Res Judicata in the Federal Courts: Federal or State Law?

I. Introduction

The effect of res judicata[1] in a federal court with diversity of citizenship jurisdiction is a complex and unresolved issue. The debate centers around whether state or federal laws of res judicata should control. The *Erie*[2] doctrine requires federal courts exercising diversity jurisdiction to follow state law in substantive matters and federal law for merely procedural matters. Federal courts differ, however, as to whether res judicata is a substantive or procedural issue.[3] Some federal courts hold that state rules of res judicata create substantive rights so that the applicable state law controls.[4] Others take the view that federal law of res judicata should be used, either under the rationale that res judicata is merely a procedural device,[5] or that countervailing federal policies justify the use of federal res judicata law in diversity actions.[6]

While state and federal law of res judicata may be the same in some instances,[7] the question remains as to which law controls when they differ.

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[1]For a general discussion of res judicata, see C. Wright, The Law of Federal Courts § 100A (4th ed. 1983). As Professor Wright notes, res judicata is initially divided into two broad categories, "claim preclusion" and "issue preclusion." *Id.* at 680. Unlike claim preclusion, there may be valid reason to utilize federal rules for issue preclusion in diversity suits. *See infra* notes 162-63 and accompanying text. *See also* Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 Cornell L. Rev. 96, 106-07 (1965) (discussing the application of collateral estoppel in federal courts). The consideration of issue preclusion, however, is beyond the scope of this Note. The term "res judicata" for the purposes of this Note is limited to claim preclusion.

[2]Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[3]*Compare* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948) (all holding state law controls) *with* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (all holding federal law controls). *See also* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 769 (1976) (supporting the view that federal law should control); 1A J. Moore & B. Ward, Moore's Federal Practice ¶ 0.311[2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and federal rules of issue preclusion should control).

[4]*See* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948).

[5]*See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum).

[6]*See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962); *see also* Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum).

[7]*See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 539-40 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (same result whether state or federal rules of collateral estoppel applied); Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 n.3 (2d Cir. 1977) (effect of prior dismissal was on the merits under state or federal

For instance, in some states a trial court judgment that has been appealed is not res judicata until the appeal process is complete. In federal courts a trial judgment is res judicata when rendered although the judgment is appealed.[8] In addition, a dismissal for lack of prosecution may not bar a subsequent suit in state courts, yet such a dismissal may bar a second suit in federal courts if it is not labeled "without prejudice."[9] Likewise, a dismissal of a suit because the statute of limitations has expired may not bar a second action in state courts, while a federal court could treat it as a bar.[10] As these examples illustrate, the individual states and federal court system often utilize the doctrine of res judicata in a different manner. Consequently, a plaintiff faced with a res judicata question is likely to choose the forum most favorable to him.

The conflict between applying state or federal res judicata law involves more than differing views as to whether it affects substantive or procedural rights. The debate goes to whether the federal courts perceive their roles as merely another tribunal of the state,[11] or as a strictly federal forum.[12] The courts are also affected by their view of the importance of federal policies of efficiency and reliability,[13] and the *Erie* requirements of uniformity and non-discrimination.[14] Additionally, the policies behind res judicata—avoiding harassing litigation, preventing overcrowded court dockets, and ensuring certainty and respect for court decisions—are important in resolving the question. This Note will examine the conflicting approaches to res judicata issues in diversity actions, and will suggest that the use of state law would best fulfill the goals of diversity jurisdiction and the *Erie* doctrine.

II. The Impact of the *Erie* Doctrine on Choice of Law

In diversity of citizenship actions,[15] there has been a historical controversy over which law the court must use, state or federal. Although

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law); Gerrard v. Larson, 517 F.2d 1127, 1131-32 (8th Cir. 1975) (state and federal rules of mutuality for defensive collateral estoppel the same).

[8]*See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983).

[9]*See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (dismissal under Federal Rule 41(b) is with prejudice unless specifically stated otherwise).

[10]*See* Hartmann v. Time, 166 F.2d 127 (3d Cir. 1948) (a dismissal on the grounds that the statute of limitations has run is not on the merits so that it is not res judicata).

[11]*See, e.g.*, Hartmann v. Time, Inc., 166 F.2d 127, 138 (3d Cir. 1948) (stating that a district court is a court of the state in which it sits insofar as diversity cases are concerned).

[12]*See, e.g.*, Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir. 1975) (stating that the federal court system is independent of state courts in diversity suits).

[13]*See, e.g.*, *id.* (stating that the importance of preserving the integrity of the federal court judgment cannot be overemphasized).

[14]Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).

[15]28 U.S.C. § 1332 (1982). This statute provides in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of in-

the Rules of Decision Act [16] provided that "the laws of the several states . . . shall be regarded as the rules of decision" in diversity actions, for many years federal courts did not consider state court decisions to be "laws."[17] The United States Supreme Court upheld this approach in *Swift v. Tyson*.[18] In the *Swift* case, the Court found that federal courts exercising diversity jurisdiction could apply federal common law,[19] unless the state law was based on the state's written constitution or statutes, or the claim was a purely local matter, such as a real estate dispute.[20]

In *Erie Railroad v. Tompkins*,[21] the Supreme Court overruled its decision in *Swift* and held that in diversity actions, federal courts are bound by the substantive law of the states in which they sit.[22] In delivering the Court's opinion, Justice Brandeis gave three reasons for abandoning the *Swift* doctrine. First, he stated that Congress did not have the constitutional power[23] to declare the substantive rules of common law applicable in a state.[24] Second, he recognized that diversity of citizenship jurisdiction

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terest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. The necessity of retaining diversity jurisdiction has been the subject of heated debate for over sixty years. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1981) [hereinafter cited as WRIGHT & MILLER]. If diversity jurisdiction were eliminated from the federal courts, the issue of whether state or federal rules of res judicata should apply in diversity suits would, of course, become moot.

[16]Rules of Decision Act, ch. 646, 62 Stat. 944 (1948) (codified as amended at 28 U.S.C. § 1652 (1982)). The Rules of Decision Act provides: "The laws of several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

[17]C. WRIGHT, *supra* note 1, § 54, at 348.

[18]41 U.S. (16 Pet.) 1 (1842).

[19]*Id.* at 18.

[20]*Id.* at 18-19.

[21]304 U.S. 64 (1938).

[22]*Id.* at 78.

[23]The Court stated that the aim of the Rules of Decision Act "was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." *Id.* at 72-73 (footnote omitted). The *Swift* doctrine, however, held that federal courts were only bound by written laws and constitutions of the State, except in purely local matters. 41 U.S. (16 Pet.) at 18-19. *See supra* note 20 and accompanying text.

[24]304 U.S. at 79. Brandeis concluded:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law

"was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."[25] The *Swift* doctrine, however, had produced the opposite effect. Because federal courts in diversity actions applied federal common law under the *Swift* doctrine, it made "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court . . . ."[26] Finally, Justice Brandeis noted that the application of federal common law resulted in "forum shopping"[27] by out-of-state litigants between state and federal courts.[28] Justice Brandeis reasoned that the ability of the non-citizen to forum shop between state and federal diversity-based courts, and the resulting discrimination exercised against local citizens, "rendered impossible equal protection of the law."[29] Consequently, the Court ruled that federal courts exercising diversity jurisdiction must follow the substantive laws of the state in which they sit. In procedural matters, however, federal law would control.[30]

The *Erie* decision created some new issues in determining which law the federal courts must apply in diversity suits. The courts became concerned with how the Federal Rules of Civil Procedure,[31] adopted shortly after the *Erie* decision,[32] related to the substance/procedure issue. Additionally, questions arose as to how the full faith and credit requirements[33] affected their choice of res judicata law in diversity suits.[34] Finally, courts disagreed on whether particular state rules were substantive or procedural,[35]

> applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 78. The Court then ruled that the *Swift* doctrine of applying federal general common law in diversity cases was unconstitutional. *Id.* at 79.

[25] *Id.* at 74. The second and third reasons given by Justice Brandeis for overruling *Swift* were policy reasons.

[26] *Id.* at 74-75.

[27] *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (overruled by *Erie*). In *Black & White*, the plaintiff and defendant were both citizens of the state of Kentucky. The plaintiff, in order to avoid a Kentucky state law concerning monopolies, reincorporated in the state of Tennessee. Thus, the plaintiff could invoke diversity jurisdiction in Kentucky and receive the benefit of federal common law which was favorable to its case. Because the plaintiff could forum shop between state and federal court, he could avoid the unfavorable Kentucky state law. *Id.* at 532 (Holmes, J., dissenting).

[28] 304 U.S. at 75. The Court stated that "the privilege of selecting the court in which the [litigants'] rights should be determined was conferred upon the non-citizen." *Id.* (footnote omitted).

[29] *Id.*

[30] *Id.* at 78.

[31] See *infra* notes 45-52 and accompanying text.

[32] See *infra* note 46 and accompanying text.

[33] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1970). *See infra* notes 53-54.

[34] *See infra* notes 53-66 and accompanying text.

[35] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (noting that the substance/procedure distinction is ambiguous).

a debate that continues today.[36] The impact of the Federal Rules, full faith and credit, and the substance/procedure distinction affect the choice of res judicata law in diversity actions and a thorough understanding of each is crucial.

A. The Substance/Procedure Problem of Erie

The United States Supreme Court recognized the problem of procedural versus substantive law in the case of *Guaranty Trust Co. v. York*,[37] where the issue was whether the state or federal statute of limitations should apply in a diversity action when the two are at odds.[38] The Court offered a substitute to the vague substantive/procedural distinction of the *Erie* case, replacing it with the policy that the outcome of the litigation should be the same in federal court as it would be if tried in a state court.[39] The Court reasoned that because the federal court is adjudicating a state created right solely because of diversity of citizenship, it is acting as another tribunal of the state.[40] Concluding that the state law for statute of limitations should control, the Court held:

> [A] statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.[41]

Thus, the fact that the statute of limitations appeared to be a procedural rule was not sufficient to allow the federal court exercising diversity jurisdiction to ignore the state practice.[42]

Other apparently procedural practices of the state courts have been found to create substantive rights so as to control over conflicting federal practices. The Supreme Court has held that a federal court sitting in a diversity action must follow the conflict-of-laws rules of the state in which it sits.[43] Likewise the Court has held that the allocation of the burden

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[36]*Cf.* Hanna v. Plumer, 380 U.S. 460 (1965) (noting that the line between substance and procedure shifts as the legal context changes).

[37]326 U.S. 99 (1945).

[38]*Id.* at 100-01.

[39]*Id.* at 109. *But see* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (stating that every procedural variation is "outcome determinative" so that state law would always control under this analysis). *See infra* note 144.

[40]326 U.S. at 108-09.

[41]*Id.* at 110.

[42]*Id.*

[43]Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941). *See also* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975). In *Day*, the plaintiff sued the defendant in federal court in Texas based on diversity jurisdiction. The plaintiff claimed that the defendant was liable for the premature explosion of ammunition which had been manufactured

of proof relates to the substantive rights of the parties, and that the state rules should take precedence over conflicting federal practices.[44] As these examples illustrate, state rules that appear to be procedural may nevertheless be found to control in diversity actions because the state rules create vital rights, and a different outcome would result under federal law.

B. The Erie *Doctrine and The Federal Rules of Civil Procedure*

The same year the *Erie* decision was handed down, another major development occurred in the federal court system when the Supreme Court introduced the Federal Rules of Civil Procedure.[45] The Court was given the power to create rules for the federal court system by the Rules Enabling Act.[46] The Act, however, limited the power in that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ."[47] The conflict between the procedural control of the Federal Rules and the *Erie* requirement of applying state law in diversity suits was settled by the Supreme Court in *Hanna v. Plumer*.[48]

In *Hanna*, a federal court in a diversity action faced a situation where the Federal Rule and the state rule were in direct conflict on the requirements for service of process.[49] The Court held that the Federal Rule

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by the defendant. The injury occurred in Cambodia. The district court ignored Texas conflict-of-laws rules, which would require the application of the law of the place of injury, Cambodia, and applied federal rules. The Court of Appeals for the Fifth Circuit affirmed, stating that "it was 'a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States.' " *Id.* at 4. The Supreme Court reversed, holding that the district court was required to apply state conflict-of-laws rules in diversity actions. *Id.* at 4-5. The Court stated:

> [T]he conflict-of-laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts. A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Id. at 4.

[44]Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939).

[45]The scope of the Federal Rules "govern[s] the procedure in the United States district courts in all suits of a civil nature." FED. R. CIV. P. 1. This Note will use "Federal Rule" to mean a Federal Rule of Civil Procedure or other rule promulgated pursuant to the Rules Enabling Act for use in all federal district courts, and "federal rule" to mean a rule followed in one or more federal courts but not promulgated under the Enabling Act.

[46]Rules Enabling Act, ch. 651, §§ 1, 2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)). In the Act, Congress vested in the Supreme Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and court of appeals of the United States in civil actions . . . and appeals therein." *Id.*

[47]*Id.*

[48]380 U.S. 460 (1965).

[49]*Id.* at 461-62. In *Hanna*, the federal court was located in the State of Massachusetts, and under Massachusetts statutory law, service of process required in-hand delivery. Federal Rule 4(d)(1), however, allowed service by leaving copies at the dwelling place or with

controlled, stating, "The *Erie* rule has never been invoked to void a Federal Rule."[50] The Court held:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[51]

The *Hanna* decision supplied the answer in no uncertain terms as to the relationship of the Federal Rules of Civil Procedure to the *Erie* doctrine in diversity cases. The Federal Rules are procedural in nature, and regardless of the existence of a conflicting state law, the Federal Rules control.[52] If a Federal Rule addresses a given issue, then that rule must be used by the federal court when jurisdiction is based on diversity of citizenship.

C. The Effect of Full Faith and Credit on Res Judicata

The doctrine of full faith and credit also affects res judicata issues, but it is not determinative on the question of whether state or federal law controls in diversity cases. The full faith and credit clause of the Constitution,[53] and the statutory full faith and credit clause as implemented by the Judicial Code of the United States,[54] require courts to give the same effect to a valid judgment that the court which rendered it would.

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persons residing therein. The plaintiff in *Hanna* served copies of the summons and complaint with the defendant's wife at the defendant's home, which would satisfy the Federal Rule, but not the Massachusetts law. *Id.*

[50] *Id.* at 470.

[51] *Id.* at 471 (footnote omitted).

[52] *Id. See generally* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). As Professor Ely notes:

> [W]here there is no relevant Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Enabling Act and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by . . . *Erie* . . . . Where the matter in issue is covered by a Federal Rule, however, the Enabling Act . . . constitutes the relevant standard.

Id. at 698.

[53] U.S. CONST. art. IV, § 1. This section states, "Full Faith and Credit shall be given in each State to 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."

[54] 28 U.S.C. § 1738 (1982). This section states in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Thus, full faith and credit requires a second court to follow the res judicata laws that the first court which rendered the judgment would apply. For example, suppose a federal court exercising diversity jurisdiction enters a judgment on the merits either for the plaintiff or defendant. Then a second action is brought in another court, either state or federal, involving the same issues and between the same parties. If the victorious party in the first suit asserts a defense of res judicata in the second action, full faith and credit would require the second court to determine what effect the first court would have given to the judgment. In other words, the second court must look not to its own res judicata laws, but to those of the court which rendered the judgment.

The problem remains, however, in deciding which law a federal court exercising diversity jurisdiction would use to determine the scope of its own judgment. This dilemma was addressed by the United States Court of Appeals for the District of Columbia Circuit in *Semler v. Psychiatric Institute of Washington, D.C.*[55] After obtaining a judgment for a wrongful death action in a federal court in Virginia exercising diversity jurisdiction, the plaintiff initiated a second suit against the same defendants based on diversity jurisdiction in the District Court for the District of Columbia.[56] The plaintiff sought relief under two District of Columbia statutes, the Wrongful Death Act and the Survival Act.[57] The district court granted a summary judgment for the defendants on the ground that the Virginia judgment was res judicata.[58] The court of appeals affirmed. After a brief reference to the *Erie* doctrine, the court stated:

> [T]he mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require [sic] a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I *at least* in the absence of an overriding federal interest.[59]

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[55]575 F.2d 922 (D.C. Cir. 1978). *See also* Recent Decisions, *Civil Procedure—State Law of Res Judicata Applied in Federal Court Exercising Diversity Jurisdiction*, Semler v. Psychiatric Institute of Washington, D.C., 9 CUM. L. REV. 569 (1978).

[56]575 F.2d at 923-24.

[57]*Id.* at 924. The District of Columbia allows two independent causes of action for negligently causing a death. The Wrongful Death Act creates a right of action in favor of designated beneficiaries. Recovery is based on the pecuniary benefits the beneficiaries would have gained had the decedent lived. *Id.* at 924-25. The Survival Act is designed to place the decedent's estate in the position it would have been in had the decedent lived. Recovery is based on the future earnings the decedent would have made had he lived less the amount he would have spent in order to maintain himself and his beneficiaries under the Wrongful Death Act. *Id.* at 925.

[58]*Id.* at 933.

[59]*Id.* at 927-28.

Thus, the appellate court in *Semler* recognized that full faith and credit required it to follow the "law or usage" of the court which rendered the first judgment.[60] In addressing the issue of whether the Virginia federal court would choose state or federal law or usage, the court cited the United States Supreme Court decision of *Magnolia Petroleum Co. v. Hunt*[61] as dispositive on this issue.[62] In *Magnolia*, the Supreme Court held that a district court had to accord full faith and credit to a prior state court judgment.[63] Recognizing that the *Magnolia* decision involved a prior judgment of a state court and not a federal court exercising diversity jurisdiction, the District of Columbia Circuit nevertheless found that the *Magnolia* decision controlled and that state law should control in diversity actions.[64] Because Virginia law would bar a second action, the circuit court held that the plaintiff's claim was res judicata.[65]

While the District Court for the District of Columbia regarded the "law or usage" of the diversity court to be state law, the question is not yet settled. One commentator has reasoned that the "law or usage" of a federal court is federal law, so that the res judicata law of a federal

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[60] *Id.*

[61] 320 U.S. 430 (1943).

[62] 575 F.2d at 928.

[63] 320 U.S. at 445-46.

[64] 575 F.2d at 930. The *Semler* court also cited the Restatement (Second) of Conflict of Laws. *Id.* The Restatement provides:

> § 93 Recognition of Sister State and Federal Court Judgments
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> A valid judgment rendered in one State of the United States must be recognized in a sister State, except as stated in §§ 103-121.
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> § 94 Persons Affected
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> 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 Issues Affected
>
> What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971). Because the Restatement (Second) explicitly addresses the issue in terms of state recognition of a valid state judgment rendered in other states, and does not mention federal judgments, it offers no help in determining whether state or federal laws of res judicata apply in diversity actions. One solution offered by Professor Ronan Degnan, a proponent of using federal laws of res judicata, is a new restatement of the law which would read:

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

Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 773 (1976). The current version of the Restatement, however, does not allow for its application in diversity actions because the Restatement is limited to state, and not federal, judgments.

[65] 575 F.2d at 931.

diversity court would be federal law.[66] This analysis, however, ignores the fact that federal courts exercising diversity jurisdiction must use state substantive law under the *Erie* doctrine. The assumption that the law or usage in federal diversity suits will always be federal law is incorrect.

The use of full faith and credit to solve the problem of whether state or federal rules of res judicata control in a diversity action is easily manipulated to resolve the issue either way. Full faith and credit must be given to the first judgment in a federal court exercising diversity jurisdiction. The second court, however, should not simply conclude that the first federal court's judgment is entitled to full faith and credit for res judicata purposes. The second court must take the next logical step to determine what "law or usage" the first federal court would apply, state or federal rules of bar and merger. Thus, full faith and credit, although applicable to the issue of res judicata as bar or merger, does not determine whether federal or state law applies in diversity actions.

III. Federal Courts Differ in Applying Res Judicata Laws in Diversity Suits

The issue of what res judicata law controls when the first action was based on federal question jurisdiction[67] was decided by the United States Supreme Court in *Heiser v. Woodruff*.[68] The Court stated that in such cases, "the federal courts will apply their own rule of res judicata."[69] The Court specifically declined to decide whether the rule applicable to federal question cases is also applicable to diversity cases, stating:

> We need not consider whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie* . . . can be other than that of the State in which the federal court sits.[70]

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[66]Comment, *supra* note 1, at 100. The writer states:

> The "full faith and credit clause" as implemented by the judicial code refers to the "law or usage" of the judgment court. Any issues as to the extent or effect of the judgment for res judicata purposes must be gleaned from that "law or usage". Without reference to the judgment the requirements of full faith and credit are not met. If full faith and credit is the determinative issue then resort to the state's rules of res judicata is not required.

Id.

[67]28 U.S.C. § 1331 (1976). This statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

[68]327 U.S. 726 (1946).

[69]*Id.* at 733 (action under federal bankruptcy law).

[70]*Id.* at 731-32 (citations omitted).

In failing to decide the issue, the Court has left this question open for debate.[71] The federal courts which have decided the issue are split as to whether the rules of claim preclusion of the state or federal system apply in diversity cases.[72] The Third, Seventh, and Eighth Circuits have applied

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[71]The Supreme Court has touched upon the issue of res judicata in diversity suits in other decisions. In a later decision concerning mutuality requirements for collateral estoppel, the Supreme Court stated, "Many federal courts, exercising both federal question and diversity jurisdiction, are in accord [on mutuality requirements] unless in a diversity case bound to apply a conflicting state rule requiring mutuality." Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 325 (1971). One commentator has noted:

> Following this statement in *Blonder Tongue's* text is a string of citations to cases . . . which seem to bear out the principle that federal courts in diversity cases may be required to conform to state law on the scope or effect of a judgment. Neverthless, this statement in the opinion is certainly not a holding (*Blonder-Tongue* itself arose entirely under federal question jurisdiction . . .) and should not even be regarded as dictum. It is merely a factual observation most federal courts have said that in diversity cases they are bound to apply the law of judgments of the state in which they sit.

Degnan, *supra* note 64, at 751.

[72]The Supreme Court has decided some of the issues concerning the effect of a prior state court judgment in a subsequent suit in federal court. *See* Allen v. McCurry, 449 U.S. 90 (1980); Migra v. Warren City School Dist., 104 S. Ct. 892 (1984). In *Allen*, the respondent had been convicted in a state court criminal proceeding. The respondent subsequently brought a § 1983 suit in federal court against certain police officers alleging a conspiracy to violate the respondent's fourth amendment rights. 449 U.S. at 92. The district court held the federal suit barred by collateral estoppel (issue preclusion) because the issue of a fourth amendment violation has been resolved against the respondent by the denial of his suppression motion in the state court criminal proceeding. *Id.* at 93. The Supreme Court upheld the district court, stating:

> Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . .

Id. at 96. *Allen*, therefore, established that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where the judgment was rendered. The Court in *Allen* left open the possibility, however, that the preclusive effect of a state court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state court proceeding. The Supreme Court answered this question in *Migra*. The petition in *Migra* brought suit in state court for breach of contract against the Board of Education and was awarded reinstatement. 104 S. Ct. at 895. Petitioner then filed suit in federal court under a § 1983 claim, and the district court granted summary judgment for the defendants on the basis of res judicata. *Id.* The Supreme Court upheld the district court, holding that the state court judgment should preclude her suit in federal court even though the petitioner did not litigate her § 1983 claim in state court, but could have. *Id.* at 897. The Court ruled that the petitioner's state court judgment in the litigation had the same claim preclusive effect in federal court that the judgment would have in the state courts. *Id.* at 898.

the *Erie* doctrine and have held that state law of res judicata controls.[73] The Second, Fifth, and District of Columbia Circuits have held that under the Supreme Court decision of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[74] federal rules of res judicata should control in diversity suits.[75]

A. Federal Courts Applying State Res Judicata Law

An examination of the decisions of courts which have held that state law of bar and merger controls in federal diversity actions shows that several of these courts reached their conclusions without much analysis.[76] In *Gatzemeyer v. Vogel*,[77] for example, the res judicata issue arose when the plaintiff had previously sued the defendant in a federal diversity action for specific performance or damages for breach of contract. The court had found in the defendant's favor.[78] The plaintiff then brought a suit based on fraud and deceit in the same transaction against the same defendant and in the same federal district court.[79] The district court ruled that the plaintiff's second suit was barred by the first action.[80] The Eighth Circuit Court of Appeals affirmed, stating: "In considering the issue of claim preclusion the district court was of the view that the law of Iowa governed and plaintiffs do not quarrel with that proposition."[81] The court did not consider whether application of federal law of res judicata could be applied in diversity actions.

The United States Court of Appeals for the Seventh Circuit did not devote much more analysis to the issue in *Gasbarra v. Park-Ohio Industries, Inc.*[82] The plaintiff in that case had received a judgment in federal court exercising diversity jurisdiction in Illinois for improper and ineffective termination of employment, and had received damages for the amount of salary accrued.[83] In a second diversity-based action, the plaintiff sued for non-contractual benefits arising out of employment against the same employer.[84] The district court ruled that the plaintiff's cause

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[73]Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978); Hartmann v. Time, 166 F.2d 127 (3d Cir. 1948).

[74]356 U.S. 525 (1958).

[75]Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) (dictum); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962).

[76]*See* Gasbarra v. Park-Ohio Indus., 655 F.2d 119 (7th Cir. 1981); Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978).

[77]589 F.2d 360 (8th Cir. 1978).

[78]*Id.* at 361.

[79]*Id.* at 362.

[80]*Id.* at 361.

[81]*Id.* at 362.

[82]655 F.2d 119 (7th Cir. 1981).

[83]*Id.* at 120-21.

[84]*Id.* at 121.

was merged into the first judgment so that claim preclusion operated in the second suit.[85] The Seventh Circuit affirmed.[86] In deciding whether state or federal law of merger applied, the court cited the *Erie* doctrine and stated, "As the trial court properly noted, we are bound in a diversity case by the law of Illinois as expressed by its highest court."[87] The court did not consider whether res judicata is substantive and therefore controlled by state law, or whether federal rules of res judicata could or should control in diversity actions. Decisions such as *Gatzemeyer* and *Gasbarra* which simply cite the *Erie* doctrine and then blindly apply state law of res judicata in diversity suits shed little light on the substance/procedure conflict of *Erie* and the issue of why state, and not federal, law controls in such actions.

The United States Court of Appeals for the Third Circuit has explored the issue more thoroughly in the decision of *Hartmann v. Time, Inc.*[88] The case concerned Hartmann's claim that he was libeled by certain material printed in "Life" magazine, which was published by Time, Inc.[89] Hartmann initiated the first suit in the District Court for the District of Columbia. The district court dismissed the action on the merits as being barred by the statute of limitations.[90] Hartmann then filed suit in a New York state court which also dismissed on the grounds of statute of limitations.[91] The third suit was filed by Hartmann in a Massachusetts state court, and Time filed answers setting up defenses of the statute of limitations and res judicata based on the previous two decisions. The jury rendered a verdict for Time, but the record did not state whether the judgment was based on the statute of limitations defense or the res judicata defense.[92] In a fourth suit, filed in the District Court for the Eastern District of Pennsylvania and based on diversity jurisdiction, the court held that res judicata barred the suit, and thus granted Time's motion for summary judgment.[93] Hartmann appealed to the Third Circuit.[94]

After discussing whether state or federal rules of res judicata should apply in diversity actions, the court stated that "we ourselves must follow the law and policy of Pennsylvania in respect to the plea of res judicata."[95] The court then determined that Pennsylvania law of res judicata required that the first action "will bar an action when a court of competent

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[85] *Id.* at 123.
[86] *Id.*
[87] *Id.* at 122 (citations omitted).
[88] 166 F.2d 127 (3d Cir. 1948).
[89] *Id.* at 131.
[90] *Id.* at 136.
[91] *Id.*
[92] *Id.* at 136-37.
[93] *Id.* at 131.
[94] *Id.* at 130.
[95] *Id.* at 138.

jurisdiction has determined a litigated cause on its merits, and not otherwise."[96] Because Pennsylvania law dictated that "a judgment rendered on the ground of the statute of limitations usually is not bar to a subsequent suit,"[97] the court held that the District of Columbia and New York suits would not be a bar to the new actions.[98]

Ultimately the Third Circuit reversed the district court because the record was unclear whether the Massachusetts court's decision was based on res judicata or the expiration of the applicable statute of limitations.[99] If the statute of limitations were the basis, the district court could, under Pennsylvaina law, entertain a new suit because no adjudication on the merits had occurred.[100] Yet if the Massachusetts decision were based on res judicata, the district court must recognize it "since it is now settled that a judgment must be given full faith and credit, even though erroneous, if there was jurisdiction."[101] Due to the ambiguity of the Massachusetts decision, the plea of res judicata in the district court could not be upheld until the nature of the previous decision could be ascertained.[102]

Alternatively, the *Hartmann* court could have used Federal Rule 41(b)[103] which states that a prior dismissal is on the merits unless it is designated otherwise. Although Rule 41(b) is generally applied by a court to its own dismissals,[104] one federal court has extended its use to include a prior adjudication by any federal court.[105] Thus, the district court in *Hartmann* could have used a Federal Rule of res judicata and extended the use of Rule 41(b) to the dismissal of the District Court for the District of Columbia, finding it to be "on the merits." The previous dismissal

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[96] *Id.*

[97] *Id.* (footnote omitted).

[98] *Id.*

[99] *Id.* at 139.

[100] *Id.* at 138 (citing Restatement of Judgments § 49 (1942) and *In re* Philadelphia Elec. Co., 352 Pa. 457, 43 A.2d 116 (1945)).

[101] 166 F.2d at 139 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

[102] 166 F.2d at 139.

[103] FED. R. CIV. P. 41(b). The Rule provides, in part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Id.

[104] *See* 18 WRIGHT & MILLER, *supra* note 15, § 4441 (1981). WRIGHT & MILLER states:

> The traditional rule has been that a forum applies its own period of limitations as a matter of procedure . . . . This rule has led in turn to the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations.

Id. at 369. (footnote omitted). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 comments a & b (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 19 comment f (1982).

[105] *See* Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962). *See infra* notes 171-77 and accompanying text.

in federal court could be a prior adjudication under a federal practice and thus a bar to the plaintiff's present claim. A different result, then, could have occurred if the court had chosen to apply a federal rule of res judicata, instead of the state rule which dictated the district court's dismissal was not a bar.

1. State Laws of Res Judicata Create Vital Rights.—The *Hartmann* court relied on several Supreme Court cases[106] decided in the wake of *Erie* to determine whether state or federal law controls in diversity cases.[107] In light of these Supreme Court decisions, the *Hartmann* court concluded that the state rules of res judicata created vital rights for the parties so that the differing federal procedure had to give way to state law.[108]

In *Angel v. Bullington*,[109] one of the cases cited by the *Hartmann* court, the Supreme Court stated in broad terms that when a federal court is exercising diversity jurisdiction, the federal court "must follow state law and policy."[110] The *Hartmann* court recognized this as persuasive dictum, and interpreted the decision as stating "categorically that a district court of the United States is a court of the State in which it sits insofar as diversity cases are concerned."[111] Although this interpretation of the *Angel* decision may be strained, it is reinforced by an earlier statement by Justice Frankfurter in *Guaranty Trust* that federal courts exercising diversity jurisdiction constitute "another tribunal, not another body of law."[112] Justice Frankfurter concluded:

> The source of substantive rights enforced by a Federal court under diversity jurisdiction . . . is the law of the States. Whenever that

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[106]*E.g.*, Angel v. Bullington, 330 U.S. 183 (1947); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Palmer v. Hoffman, 318 U.S. 109 (1943); Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941).

[107]166 F.2d at 138.

[108]*Id.*

[109]330 U.S. 183 (1947).

[110]*Id.* at 192. In *Angel*, the plaintiff brought a second suit in federal court based on diversity jurisdiction. The first suit was in state court, where the North Carolina Supreme Court held that a state statute, which barred the plaintiff's recovery, was constitutional. The United States Supreme Court held that the federal court was bound by the North Carolina decision, stating:

> [A] North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . .[D]iversity jurisdiction must follow state law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.

Id. at 191-92.

[111]166 F.2d at 138. The reference to the *Angel* case is dictum as to the question in *Hartmann* because *Angel* involved a federal question of the constitutionality of a statute, and not simply diversity jurisdiction.

[112]326 U.S. at 112. *But see* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958) (federal system is an independent system even under diversity jurisdiction).

> law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court . . . .[113]

According to this view, when a state declares substantive rights either by statute or case law, federal courts exercising diversity jurisdiction are bound by these laws.

Even if a federal diversity court takes a very broad outlook of the federal procedural laws which should control, the operation of state laws of res judicata do create substantive rights in litigants. Similar to the differing time periods of statutes of limitations in state and federal law,[114] state rules of bar and merger may allow a party to initiate and litigate a second suit where federal rules would hold the second suit as barred by or merged in the first action.[115] The stricter federal law would narrow a litigant's right to bring a later suit and would lead to a different result than if state law were used. As the Supreme Court in *Guaranty Trust* stated, "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."[116] Because the outcome of the litigation would be different under state and federal rules, the state law creates substantive rights for the litigants and should control in diversity suits.

While it may be argued that every difference between state and federal law would lead to a different outcome,[117] res judicata is one doctrine wherein the differences in law may vitally affect litigants' rights. As Professor Wright notes, "Claim preclusion applies 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' "[118] The Restatement (Second) of Judgments offers a good example of the operation of claim preclusion in its rule for merger, stating that "[i]n an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action."[119] For example, if a defense such as contributory negligence were available in an action, but the defendant did not raise it and loses the case, he will not be able to assert that defense when the

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[113]326 U.S. at 112.

[114]*See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *See supra* notes 38-42 and accompanying text.

[115]*See* Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948). *See supra* notes 88-105 and accompanying text.

[116]326 U.S. at 110 (citation omitted). *See supra* notes 37-41 and accompanying text.

[117]*See infra* note 144 and accompanying text.

[118]C. WRIGHT, *supra* note 1, at 681 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)).

[119]RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (1982).

plaintiff sues on the judgment.[120] Thus, the effect of claim preclusion is to grant special rights to a party in a subsequent action. A previous valid judgment prevents a second action not only on the claim itself, but also on all matters that might have been offered to prove or defeat the claim.[121] With such far-reaching effects, it seems preferable to treat res judicata as a substantive right.

Moreover, viewing state laws of res judicata as creating the substantive rights of litigants is closely related to important policies behind res judicata such as preventing harrassing litigation and insuring certainty for court decisions. As the *Hartmann* court noted, every litigant is entitled to have a court of competent jurisdiction determine his cause of action.[122] Once the claim has been heard on the merits, however, the defendant is granted the right by operation of res judicata to be protected from harassing multiple suits on the same claim.[123] According to one commentator, prevention of harassment is necessary because otherwise a plaintiff could relitigate the same claim until he was successful, placing an unfair burden on the defendant to defend each suit.[124] Because res judicata creates substantive rights in both litigants by allowing the plaintiff his one day in court, and the defendant the assurance of protection from multiple suits, state rules of res judicata should control in federal diversity suits.

2. The Federal Rules of Civil Procedure Do Not Apply to Res Judicata.—In addition to the substantive/procedural issue of res judicata, another consideration in determining which laws control in diversity suits is whether the matter is covered by the Federal Rules of Civil Procedure.[125] If so, the Federal Rule would prevail over a similar state rule.[126] One such Federal Rule is 8(c), which provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata."[127] In *Palmer v. Hoffman*,[128] a question arose in a diversity action over allocating the burden of proof which is also listed among the defenses in Federal Rule 8(c).[129] In *Palmer*, the state law placed the burden of proof for lack

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[120]*See id.* § 18 comment c.

[121]*Id.*

[122]166 F.2d at 138.

[123]Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 34 (1964) [hereinafter cited as *Rationale of Preclusion*].

[124]*Id.*

[125]*See supra* notes 45-52 and accompanying text.

[126]Hanna v. Plumer, 380 U.S. 460 (1965).

[127]FED. R. CIV. P. 8(c). For a discussion of whether other Federal Rules may control, *see infra* notes 160-63 and accompanying text.

[128]318 U.S. 109 (1943).

[129]FED. R. CIV. P. 8(c). Rule 8(c) provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute

of contributory negligence on the plaintiff. The district court found, however, that the Federal Rules should apply in the diversity suits because Rule 8(c) addressed the issue of burden of proof.[130] Thus, the district court held that because the Federal Rules required the defendant to affirmatively plead contributory negligence, the defendant, not the plaintiff, had the burden of proving contributory negligence.[131] The Supreme Court reversed, stating that "Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply."[132] Rule 8(c), then, cannot be used to determine the substantive laws of the affirmative defenses listed therein, but merely prescribes the form of pleading the parties in federal court must observe.

Likewise, by requiring the defendant to affirmatively plead the defense of res judicata, Rule 8(c) merely prescribes the form of pleading. Rule 8(c) does not require federal law to control in diversity suits. Therefore, state laws of merger and bar should control. In the Supreme Court decision of *Walker v. Armco Steel Corp.*,[133] the Court held that when a Federal Rule and a state statute do not directly clash, then the two "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict."[134] The *Walker* analysis can be applied to res judicata and Rule 8(c). The Federal Rule would control the manner of pleading, and the state law of bar and merger would control the substantive effect of such a plea.

B. Federal Courts Applying Federal Res Judicata Law

Several of the federal courts have applied federal law of res judicata when jurisdiction is based on diversity of citizenship.[135] They have generally based their holdings on the Supreme Court decision of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[136] In *Byrd*, the plaintiff initiated a personal injury suit in the District Court for the Western District of South

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of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. *Id.*

[130] 318 U.S. at 116.

[131] *Id.* at 116-17.

[132] *Id.* at 117.

[133] 446 U.S. 740 (1980) (addressing a state statute of limitations and the filing of a complaint in federal court). *See also* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (addressing the same issue as *Walker*).

[134] 446 U.S. at 752.

[135] *See* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962).

[136] 356 U.S. 525 (1958). *See, e.g.*, Hunt v. Liberty Lobby, Inc., 707 F.2d 1483, 1496 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710, 718 (5th Cir. 1975); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

Carolina, invoking diversity jurisdiction. The defendant argued that the plaintiff was a statutory employee and limited, therefore, to workmen's compensation benefits under South Carolina law. South Carolina law required the judge and not the jury to determine whether the plaintiff was a statutory employee.[137] The district court followed the South Carolina law.[138] The United States Supreme Court reversed and held that the issue was to be determined by a jury, in spite of the South Carolina law.[139]

In an opinion by Justice Brennan, the Court offered two reasons for following federal law rather than the *Erie* doctrine. First, the Court stated that the South Carolina rule was one of form, and did not involve rights and obligations created by the state since it did not appear that the rule was promulgated for any special reason.[140] Second, the Court found that there were affirmative countervailing considerations,[141] namely the seventh amendment right to trial by jury,[142] which required that the federal law be used.[143]

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[137]356 U.S. at 534.

[138]*Id.* at 529.

[139]*Id.* at 538.

[140]*Id.* at 536. The Court found that the South Carolina court, in deciding that the judge and not the jury should decide the issue, did not offer any reasons for its decision. *Id.* In concluding that the matter was one of procedure to be governed by federal rules, the Court stated:

> We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties.

Id. (citations omitted). Moreover, the Court, in its statement, echoed the words of the Rules Enabling Act, which states that the Supreme Court has the power to prescribe rules for "the forms . . . practice and procedure," but not "enlarge or modify any substantive right." 28 U.S.C. § 2072 (1976). *See supra* notes 46-47 and accompanying text. Thus, the Supreme Court held that the state law indicating that a judge was to be the fact-finder of a certain issue instead of a jury is more a matter of procedure and not a substantive right created by the state. 356 U.S. at 536.

[141]356 U.S. at 537. The affirmative countervailing consideration stated by the Court for disregarding the federal practice is based on the seventh amendment of the Constitution, the right to trial by jury in a civil suit. *Id.*

[142]U.S. CONST. amend. VII. The seventh amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Id. The Court stated that "in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." 356 U.S. at 538. Thus the Supreme Court considered the *Erie* doctrine and found it not to be absolute in the case where state law altered the roles of judge and jury. The strong federal policy based on the seventh amendment was a reason for avoiding the *Erie* doctrine and the state law in favor of the federal law in *Byrd*. For discussion of the importance of the strong federal policy being based on a constitutional right, see *infra* note 201.

[143]Some commentators have noted that the Court, in its discussion of the seventh

The *Byrd* decision has been used by some federal courts to justify applying federal res judicata laws in diversity actions. These courts have attempted to utilize the standard enunciated in *Byrd*: 1) that the state law is a form and not a state-created right, or 2) that there are affirmative countervailing considerations. Under the *Byrd* decision, if either of the two categories actually justify using federal rules of res judicata, the federal courts could bypass the *Erie* doctrine and ignore state law of res judicata in diversity actions.[144]

1. Res Judicata Affects Only the Form of Recovery.—The language of the *Byrd* decision, that state laws of procedure may be avoided if they are merely forms of practice and not state-created substantive rights,[145] has been noted by the federal courts which apply federal rules of res judicata in diversity actions. In *Hunt v. Liberty Lobby, Inc.*,[146] for example, the plaintiff received a judgment against the defendant in the District Court for the Southern District of Florida, which had diversity jurisdiction.[147] The defendant appealed the judgment.[148] While the appeal was pending, the plaintiff sued on the judgment in the District Court for the District of Columbia where the defendant's principal assets were located. The defendant moved to dismiss the action, claiming that under Florida law of res judicata, a judgment pending appeal is not final and cannot be sued upon in another court.[149] The district court agreed and

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amendment, was attempting to avoid a constitutional issue. *See, e.g.*, Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 450 (1961) (stating that the Court implicitly decided the case on constitutional grounds, while avoiding the appearance of a constitutional decision).

[144]The Supreme Court in *Byrd* also addressed the issue of "outcome determination" noted in the *Guaranty Trust* case as a means for determining state and federal laws in diversity actions. Guaranty Trust Co. v. York, 326 U.S. 99, 109-10 (1945). *See supra* notes 37-42 and accompanying text. The *Byrd* Court noted that if " 'outcome' [were] the only consideration, a strong case might appear for saying that the federal court should follow state practice." 356 U.S. at 537. This statement is important in signalling the decline of outcome determination as the test in deciding whether state or federal law should apply in diversity actions. Seven years later, the Court openly criticized the outcome-determination test. In *Hanna v. Plumer*, the Court stated, " 'Outcome-determination' analysis was never intended to serve as a talisman [for whether state or federal law controlled in diversity actions]." 380 U.S. 460, 466-67 (1965). The rationale of abandoning outcome determination as the test is that when the state and the federal rules are different, "*every* procedural variation is 'outcome-determinative.' " *Id.* at 468. Thus, the *Hanna* Court pointed out the fallacy of the outcome-determination test: if the federal and state procedural laws clash, the result of using the federal law instead of the state law would always lead to the possibility of a different outcome, so that state law would always control.

[145]356 U.S. at 536. *See supra* note 140 and accompanying text.

[146]707 F.2d 1493 (D.C. Cir. 1983).

[147]*Id.* at 1494.

[148]*Id.*

[149]*Id.* The status of the Florida law on the question of the finality of a judgment on appeal is unclear. The *Hunt* court stated:

granted the motion.[150] The Court of Appeals for the District of Columbia Circuit reversed, holding that federal rules of res judicata, and not the Florida state rules, apply in diversity actions.[151] In citing language from the *Byrd* decision,[152] the appellate court reasoned that "[b]ecause a rule governing the res judicata effect of a judgment pending appeal affects only the timing of recovery, the rule can scarcely be described as bound up with the definition of the rights and obligations of the parties under Florida . . . law."[153] Using the rationale that res judicata affected only the timing of recovery, the appellate court concluded that "there is little likelihood that our ruling will encourage forum-shopping."[154] The court reasoned that the Florida rule merely delayed recovery, and did not entirely bar it.[155] Because the court decided that the difference in the state and federal rules was one of form, not substance, federal law was applied.

The court's reasoning, that the result will lead to minimal forum-shopping, is not persuasive on the facts of the case. There was evidence in the case that the defendant was in financial trouble, shown by the fact that the defendant corporation was unable to meet the cost of a supersedeas bond.[156] If the defendant's assets were quickly dwindling, the

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> Our own reserach has been . . . fruitless . . .; apparently, there *is* no Florida law on the question. Fortunately, our ruling that federal law governs spares us from embarking on the hazardous quest of predicting how the Florida Court of Appeals would resolve the issue if squarely presented to it.

Id. at 1497 n.6.

[150] *Id.* at 1494.

[151] *Id.* at 1497. In *Hunt*, the court noted that the Third Circuit had ruled that state rules of res judicata applied in diversity actions. *Id.* at 1497 n.5. The court stated, however, "we simply note that the [Third Circuit] has not yet reassessed the issue in light of recent Supreme Court decisions." *Id.*

Assuming that the *Hunt* court is referring to the *Byrd* and *Hanna* cases as the recent Supreme Court decisions, it is interesting to note that the Third Circuit has indicated that it would still follow the ruling that state law of res judicata applies in diversity cases, even after these Supreme Court decisions. *See* Murphy v. Landsburg, 490 F.2d 319, 322 n.4 (3d Cir. 1973); Gambocz v. Yelencsics, 468 F.2d 837, 841 n.4 (3d. Cir. 1972); Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Casualty Co., 411 F.2d 88, 94 (3d. Cir. 1969).

[152] 356 U.S. at 536. *See supra* note 140 and accompanying text.

[153] 707 F.2d at 1496. The court in *Hunt* also addressed the issue of outcome determination, deciding that the choice of law would not result in a different outcome if state law were applied. *Id.*

[154] *Id.* For a discussion of forum shopping, see *supra* notes 27-29 and accompanying text.

[155] 707 F.2d at 1494.

[156] *Id.* at 1494. Federal Rule 62(d) provides:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Fed. R. Civ. P. 62(d). As Professor Moore notes, the effect of Rule 62(d) is:

> [A] party who desires a stay . . . pending appeal is normally required to file

plaintiff would want to sue on the judgment immediately in order to reach the defendant's assets before bankruptcy. This situation might lead a plaintiff to prefer a federal court, where the judgment on appeal would be res judicata, over the state court, where a judgment could not be sued on until the appeal procedure ended. Consequently, the difference between state and federal law would undoubtedly affect the choice of the court by the plaintiff. The *Hunt* court, although admitting that the defendant could not pay the supersedeas bond, chose to ignore this fact when it decided that the plaintiff would have no reason to forum shop between state and federal court.[157]

The strong nexus between the doctrine of res judicata and the Federal Rules is often cited when federal and not state law of res judicata is followed.[158] As stated by the United States Court of Appeals for the Fifth Circuit in *Aerojet-General Corp. v. Askew*:[159]

> [S]everal procedural elements of federal practice affect the doctine of res judicata. For example, federal law on finality of judgments . . . and compulsory counterclaims [under Federal Rule] 13(a), is often determinative of pleas of res judicata. We see no persuasive reason to look to state law for some elements of res judicata, such as the scope of the cause of action or similarity of parties, in light of the prominent influence of federal law on the elements of the doctrine.[160]

Thus, the Fifth Circuit viewed res judicata as procedural because it is closely connected to the Federal Rules in some instances. In categorizing res judicata as procedural and not substantive in nature, the court concluded it could bypass the *Erie* doctrine's requirement of following state substantive law.[161]

In commenting upon the *Aerojet* court's proposition that the Federal Rules and certain aspects of res judicata are so related that the federal practice must control, Professor Moore reasons that this is a sound principle for issue preclusion, but not claim preclusion.[162] As Professor Moore states:

> a bond in a sum sufficient to protect the rights of the party who prevailed in the district court. The amount of the bond and the sufficiency of the sureties are matters entrusted to the determination of the district court.

9 J. MOORE & B. WARD, *supra* note 3, ¶ 208.06[1].

[157]707 F.2d at 1496.

[158]*See Hunt*, 707 F.2d at 1496; Aerojet-General Corp. v. Askew, 511 F.2d 710, 717 (5th Cir. 1975)(dictum); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

[159]511 F.2d 710 (5th Cir. 1975).

[160]*Id.* at 717 (citation omitted). For the facts of *Aerojet*, see *infra* notes 186-93 and accompanying text.

[161]511 F.2d at 718.

[162]1A J. MOORE & B. WARD, *supra* note 3, ¶ 0.311[2], at 3182. The aspects of

> [T]he [*Aerojet*] decision goes too far in holding that the federal law of res judicata determines the scope of the cause of action, which usually involves the question whether a party may split a cause of action. It is elementary under *Erie* state law determines what elements a claimant must prove to recover on the state law claim . . . . [S]tate law ought to govern the scope of a state cause of action when considered in the context of a res judicata defense.[163]

There is a close connection between the state's definition of a cause of action and the operation of res judicata which precludes that cause from being relitigated. This nexus affects the substantive rights of the litigants sufficiently to overshadow any connection between the operation of claim preclusion and the Federal Rules of Civil Procedure.[164]

2. Federal Res Judicata Laws Should Control for Policy Reasons.— In the *Byrd* decision, the Supreme Court stated a second reason for abandoning the state practice in favor of the federal law of trial by jury, that of "affirmative countervailing considerations."[165] The advocates of using federal law of res judicata have picked up on the language in *Byrd* of "affirmative countervailing considerations" to justify the use of federal laws of res judicata.[166] These justifications include: 1) a federal court's

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preclusion which Moore refers to as being closely related to the Federal Rules are privity, mutuality, and a determination of an actually litigated issue. *Id.*

[163]*Id.* (footnotes omitted).

[164]Moore also agrees with the *Aerojet* opinion with respect to the compulsory counterclaim bar under Federal Rule 13(a). Rule 13(a) provides:

> *Compulsory Counterclaims*: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

FED. R. CIV. P. 13(a). Moore states:

> Whether a claim in the second federal suit arises out of the transaction or occurrence sued on in the first federal suit ought to be determined as a matter of federal law. Since Rule 13(a) expressly defines a compulsory counterclaim and the effect of failure to bring it in the first action, the rule of *Hanna v. Plumer* governs and therefore Rule 13(a) applies even though the effect may be to ignore the res judicata rules of the forum state.

1A J. MOORE & B. WARD, *supra* note 3, ¶ 0.311[2], at 3182-83 (footnotes omitted).

[165]356 U.S. at 537. *See supra* notes 141-43 and accompanying text.

[166]*See Hunt*, 707 F.2d at 1496; *Aerojet*, 511 F.2d at 718; Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) (all citing the "affirmative countervailing considerations" language of *Byrd*).

need to determine the scope of its own judgment;[167] 2) the preservation of the Federal Rules of Civil Procedure;[168] 3) a federal court's need to be a reliable forum;[169] and 4) the need for judicial economy.[170]

The first justification, a federal court's need to determine the scope of its own judgment, was explored by the United States Court of Appeals for the Second Circuit in *Kern v. Hettinger*.[171] The court was faced with a prior decision of the District Court for the Northern District of California based on diversity jurisdiction which dismissed the case for lack of prosecution.[172] When a diversity suit was initiated in a New York federal court, it was dismissed as res judicata because of the prior action of the California court. On appeal, the Second Circuit found that the first suit in the California federal court was res judicata.[173] The court extended Federal Rule 41(b)[174] to apply to dismissals rendered by another federal court; and, held that because the dismissal was not designated "without prejudice," the second action was barred by res judicata.[175] The court, relying on the *Byrd* decision, reasoned: "One of the strongest policies a court can have is that of determining the scope of its own judgments."[176] Thus, the *Kern* court held that the overriding federal policy of a court's determining the effect of its own judgment was a sufficient "countervailing consideration" to ignore the state law of res judicata.[177]

One problem with the Second Circuit's analysis is that Federal Rule 41(b) generally applies only to courts determining the scope of their own prior judgments.[178] As with all pleas of res judicata in a court other than

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[167]*See* Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).

[168]*Id.*

[169]*See Aerojet*, 511 F.2d at 716 (dictum).

[170]*See* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1742 (1968) [hereinafter cited as *Res Judicata/Preclusion*].

[171]303 F.2d 333 (2d Cir. 1962).

[172]*Id.* at 340.

[173]*Id.* Five defendants were named in the action. The district court's dismissal applied only to two defendants, Western Pacific Railroad Company and A. J. Hettinger, Jr., a member of Western Pacific's board of directors. Western Pacific was a party to the earlier suit dismissed for lack of prosecution in the United States District Court for the Northern District of California. In that action Hettinger was named as a defendant but was not served with process and did not make an appearance. Hettinger was dismissed as a defendant on the basis of collateral estoppel. *Id.* at 339. The Second Circuit affirmed the dismissal of Western Pacific, but reversed the dismissal of Hettinger on the basis of collateral estoppel because there was no adjudication on the merits of the case. *Id.* at 341.

[174]FED. R. CIV. P. 41(b). For the text of Rule 41(b), see *supra* note 103.

[175]303 F.2d at 340 (citation omitted).

[176]*Id.*

[177]*Id.*

[178]*See* 18 WRIGHT & MILLER, *supra* note 15, at 381. *See supra* note 104 and accompanying text.

the court which rendered the judgment, full faith and credit[179] requires the second court to examine the scope of the first court's judgment. Hence, the *Kern* court should have determined what effect the California district court would have given to its own judgment. The California district court may have chosen to use California state laws of res judicata, and not federal laws.[180]

In addition to the policy that a court ought to be able to determine the scope of its own judgment, the *Kern* court offered another affirmative countervailing consideration to justify ignoring state rules of res judicata in favor of federal law: "It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity."[181] Thus, the Second Circuit justified applying the federal laws of res judicata on the basis of preserving the Federal Rules of Civil Procedure.

The assertion that the power of the Federal Rules of Civil Procedure would be undermined if state rules of res judicata were used in diversity actions is without merit. The Federal Rules and the state laws governing other "procedural" matters have co-existed with relatively few problems. Examples of where the Federal Rules and state procedural laws co-exist include statutes of limitations,[182] burdens of proof,[183] and conflict-of-laws rules.[184] The Federal Rules have not been negated in these areas, but are held to control only those matters that they address specifically.[185] Thus, it is doubtful whether the Federal Rules of Civil Procedure would be stripped of their power if state laws of res judicata were applied in diversity actions.

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[179]U.S. CONST. art. VI, § 1; 28 U.S.C. § 1738 (1982). *See supra* notes 53-54 and accompanying text.

[180]*See* Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948) (federal court used state laws for issue of effect of prior dismissal). *See supra* notes 88-105 and accompanying text.

[181]303 F.2d at 340.

[182]*See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (holding that state rules for meeting the statute of limitations are independent of service of process in federal diversity suits). *See supra* notes 133-34 and accompanying text.

[183]*See* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (holding that state burden of proof allocation is not disturbed by Federal Rule 8(c) in diversity suits). *See supra* notes 128-32 and accompanying text.

[184]*See* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975); Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts exercising diversity jurisdiction must follow the conflict-of-laws rules of the state in which they sit). *See supra* note 43 and accompanying text.

[185]*See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980). The Supreme Court stated that when the Federal Rules of Civil Procedure and a state statute do not directly clash, the two "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.*

A third policy argument for applying federal laws of res judicata, that federal courts need to be reliable forums, was espoused by the Fifth Circuit in *Aerojet-General Corp. v. Askew.*[186] The plaintiff, Aerojet, obtained a judgment for specific performance on a lease with an option to purchase. The suit was in federal court based on diversity jurisdiction and the defendant was the Board of Trustees of the Internal Improvement Trust Fund.[187] After the judgment was affirmed on appeal, Metropolitan Dade County brought a suit against the Board of Trustees in Florida state court.[188] Dade County asserted that it was entitled to the land under a Florida statute,[189] an issue not raised in the first suit. The Florida Supreme Court ruled in favor of Dade County.[190] Aerojet then brought suit against both Dade County and the Board of Trustees in federal court, invoking diversity and federal question jurisdiction.[191] Aerojet asserted that the federal court's first judgment was res judicata and the defense offered by the statute was barred.[192] Although a federal question was involved in the suit, the Fifth Circuit affirmed the judgment for Aerojet and stated that federal laws of res judicata control in actions based on diversity of citizenship.[193]

This sequence of events raised a major concern which the *Aerojet* court noted: "If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims."[194] Thus, the overriding federal policy of preserving the integrity of the federal courts weighed heavily in the court's choice of federal laws of res judicata.[195]

While there is much merit to this argument, it is important to realize that the effect of the court's ruling is that federal courts are free from supervening interpretations of state law for res judicata purposes, whereas state courts are bound by the new interpretations. The Florida Supreme

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[186]511 F.2d 710 (5th Cir. 1975).

[187]*Id.* at 713.

[188]*Id.* at 714.

[189]FLA. STAT. § 253.111 (1975).

[190]511 F.2d at 714.

[191]*Id.*

[192]*Id.*

[193]*Id.* at 716 (dictum).

[194]*Id.* (footnote omitted).

[195]Preserving the integrity of the decision of courts is closely related to one of the policies behind res judicata: the prestige of courts in commanding respect for their decisions. As Professor Vestal states:

> This general respect for decisions of courts supports the generally felt attitude that decisions in earlier cases should not be undercut promiscuously by decisions in later cases. The later decisions should—unless the contrary—be consistent with earlier decisions. Only thus can the respect for the court system be maintained.

Rationale of Preclusion, supra note 123, at 33 (footnote omitted).

Court has ruled that "res judicata is not a defense in a subsequent action where the law under which the first judgment was obtained is different from that applicable to the second action."[196] Regardless of the policies which lie behind this rule, the state courts of Florida are subject to the possiblity of supervening interpretations of state law by the Florida Supreme Court. The Fifth Circuit, however, reasoned that the federal courts exercising diversity jurisdiction should not be bound by this Florida policy on the grounds that they could not be reliable forums if subject to the supervening interpretations of state law.[197] But when the policy of being a reliable forum is compared with the goals of the *Erie* doctrine, including discouragement of forum shopping and avoidance of inequitable administration of the laws, the preservation of the integrity of federal court judgments becomes less important. The rights and obligations of the parties created or extinguished by a change in state law should be honored by a federal court exercising diversity jurisdiction.

Another "overriding federal policy" used to support applying federal res judicata law in diversity suits is judicial economy.[198] As one commentator has stated:

> In view of the enormous docket loads of the federal courts, one might well conclude that the federal courts must consider the wise use of the judges' time to be of paramount importance. If this is true, the law of preclusion, which serves to bar unnecessary litigation, would be of great concern to the federal courts and this particular federal interest may be overriding regardless of whether the court handing down the first judgment was a state or federal court.[199]

Implicit in this argument is the assumption that the federal system of res judicata is more efficient than the state's rules. Even if this assumption were true, one major problem remains concerning these overriding federal policies or reasons for choosing federal over state laws of res judicata.

The overriding federal policy announced in the *Byrd* decision was based on the Constitution, more specifically the seventh amendment right to trial by jury.[200] A right guaranteed in the Constitution is the strongest

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[196]Thompson v. Thompson, 93 So. 2d 90, 92 (1957).

[197]511 F.2d at 716.

[198]*Res Judicata/Preclusion, supra* note 170, at 1742.

[199]*Id.* (footnotes omitted). One of the recognized policies of res judicata is based on an efficient use of the courts "in seeing that there is an end to litigation." *Rationale of Preclusion, supra* note 123, at 31. As Professor Wright has noted, the work load in the courts has become so great that "courts today are having difficulty giving a litigant one day in court. To allow a litigant a second day is a luxury that cannot be afforded." C. WRIGHT, *supra* note 1, § 100A, at 678.

[200]356 U.S. at 539. *See supra* notes 141-42 and accompanying text.

countervailing consideration a federal court would protect in lieu of a contrary state law or practice.[201] The federal courts do have an interest in determining the scope of their own judgments and preserving the Federal Rules of Civil Procedure. Likewise, federal courts should be reliable forums and economical. Nevertheless, none of these policies is as fundamental as a right guaranteed by the Constitution. Thus, it is questionable whether these policies offered by federal courts for choosing federal rules of res judicata over state rules are so important so as to disregard the state created rights and obligations stemming from res judicata.

IV. The Goals of *Erie* Fulfilled by Following State Law of Res Judicata

The goals of the *Erie* doctrine, discouragement of forum shopping[202] and avoidance of inequitable administration of the law,[203] would best be fulfilled in following state laws of bar and merger in federal diversity cases. If state law controlled, a party to a law suit would have no incentive to forum shop between federal and state courts when diversity jurisdiction is available, because the same rules of res judicata would apply to both systems. For example, if a plaintiff's claim is barred under state law so that he could not initiate a second suit, he could not avoid this result by bringing the action in federal court under diversity jurisdiction. Although the federal law might allow the plaintiff to relitigate the claim, the federal court would apply state law so that the plaintiff would not have a reason to choose either state or federal diversity action over the other. Secondly, no discrimination against a citizen of the forum state would occur when a citizen of a different state invoked diversity jurisdiction, because the same rules would apply to both systems. Therefore, if state and federal diversity-based courts applied the state's laws of bar and merger, both the initiator of the suit and the defender against the claim would receive the same treatment in federal or state court. Thus, the *Erie* decision's goals of preventing forum shopping and realizing equal protection under the law would be achieved.

One interesting aspect of the opinions which choose federal law over state law is the lack of discussion concerning the goals of *Erie*. One court which did address the issue was the District Court for the District of Maryland in the decision of *J. Aron & Co. v. Service Transportation*

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[201] *See, e.g.*, Smith, *supra* note 143. Professor Smith states:

> [The] inference is therefore strong that the [*Byrd*] decision was in fact based solely on the constitutional ground, and that its effect is thus limited to questions relating to the right to a jury in a federal court. Reinforcing this view is the fact that protection of the right to trial by jury is a function to which a majority of the Court has devoted itself with enthusiasm.

Id. at 451 (footnote omitted).

[202] *Erie*, 304 U.S. at 75. *See supra* notes 27-29 and accompanying text.

[203] 304 U.S. at 74-75. *See supra* notes 25-26 and accompanying text.

Co.[204] As to the avoidance of inequitable administration of the laws, the court stated:

> [I]t is clear that the merits of the case which went to judgment . . . were governed by the law of Maryland; to argue from this that the federal court, as part of a constitutionally established judicial system equal in dignity to the state judicial system, cannot do its own housekeeping and determine the scope of its own judgments because the end result might be different in a state court is to stretch the . . ."outcome determination" test well beyond the limits the Supreme Court has set for it.[205]

Although "outcome determination" is not the only test for deciding whether state or federal laws should apply,[206] the court avoided the consideration of whether the state-created rights and obligations were affected.[207] The basic function of claim-preclusion, to merge a claim into a judgment which is final or to bar a claim from being reasserted, is promulgated by a state to create such rights and obligations for its citizens. Such rights should not be aborted in the interest of judicial "housekeeping" in the federal courts based on diversity jurisdiction.

Secondly, the court in *Aron* addressed the other goal of *Erie*, discouragement of forum-shopping, reasoning that:

> It strains credulity (not to mention fundamental notions of good faith and fair play) to assume that a party would choose a state court over a federal court (or vice versa) on the basis that, if he were to lose, he could keep dragging the defendant back into litigation on different theories until he prevails or he exhausts the capacity of his legal imagination, whichever comes first.[208]

Under this line of reasoning, one wonders why the doctrine of res judicata exists at all, if its basic function is to bring litigation to an end.[209] As one commentator has warned:

> One should not make the mistake of assuming that a litigant would not engage in such harassment. Even with the controlling concept

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[204]515 F. Supp. 428 (D. Md. 1981).

[205]*Id.* at 439. Judicial housekeeping, or efficient use of the court system, is one of the recognized policies of res judicata. *See supra* note 199.

[206]*See* Hanna v. Plumer, 380 U.S. 460, 467 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958). *See supra* note 144.

[207]*See* Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945). *See supra* notes 37-42 and accompanying text.

[208]515 F. Supp. at 439.

[209]As James and Hazard recognize, the concept of res judicata is based on the fundamental policy that a "party should not be allowed to relitigate a matter that he already had opportunity to litigate." F. James & G. Hazard, Civil Procedure § 11.2, at 531 (2d ed. 1977).

> of preclusion, a number of litigants attempt to recover in successive suits although they have lost in earlier attempts. If there were no such concept, the multiplicity of litigation would be hard to imagine.[210]

Thus, although good faith and fair play might dictate otherwise, few litigants would choose to limit the number of times they would be allowed a chance to recover. If differing standards of res judicata exist in federal and state courts, a party would be likely to choose the court with the standard most favorable to his case.

Finally, the court in *Aron* expressed the fear that if state rules of res judicata were applied instead of federal laws, the policy behind the *Erie* doctrine of prevention of forum shopping would be defeated.[211] The court stated that to apply "individual state laws really *would* pose a danger of forum shopping, this time between different federal districts."[212] It is true that one of the reasons for the *Erie* decision was the need for "equal protection of the law."[213] But the Supreme Court in *Erie* was not speaking of uniformity of result throughout the federal system in diversity actions. The Court explicitly stated, "[I]n attempting to promote uniformity of law throughout the United States, the doctrine [of applying federal substantive law in diversity-based actions] had prevented uniformity in the administration of the law of the state."[214] Thus, the argument for adopting the federal law of res judicata to insure uniformity among the federal courts in diversity suits flies directly in the face of one of the main goals of the *Erie* decision, uniformity in the administration of the law of the state.

V. Conclusion

Res judicata is a powerful doctrine whereby claims are transformed either by merging into the judgment in favor of the plaintiff or as a bar by the judgment in favor of the defendant. State laws can enlarge or modify these effects of claim preclusion. It follows that under the *Erie* doctrine, res judicata is not simply a mode or form in the litigation, but is a concept by which states create rights and obligations to and for the parties. The interests of the federal courts in determining the scope of their own judgments and preserving the integrity of their judgments are strong. Yet they are not so strong as to override the state-created rights and obligations which occur in the form of res judicata. A federal court

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[210] *Rationale of Preclusion*, *supra* note 123, at 34 (footnote omitted).

[211] 515 F. Supp. at 440.

[212] *Id.*

[213] 304 U.S. at 75. *See supra* notes 25-29 and accompanying text.

[214] 304 U.S. at 75.

sitting in diversity should not abandon the goals of the *Erie* doctrine—discouragement of forum shopping, and avoidance of inequitable administration of the laws. Thus, a federal court whose jurisdiction is based on diversity of citizenship should apply state and not federal rules of res judicata. Until the Supreme Court decides whether state or federal law applies in diversity actions, however, the federal courts will remain divided as to the issue. Action by the Supreme Court is needed to resolve the issue as quickly as is possible.

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