason to allow the plaintiff the opportunity to pick and choose among the possible defendants and sue each separately in hopes of eventually finding a kindly or confused jury.

In *Sanderson v. Balfour*[48] Sanderson was operating a tractor which collided with a parked car. When sued by the owner of the car for property damage, Sanderson counterclaimed for personal injuries.[49] A jury found for the owner on his claim and against Sanderson on his counterclaim. Sanderson then brought a second action for personal injuries against the bailee of the car (the owner's wife) who had parked it near the highway. The trial court denied the bailee's motion to dismiss. The New Hampshire Supreme Court reversed the trial court and dismissed the action, saying that the plaintiff had had a full and fair opportunity to litigate the issue in the prior action.

48. 109 N.H. 205, 247 A.2d 185 (1968).

49. When a defendant counterclaims, for purposes of this comment, he will be treated as the plaintiff with respect to that counterclaim. When a jurisdiction has a compulsory counterclaim rule, courts should consider the inconvenience of the forum and the availability of the witnesses in that jurisdiction when they consider whether he was afforded a full and fair opportunity to litigate an issue.

In *Pat Perusee Realty Co. v. Lingo*[50] a broker sued a husband and wife (sellers) for a commission he alleged to be due and owing. Only the husband was served with process and the jury verdict was in favor of the husband, because no willing purchaser had been found. The broker then brought attachment (garnishment?) against a debtor of the wife. The wife pleaded the prior judgment. The trial court held for the wife, saying that she would have been bound by the judgment even though she was never served or appeared, because she had notice and could have defended. The appellate court decided that regardless of whether the wife was bound, Maryland had abandoned mutuality and allowed the prior judgment to be pleaded despite the fact that the broker argued he could establish a better case against the wife than against the husband. The court came perilously close to sanctioning a "one chance in court is all you get" approach that can be even more unfair than mutuality. The broker obviously had difficulty getting service of process on the wife in the first action, but prosecuted the action even though she was the moving force behind the sale transaction. Had the broker realized that an adverse judgment in the suit against the husband would bar a later action against the wife, he might well have dismissed the first action. This arguably unfair result shows that the reliance on past decisions by the practicing bar is a factor to be considered when a jurisdiction decides to abandon mutuality.[51]

In *Pennington v. Snow*[52] a husband, wife, and the estate of their deceased child sued the owner and driver of a vehicle involved in a collision with a car driven by the husband. The plaintiffs claimed damages of $175,000, alleging that defendants' negligence caused the wife's miscarriage. While that suit was pending in superior court, the husband sued his insurer for medical payments of $2,500 in a state district court of limited jurisdiction. The state district court action was the first to come to trial and the court found that the wife's miscarriage was not causally connected to the accident. When the superior court action came to trial the defendants moved for summary judgment due to the lack of a causal connection between the accident and the miscarriage. The Supreme Court of Alaska abandoned mutuality as a requirement of collateral estoppel and adopted the *Bernhard* rationale of proceeding on a case by case basis. The court thoroughly examined the facts to determine whether the party to be precluded from relitigating the issue in a second action had in fact had a full and fair opportunity to litigate the issue in the first action. In this case the court decided that there was not a full and fair opportunity to litigate, because the first judgment was in a court of limited jurisdiction for a small sum, whereas the second action was in a court of general jurisdiction for $175,000. The district court was

50. 249 Md. 33, 238 A.2d 100 (Ct. App. 1968).
51. Continental Can Co. v. Hudson Foam Latex Prod., Inc., 123 N.J. Super. 364, 303 A.2d 97 (Law Div. 1973), *rev'd,* 129 N.J. Super. 426, 324 A.2d 60 (1974).
52. 471 P.2d 370 (Alas. 1970).

certainly not the forum the plaintiffs would have chosen as the most appropriate for a conclusive adjudication of this crucial issue, and plaintiffs certainly expended less time and preparation on the relatively minor district court suit. The dissent agreed with the abolition of mutuality, but would have given preclusive effect to the district court's finding of fact.[53]

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[54] the Supreme Court of the United States allowed the defensive use of a prior judgment by a non-party to the prior litigation against the plaintiff in the prior patent litigation. The Court overruled all previous authority that a patentee could not be collaterally estopped from relitigating his patent's validity. The Court paid particular attention to the prohibitive costs involved in patent infringement defenses and the likelihood that such prohibitive costs will result in settlement rather than litigation, even if the allegations of infringement are frivolous. The Supreme Court rejected the strict rule of mutuality, but also rejected a strict rule of no relitigation. Instead, the Court placed upon the patentee, who had previously lost a decision holding his patent invalid, the burden of showing a need to relitigate its validity because he had not had a fair opportunity procedurally, substantively, or evidentially to pursue his claim in the first action.[55] The Court recognized that the decision whether to allow the relitigation of the validity of a patent previously held invalid will necessarily rest on the trial court's sense of justice and equity. The Court rejected the argument that its holding would merely shift the focus of litigation from the merits of infringement to whether the party to be estopped has had a full and fair opportunity to litigate his claim.

B. *Losing Defendant in First Suit Is Plaintiff in Second Suit*

The second category where a party to a prior adjudication may subsequently be met with a defense of that prior judgment arises where a defendant loses in the first suit, and later brings his own action based on, or involving, issues decided in the first suit. This problem arises most often in jurisdictions having no compulsory counterclaim requirement or in cases where the compulsory counterclaim rule is inoperative on the facts.

One commentator has said that refusing to give preclusive effect to the prior judgment is justified in this situation, because the defendant in the first action (the party to be estopped in the second action) was

53. *Id.* at 379.

54. 402 U.S. 313 (1971).

55. Placing the burden of proof upon the party against whom the prior judgment is pleaded to refute the fact that he had a full and fair opportunity to litigate the issue in the first suit seems appropriate. The party asserting the plea has the burden to show that the issue in question in the second action is identical to the issue previously determined adversely to the other party in the prior, valid, and binding judgment. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 298 N.Y.S.2d 722, 246 N.E.2d 722 (1969); Bahler v. Fletcher, 474 P.2d 329 (Ore. 1970). *Contra,* Waitkus v. Pomeroy, 31 Colo. App. 396, 506 P.2d 392 (1972), *rev'd on other grounds,* 183 Colo. 344, 517 P.2d 396 (1974).

forced into a court that was not of his own choosing and which may have been inconvenient, thus preventing the prior defendant from putting forth his best efforts.[56] No court has accepted this distinction[57] and one court effectively criticized it, stating: "There would be something radically wrong with our system of justice if we were required to start basing rules of law upon the proposition that defendants do not on the average have a fair opportunity to litigate relevant issues."[58]

This situation frequently arises where a third party is used to finance an undertaking. In *Bahler v. Fletcher*[59] a homeowner contracted with a builder to remodel his house. The builder assigned the contract and deed of trust to a lender to raise funds to pay for the cost of materials. The assignment was subject to a warranty that the work be done in a workmanlike manner. The homeowner refused to pay for the remodeling, alleging that it was not performed in a workmanlike manner. The lender then sued the builder to recover its money and return the contract and deed of trust to the builder, resulting in judgment for the lender based on the breach of warranty. The builder then sued the homeowner to foreclose the deed of trust and the homeowner pleaded the prior judgment between the builder and his lender. The builder argued for mutuality, claiming that if the builder had prevailed in the prior action, the determination of the quality of workmanship would not have been binding on the homeowner. The Oregon court rejected mutuality as being irrelevant to the question whether the defendant had a full and fair opportunity to litigate the issue. The court said that once such an opportunity has been afforded, the defendant was bound by the determination. In an extended opinion, the court considered many factors and concluded it would not be unfair to allow collateral estoppel under the facts presented. The court adopted a two-part test for determining when the use of collateral estoppel by a non-party in the first suit would be allowed: (1) the identical issue must have been necessarily decided in a prior action and be decisive of the present action; and (2) a full and fair opportunity to contest the decision must have been afforded in the prior action. The Oregon court appears to have added a new requirement by saying that the issue to be precluded must be *decisive* to the subsequent action. This presumably would make collateral estoppel inapplicable to unnecessary or secondary issues previously litigated. Unfortunately, the court has not given further guidance as to how "decisive" the issue must be in subsequent suits.[60]

Graves v. Assoc. Transport, Inc.[61] involved a collision between a car

56. *See* Currie, *supra* note 34, at 300-04.
57. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 606-07, 25 Cal. Rptr. 559, 561, 375 P.2d 439, 441 (1962). *See also* Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 955-56, (2d Cir. 1964).
58. Bahler v. Fletcher, 474 P.2d 329, 337 (Ore. 1970).
59. *Id.*
60. *But see In re* Estate of Ellis, 333 A.2d 728, 731 n.8 (Pa. 1975).
61. 344 F.2d 894 (4th Cir. 1965).

and a truck. The driver of the car sued the owner of the truck for injuries and property damage in a federal court. While that case was pending, the truck driver sued the driver of the car in a Virginia state court for injuries, claiming damages of $2,000. The state court suit came to trial first and resulted in a judgment for the truck driver. When the motorist's case came to trial the motorist recovered a judgment for $4,000. The United States Court of Appeals for the Fourth Circuit reversed the second judgment, concluding that the state court judgment precluded the relitigation of negligence. Although the facts themselves would fall within the common law exception to mutuality because of the indemnity relationship, the court of appeals preferred to speculate that Virginia would abandon mutuality when presented with the opportunity and based its decision on its finding that the motorist had a full and fair opportunity to litigate the negligence issue in the prior action. The court so found in spite of the facts that the motorist filed his claim first, that the motorist's claim was twice the amount of the claim it defended against, and that the motorist was represented by his insurance carrier's attorney in the prior action, whereas the motorist retained his own counsel in the federal suit. It is highly unlikely that either party to the state court action realized the judgment rendered there would be given such conclusive effect in the suit still pending in federal court.

C. *Losing Plaintiff in First Suit Is Defendant in Second Suit*

The third situation where collateral estoppel problems may arise is where a plaintiff loses in the first suit. The prior judgment is then pleaded by a non-party to the prior litigation to establish affirmatively the prior plaintiff's liability in the second suit. This use of collateral estoppel differs dramatically from the first two situations because the plea is not being utilized to defend or defeat a claim without relitigation, rather, the plea is utilized to establish a claim without litigation.

Several commentators and courts have seized upon this distinction as a rule of thumb as to when to allow or deny the plea of collateral estoppel by a non-party to the prior action.[62] This rule of thumb has been rejected by most courts,[63] but can be of some benefit in analyzing the cases.

62. *See* Rawls v. Daughters of Charity of St. Vincent De Paul, Inc., 491 F.2d 141 (5th Cir. 1974), *cert. denied,* 419 U.S. 1032 (1975); Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1973); Spettigue v. Mahoney, 445 P.2d 557 (Ariz. App. 1968); Adamson v. Hall, 202 Kan. 482, 449 P.2d 536 (1969) (dictum); Continental Can Co. v. Hudson Foam Latex Prod., Inc., 123 N.J. Super. 364, 303 A.2d 97 (Law Div. 1973). *See generally* Currie, *supra* note 32; Comment, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty,* 35 GEO. WASH. L. REV. 1010 (1967).

63. Popp v. Eberlein, 409 F.2d 309 (7th Cir. 1969); Ford Motor Co. v. Superior Court, 16 Cal. App. 3d 442, 94 Cal. Rptr. 127 (1971); Ellis v. Crockett, 451 P.2d 814 (Hawaii 1969); Paradise Palms Comm. Ass'n v. Paradise Homes, 505 P.2d 596 (Nev. 1973); Bahler v. Fletcher, 474 P.2d 329 (Ore. 1970).

Hardware Mutual Insurance Co. v. Valentine[64] demonstrates that the offensive use of prior judgments by non-parties may sometimes be appropriate. A fire in a hotel resulted in damage to the hotel and to the property of a tenant in whose premises the fire occurred. The hotel's fire insurance carrier sued the tenant, and while that suit was pending, the tenant filed a separate suit against the contractor of the hotel, alleging negligence in repairing the electrical system. The latter suit was tried first and resulted in a judicial finding of fact that the fire was caused by the tenant's negligent use of a hot plate. The insurance company then moved for summary judgment in its action against the tenant on the basis of the prior judgment. The motion was granted and affirmed on appeal. There seems to be no reason why the tenant, having fully litigated the issue of his negligence with knowledge of the pending insurer's action and making no attempt to consolidate the cases, should be permitted to relitigate. Where the party against whom collateral estoppel is used was the plaintiff in the prior suit and chose the forum, it is difficult to argue that he was denied the opportunity to present his best and most convincing case.

This situation seldom arises due to the widespread use of general verdicts. When a general verdict for a defendant is returned, it is seldom evident why the jury decided against the plaintiff. For example, in a negligence action arising from an automobile collision, a jury verdict for the defendant could mean that the defendant was not negligent, that there was no proximate cause, or that the plaintiff was contributorily negligent. In such a case, even jurisdictions that have abandoned mutuality would not allow a subsequent plaintiff to use the judgment to establish a claim against the plaintiff in the first suit.

D. *Losing Defendant in First Suit Is Defendant in Second Suit*

The fourth situation where a non-party to a prior suit will attempt to utilize that judgment arises where a defendant who lost in the first suit is subsequently sued by new plaintiffs with claims arising from the same occurrence or transaction that was previously litigated. This is the area where courts and commentators are loath to allow the plea of collateral estoppel by persons not a party to the prior litigation.[65] The fear of allowing the plea in this situation is based on the facts that the defendant in the first suit had no choice of forum and probably did not have the right to join potential plaintiffs with similar claims. Moreover, the defendant will be denied the opportunity to confront those "sideline" plaintiffs who would benefit if he loses, but would not be bound if he prevails in the first action.

These factors are compounded in Professor Currie's "chamber of

64. 119 Cal. App. 2d 125, 259 P.2d 70 (1953).

65. *See* Continental Can Co. v. Hudson Foam Latex Prod., Inc., 123 N.J. Super. 364, 303 A.2d 97 (Law Div. 1973); *In re* Estate of Ellis, 333 A.2d 728, 731 n.7 (Pa. 1975).

horrors" example of the "mass tort."[66] Currie hypothesized a train wreck where fifty passengers were injured, allegedly as a result of the railroad's negligence. Passenger #1 sues and loses. Passenger #2, who has a due process right to relitigate the railroad's negligence, sues the railroad, but loses also. Similarly, Passengers #3 through #25 lose in individual suits. For some reason, however, Passenger #26 obtains a verdict against the defendant railroad. If Passengers #27 through #50 rely on Passenger #26's judgment to prevent the railroad from relitigating the issue of its negligence, only their individual damages remain to be decided! The possibility of such an anomolous result led Professor Currie to say that collateral estoppel should not be allowed in such a situation, even if the defendant lost in the first suit instead of the twenty-fifth. The benefits to be derived by a "sideline" plaintiff certainly could result in encouraging a "wait and see" attitude in potential plaintiffs and discourage intervention and class actions.

In this day of mass transit and worldwide marketing of products, the possibility of multiple plaintiffs has become a reality. The federal courts were presented with the problem in 1958 when a United Air Lines passenger plane collided with an Air Force jet over Nevada, killing all 42 passengers and five crewmen of the airliner and the two Air Force pilots.[67] Suits were filed in eleven different jurisdictions, with twenty-four suits brought in the District Court for the Southern District of California and consolidated for trial. This consolidated lawsuit was the first to come to trial and resulted in a jury verdict for the plaintiffs on the issue of negligence. Nine cases were pending in Nevada and the plaintiffs there moved for summary judgment on the issue of liability based on the conclusiveness of the California judgment. The court granted the motion, rejecting both the rule of mutuality and Professor Currie's "mass tort" rationale. Instead, the court only examined the question whether United Air Lines had had a full and fair opportunity to litigate the issue of its negligence in the first action and decided that it had.

The second major decision allowing the offensive use of collateral estoppel by a non-party against the previous defendant was *Zdanok v. Glidden Co., Durkee Famous Foods Division.*[68] The case held that the judicial interpretation of an employment contract in a suit by five employees was binding upon the employer in a subsequent suit by the remaining employees involving the same facts. The court's rationale for its holding is interesting. The court said that the parties expected the initial suit to be a test case and binding upon later suits, and that no surprise was involved because the defendant knew that other plaintiffs were waiting in the wings; therefore, the defendant had "litigated to the hilt" in the

66. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281, 285 (1957).

67. United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom.,* United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

68. 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964).

first suit. This seems to engraft a foreseeability requirement onto the "full and fair opportunity to litigate" standard. The court also noted that the issue involved contract construction by a judge and not by a jury, implying that a different result might be appropriate in the latter situation.

Berner v. British Commonwealth Pacific Airlines, Ltd.[69] adds additional factors to consider in determining whether to allow a plea of collateral estoppel. Once again an airline accident resulted in multiple lawsuits, with the first trial in California resulting in a judgment for the plaintiffs. The second suit was brought in New York and the California judgment was pleaded as a conclusive determination of defendant's negligence. The court refused to give preclusive effect to the prior judgment, despite the fact that the defendant had a full and fair opportunity to litigate the issue in the first trial. The court was influenced by the fact that the verdict in the first trial was for $35,000, whereas the plaintiff in the second suit sought $500,000 in damages. The defendant had not appealed the small first verdict (which it may have considered to be a victory of sorts). The defendant alleged that the small award of damages was evidence that it was the result of a compromise verdict. The New York court said that giving conclusive effect to the compromise verdict in subsequent actions would force the defendant to appeal all verdicts, even if it considered a small award of damages to be a victory in that particular case. Other courts have also placed importance on evidence of compromise verdicts in determining if it would be "unfair" to a defendant to bind him with a prior verdict. Thus, the court added a concept of motive to litigate fully both at the trial and on appeal to the "full and fair opportuntiy to litigate" standard.[70]

Another question raised in these situations is when a prior judgment is "final" for purposes of collateral estoppel. The court in *United Air Lines* held as a matter of federal law that a federal district court judgment was "final" for purposes of res judicata or collateral estoppel, even if the judgment is still on appeal.[71] In practice, however, some courts have been hesitant to give conclusive effect to a prior judgment that is being appealed.[72]

The use of collateral estoppel by a non-party as a sword (offensively) as well as a shield (defensively) may compel defendants to change trial strategy, especially in multiple-claimant situations. Whereas defendants at one time tried to separate plaintiffs and prevent class actions in order to force each plaintiff to bear the high cost of litigation, they may now prefer to have all potential plaintiffs join in one action, so that the

69. 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).
70. *Id.* at 540.
71. 216 F. Supp. 709 (D. Nev. 1962). *See also* Menedez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973); Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499 (E.D. Mich. 1972); Sherman v. Jacobson, 247 F. Supp. 261, 266 (S.D.N.Y. 1965).
72. *See* Fink v. Coates, 323 F. Supp. 988 (S.D.N.Y. 1971); Maryland v. Capital Airlines, 267 F. Supp. 298 (D.C. Md. 1967).

determination will be binding on the plaintiffs as well as the defendants.[73] Federal courts now seem to allow tort actions to be brought as class actions, because of the possibility that the defendant will be collaterally estopped by an adverse decision.[74] In addition, the growing acceptance of the offensive use of collateral estoppel is having an effect on class actions in another way. In making the determination whether a class action is appropriate,[75] the Third Circuit has recently suggested that the availability of the offensive use of collateral estoppel by non-parties may mean that a class action is not "superior" to suits by individual plaintiffs.[76]

V. The Full Faith and Credit Clause, The Erie Doctrine, and Choice-of-Law Questions

If it is accepted that allowing a plea of a prior judgment by a non-party to that judgment against a person who was a party thereto does not violate due process, then each state is constitutionally free to decide whether to retain or abandon the rule of mutuality in situations where both actions arise in that state. However, where the prior judgment is from a foreign jurisdiction, three additional problems are presented.

A. *Full Faith and Credit*

Does the full faith and credit clause of the Constitution require the second court to accord the prior judgment the same, *and only the same,* faith and credit it would have received in the state where the judgment was rendered? For example, assume that plaintiff is involved in a multi-vehicle collision involving vehicles from various states. Plaintiff sues defendant *A* in State *X,* which requires mutuality. The jury in State *X* by special verdict finds that plaintiff was contributorily negligent and denies recovery. Plaintiff then sues defendant *B* in State *Y,* which has abolished mutuality. Defendant *B* seeks to preclude the relitigation of plaintiff's negligence by pleading the prior judgment. Plaintiff argues that State *X* requires mutuality and would not allow the preclusion if the second suit had been brought in State *X*; therefore, State *Y* is bound by the full faith and credit clause to deny the preclusion plea.

Interpretation of the full faith and credit clause usually arises when there has been a failure to give sufficient effect to a prior judgment of

73. Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813, 816 (S.D.N.Y. 1966).

74. *See* Gabel v. Hughes Air Corp., 350 F. Supp. 624 (C.D. Cal. 1972); Hernandez v. Motor Vessell Skyward, 61 F.R.D. 562 (S.D. Fla. 1973); American Trading & Production Corp. v. Fischback & Moore, Inc., 311 F. Supp. 412 (N.D. Ill. 1969). This has been allowed in spite of the advisory committee's note that Federal Rule 23 was not devised for tort actions. In addition, section 1407 of Title 28 provides for the consolidation and coordination of pretrial proceedings in multi-district litigation.

75. *See* Fed. R. Civ. P. 23 (b) (3) (1976).

76. Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974), *cert denied,* 419 U.S. 885 (1975).

a sister state.[77] This differs from the problem raised above which involves whether a subsequent court may grant "greater" effect to a sister state's judgment by ignoring a limitation or disability the initial forum attaches to its own judgments. The first cases presented with this situation applied a literal mechanical rule[78] to the congressional statute[79] implementing the full faith and credit clause without examining whether the purposes behind the clause were being served in the individual case. In *Board of Public Works v. Columbia College*[80] the Supreme Court propounded the mechanical rule, saying: "No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered."[81] That case can be distinguished from the above example because the Supreme Court was prohibiting giving res judicata effect to a sister state's judgment that was not final under the law of the rendering state. Challenging the finality of a foreign judgment may threaten the integrity of the rendering state's procedures. In the above example, however, the forum state would merely be giving greater effect to a judgment that is final in the rendering state, which arguably does not threaten the rendering state's internal procedure.

An examination of the purposes behind the full faith and credit clause would seem to be preferable to the mechanical rule in deciding whether a state may give greater res judicata effect to a rendering state's judgment than the rendering state would have given. Prior to the formation of our federal union, the American colonies were considered autonomous and free to disregard judgments of the other colonies and judgments previously decided were subject to reexamination upon the merits when sued upon for execution.[82] When the federal union was established both the Articles of Confederation[83] and later the Constitution,[84] took steps to prohibit this obvious source of trouble.

When the Supreme Court first considered the full faith and credit clause,[85] the Court stated that it was designed to insure that if a judgment is conclusive in the rendering state, it must control elsewhere; thus, "[i]t remains only then to inquire in every case what is the effect of a

77. Sutton v. Leib, 342 U.S. 402 (1952); Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948).

78. *See* Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873); Suydam v. Barber, 18 N.Y. 468 (1858).

79. Act of May 26, 1790, ch. 11, 1 Stat. 122, *supplemented by,* Act of March 27, 1804, ch. 56, 2 Stat. 298, 28 U.S.C. § 687 (1940), *now* 28 U.S.C. § 1738 (1970).

80. Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873).

81. *Id.* at 529.

82. Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation,* 4 COLUM. L. REV. 470 (1904).

83. Art. of Confed., Art. IV.

84. *See* M'Elmoyle v. Cohen, 38 U.S. (13 Peters) 169 (1839); U.S. CONST. art. IV, § 1.

85. Mills v. Duryee, 11 U.S. (7 Cranch) 631 (1813).

judgment in the State where it is rendered."[86] The Court has declared in other cases, however, that the purpose of the clause is to prevent a repetition of proceedings that have already been adjudicated in another forum.[87] This purpose and the purposes behind res judicata and collateral estoppel are thus fully compatable. The advancement of one would seem to be the advancement of the other.

The Supreme Court has also recognized certain limitations on the applicability of the full faith and credit clause by refusing to extend the scope of the clause to state statutes or common law.[88] The Supreme Court of Nevada recently utilized this categorization[89] to escape the full faith and credit clause in order to apply its own rules of res judicata when considering the effect to be given to a Florida judgment. One additional argument sometimes made to limit the full faith and credit clause is that the clause must give way to the interest of each state in controlling its own affairs within its own borders.[90] It is at least arguable, therefore, that the full faith and credit clause does not forbid one state from giving greater collateral estoppel effect to a sister state's judgment than the rendering state would give.

A stronger argument for not allowing the full faith and credit clause to govern this area may be presented if the example previously given is reversed so that the first action is brought in State *Y* which has abolished mutuality and the subsequent action is brought in State *X* which retains mutuality. Will State *X* be required by the full faith and credit clause to give State *Y*'s judgment the same collateral estoppel effect in State *X* that it would have received in State *Y*, thus ignoring its own requirement of mutuality? The Supreme Court has suggested that the full faith and credit clause would govern in such a situation as to res judicata.[91] It is possible, however, to distinguish traditional res judicata from the use of collateral estoppel by a non-party because jurisdictions that have abandoned mutuality do not allow issue preclusion on the basis of a mechanical "one day in court is all you get" test, but rather on the basis of whether the party to be precluded has had a "full and fair opportunity to litigate the issue." This test seems highly discretionary with the trial judge and as such, the foreign state may not be able to decide in all cases whether the rendering state itself would have allowed the plea or not. Thus when it is unclear what the collateral estoppel effect in the rendering state

86. *Id.* at 632.

87. Sutton v. Leib, 342 U.S. 402, 407 (1952); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 616 (1947) (concurring opinion); Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942).

88. Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201 (1941); Pacific Employees Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939). *See also* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

89. Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964).

90. Yarborough v. Yarborough, 290 U.S. 202, 215 (1933) (dissenting opinion).

91. *Id.* at 202.

would be, presumably the forum state could apply its own rules requiring mutuality and allow the issue to be relitigated.

If the full faith and credit clause is held to govern the collateral estoppel effect to be given a foreign judgment, this might encourage "forum shopping" and possible collusion in multi-state litigation as to which case should first come to trial in order to gain maximum benefit from the judgment.

B. *The Erie Doctrine*

The situation becomes even more complicated when either the rendering court or the forum court is a federal court. The *Berner* court stated, without deciding, that the collateral estoppel effect to be given to a prior federal court judgment in a subsequent action in either a federal or state court might itself be a federal question and the same would hold true for the collateral estoppel effect to be given to a prior judgment, either state or federal, if the subsequent action was brought in a federal court.[92] This implies that there is a body of "federal law" that governs collateral estoppel in federal courts. It would seem, however, that in a diversity case, the *Erie* doctrine[93] would apply and the law of the state where the federal court sits would govern.[94] The idea of "federal law" governing this area is important because the federal courts have shown a much greater willingness to abolish mutuality than have the state courts. Once again the practice of "forum shopping" will gain impetus if federal law governs the collateral estoppel effects to be given to judgments in federal court, especially since many federal courts sit in states that require mutuality.

C. *Choice-of-Law*

Assuming the full faith and credit clause does not require the forum state to apply the law of the rendering jurisdiction as to the collateral estoppel effects to be given to its judgment, a choice-of-law question remains. If there is a conflict, should the forum state apply its own law or defer to that of the rendering state?

The *Restatement (Second) of Conflicts* takes an unusually strong stand on this issue: "What persons are bound by a valid judgment is determined, subject to constitutional limitations, by the local law of the state where the judgment was rendered."[95] If there is no constitutional prohibition against the allowance of a plea of collateral estoppel by a non-party to the prior judgment and the full faith and credit clause is not held applicable in determining the collateral estoppel effect that can be given to

92. Berner v. British Commonwealth Pac. Airlines, Inc., 346 F.2d 532 (2d Cir. 1965); Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972); *In re* Air Crash Disaster, 350 F. Supp. 757 (S.D. Ohio 1972); Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96 (1965).

93. Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938).

94. *See* Brown v. Werner Co., 428 F.2d 375 (1st Cir. 1970); Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968); Gonzalez v. Fireman's Fund, Inc., 385 F. Supp. 140 (D.P.R. 1974).

95. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 94 (1971).

a prior judgment, this strong stand does not seem justified (except that it is easy to apply). The purpose of this comment has been to illustrate and discuss the analysis and balancing of factors that should be considered prior to deciding whether to apply mutuality in an individual case. Each time the issue is raised a careful investigation should be made to determine what benefits or prejudices would result from a decision to allow or prevent the relitigation of an issue. It does not seem justifiable to let the choice-of-law decision turn on such a rigid mechanical rule fostering a "race to the courthouse" attitude.

Each state should consider its own interests and the interests of the sister state involved concerning the effects of judgments. Considerations should include which state the parties are from, how they would be treated by their own state procedures, and which state will bear the burden of relitigation or reap the benefit of preclusion.

VI. The Missouri Position

Missouri courts have rarely been faced with the problem of a plea of collateral estoppel by a person not a party to the prior action. Most commentators list Missouri among those states that adhere to strict mutuality, citing *Smith v. Preis.*[96] That case involved an interpleader action by the defendant against the executrix of an estate. The executrix had filed two separate lawsuits against the defendant, one for personal injuries to the deceased and the other for wrongful death. To recover on both claims the executrix would have to prove in the first that the injuries caused by the defendant did not cause the deceased's death and in the second action that such injuries did cause the deceased's death. The defendant brought the interpleader suit to force the executrix to decide which theory she would pursue. The case actually involved due process and not mutuality, because the executrix in the first action represented the estate and in the later action the heirs of the deceased. Thus her presence in the two lawsuits would be in different legal capacities. The determination of causation in the first action would not be binding on the executrix in the later suit, because in her capacity as representative of the heirs she was not a party to the first suit. Therefore, the case is poor authority for saying that Missouri requires mutuality. Likewise, the recent decision in *O__ F__ L__* v. *M__ R__ R__*[97] speaks in terms of collateral estoppel, but is actually a due process case involving what constitutes privity in order to be bound by a prior adjudication, not the issue whether a non-party may benefit from a prior adjudication.

In *Taylor v. Sartorious*[98] the court allowed the defensive use of a prior judgment against the plaintiff in the prior suit by a non-party to the prior adjudication. The first suit was against one principal to a contract. The central issue in this suit was whether an agent had authority

96. 396 S.W.2d 636 (Mo. 1965).
97. 518 S.W.2d 113 (Mo. App., D.K.C. 1974).
98. 130 Mo. App. 23, 108 S.W. 1089 (St. L. Ct. App. 1908).

to bind his multiple principals to the contract; the court held that he did not. The plaintiff then brought a second suit against a different principal based on the same contract. The court recognized that mutuality was lacking, but also recognized that if the plaintiff was allowed to relitigate and won in the second action, the prior judgment in favor of the first defendant would be worthless, because the second defendant had a right of contribution against the first defendant. Rather than search for ficticious privity to satisfy mutuality, the court reasoned that the purpose of res judicata was to put an end to litigation and because the plaintiff had had one fair trial, there was no reason to allow the relitigation. It should be noted that this factual situation closely resembles the "indemnity exceptions" to mutuality.[99]

Similarly, in *Arata v. Monsanto Chem. Co.*[100] the court allowed the defensive use of a prior judgment against the prior defendant. The first action was a condemnation suit brought by the state in which Arata raised the issue whether the taking was for public or private use, with the finding that the taking was for public use. Arata then sued Monsanto for damages for influencing the state to condemn his property. Monsanto pleaded the prior adjudication and the defense was allowed.

The St. Louis District of the Missouri Court of Appeals recently approved the defensive use of a prior judgment against a plaintiff who was the plaintiff in the prior suit. In *Gerhardt v. Miller*[101] the plaintiffs had first brought a will contest, but settled their claims and agreed not to oppose probate of the will. The plaintiffs then brought a suit for damages against the present defendants, alleging "duress, fraud, deceit, manipulation, undue influence, and over persuasion" of the testatrix. The trial court sustained the motion to dismiss the petition based on res judicata and the court of appeals affirmed. The court of appeals acknowledged that mutuality was lacking, but stated that mutuality is not required for the defensive use of a prior judgment, citing *Arata*. The court decided that the ultimate issue whether the will was a product of fraud had been decided in the prior will contest against the plaintiffs by virtue of their agreement and that "it is the policy of the law to give repose to litigated matters that have been properly concluded."[102]

Two recent Missouri cases seem to stand for the proposition that collateral estoppel may not be used offensively *by* a non-party.[103] In both cases a husband sued a defendant for the loss of services of his wife. Each plaintiff attempted to plead the prior judgment in favor of the wife in her action for personal injuries against the same defendant arising out of the same transaction.[104] In both cases the plea of collateral estoppel was

99 *See* text accompanying note 14 *supra*.
100. 351 S.W.2d 717 (Mo. 1961).
101. 532 S.W. 852 (Mo. App., D. St. L. 1975).
102. *Id.* at 855.
103. *See* Marusic v. Union Elec. Co., 377 S.W.2d 454 (Mo. 1964); Elmore v. Illinois Term. R.R., 301 S.W.2d 44 (St. L. Mo. App. 1957).
104. Missouri Supreme Court Rule 66.01 (c) should prevent this issue from

denied on the authority of *Womach v. City of St. Joseph.*[105] The reliance on *Womach* seems misplaced. In *Womach* the wife lost her initial suit for injuries, and her husband subsequently sued the defendant for loss of services of the wife. The defendant pled the prior judgment *against* the husband. Thus the issue in *Womach* was the due process consideration of who may be *bound* by a judgment, not the issue of who may be *benefitted* by a judgment. The court in *Womach,* however, failed to make this distinction and in denying the defendant's plea of res judicata *against* the husband, the court felt compelled to overrule two earlier cases where the offensive use of a prior judgment *by* a non-party had been allowed.[106]

Only one Missouri case, *Estate of Laspy v. Laspy,*[107] has discussed the *Bernhard* rationale. In *Laspy,* a widow filed a claim against the estate of her husband for her statutory allowance. The estate defended on the ground that the wife had been previously convicted of manslaughter of her husband. In a well-reasoned decision the court noted that in the past a prior criminal conviction had been inadmissible as evidence of the facts determined in the criminal case, but also noted that all previous cases involved a civil proceeding brought *against* the convicted defendant to recover damages for the acts previously determined to have been criminal. The court decided the same rule need not apply where the civil action is brought *by* the convicted person for the purpose of profiting from his criminal actions. The court noted the lack of mutuality, but determined that it was not necessary in this factual situation. The decision contains an excellent discussion of *Bernhard,* but the court based its decision on case law pertaining to evidence of criminal convictions, rather than on collateral estoppel. The dicta of the case, although not speaking in terms of defensive or offensive use, certainly implies that the Missouri courts may allow a non-party to use a prior judgment defensively, but not offensively.

VII. CONCLUSION

There is a definite trend towards allowing the plea of a prior judgment by a non-party to that judgment to prevent one who was a party from relitigating an issue previously decided. Courts faced with an ever-increasing docket load will find it tempting to adopt such a doctrine in order to eliminate the added cost and time involved in relitigating an issue. However, the goal of judicial efficiency should never be allowed to override the *raison d'etre* for the courts' existence—*i.e.,* to do justice between the parties. Just as the rigid requirement of mutuality was unfair in certain circumstances, so would a rigid rule of no relitigation, as is illustrated by *United States v. Wexler.*[108] That case involved an action

arising in the future, because it compels joinder of a consortium claim with the personal injury claim in most instances.

105. 201 Mo. 467, 100 S.W. 443 (1907).

106. Morris v. Kansas City, 117 Mo. App. 298, 92 S.W. 908 (1906); Brown v. Missouri Pac. R.R., 96 Mo. App. 164, 71 S.W. 1083 (1902).

107. 409 S.W.2d 725 (K.C. Mo. App. 1966).

108. 8 F.2d 880 (E.D.N.Y. 1925).

to vacate a certificate of naturalization on the ground of Wexler's alleged bad moral character. The court held that this bad character was conclusively established by a prior divorce action brought by Wexler's wife on the ground of adultery. At the time of the divorce, however, adultery was the only ground available for obtaining a divorce in the jurisdiction.

Most courts which have considered the mutuality issue have adopted a case by case approach, using the "full and fair opportunity to litigate" standard. This flexible approach is superior to either strict adherence to the rule of mutuality or a rigid rule of no relitigation. However, this approach also puts courts to the task of carefully evaluating all relevant factors. Overlooking relevant factors can lead to very harsh and unfair results, as is illustrated by *Lustik v. Rankila*.[109] In *Lustik* the trustee of an estate brought a suit for wrongful death against Lustik, arising out of an automobile accident. Before trial Lustik filed suit for personal injuries against the estate administrator, basing her claim on the same accident. Consolidation of the two actions was denied and the trustee's suit was given priority because it was filed first. Judgment was for the trustee. When Lustik's suit came to the trial the administrator moved for summary judgment claiming the issue of Lustik's negligence had been decided in the first action. The trial court granted the summary judgment and the Minnesota Supreme Court affirmed. The dissent in *Lustik* points out some of the problems involved. Minnesota has a statutory presumption[110] of a decedent's due care in wrongful death actions and the jury was so instructed. Lustik never had an opportunity to litigate her negligence or that of the decedent without confronting evidentiary rules stacked against her by the statutory presumption. Also, Lustik based her action on last clear chance (humanitarian negligence in Missouri). Thus, she could have prevailed in spite of her contributory negligence. She was precluded by the prior finding that the decendent was not negligent—a finding that had the benefit of the statutory presumption. In the future courts should certainly consider the impact of evidentiary rules such as a Dead Man's Statute on the prior adjudication in deciding what constitutes a full and fair opportunity to litigate an issue in the prior adjudication.

If courts carefully examine the facts of each case, make an effort to understand the policy considerations underlying the doctrine of collateral estoppel, and avoid the temptation to rely on rigid rules of thumb and out-moded distinctions, the goals of efficient use of judicial resources and the opportunity to seek judicial vindication of one's rights can be served equally well. Although precise standards are hard to apply, perhaps the Supreme Court provided the answer when it said: "In the end, the decision will necessarily rest on the trial court's sense of justice and equity."

GARY R. CUNNINGHAM

109. 131 N.W.2d 741 (Minn. 1964).
110. MINN. STAT. ANN. § 602.04 (1957).