Applying Res Judicata in Antitrust Cases: *Marrese* Provides an Approach, But Few Answers

I. Introduction

Federal courts have long been plagued by the question of what effect, if any, a state court judgment[1] should have on a subsequent federal antitrust suit[2] involving the same parties[3] and based on the same operative facts.[4] Bringing a federal antitrust suit after a state court action causes the confrontation of two strongly-held legal principles:[5]

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[1]The issue of the effect of a state court judgment on a subsequent federal antitrust suit has arisen not only when the original action was a state antitrust action, *see* Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (9th Cir. 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.) *cert. denied*, 454 U.S. 878 (1981); Straus v. American Publishers' Ass'n, 201 F. 306 (2d Cir. 1912), but also after state contract actions, *see* Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985); Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980), and following a state unfair competition suit, *see* Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967). Additionally, the issue has been addressed where a state defendant brought a federal antitrust suit after raising the federal antitrust laws as a defense against a state contract action. *See* Lyons v. Westinghouse Electric Corporation, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) (collateral estoppel).

[2]Federal antitrust actions have been brought under the Sherman Antitrust Act, 15 U.S.C. §§1-7 (1982), *see* Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985), and Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d at 1348; under the Clayton Antitrust Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1982), *see* Hayes v. Solomon, 597 F.2d 958, 960 (5th Cir. 1979); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967); and under the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1982), *see* Lyons v. Westinghouse Electric Corporation, 222 F.2d 184, 185 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) (action also based on Clayton Act).

For the purpose of analyzing the issue of res judicata, there is no significant difference between the federal antitrust statutes cited. *See infra* note 8.

[3]The same issue is involved if "privies" of parties to the original action are parties in the subsequent suit. *See, e.g.*, Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

[4]*See, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985); Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (9th Cir. 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967); Lyons v. Westinghouse Electric Corporation, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); Straus v. American Publishers' Ass'n, 201 F. 306 (2d Cir. 1912).

[5]Often the goals and underlying principles of the policies of res judicata and exclusive federal jurisdiction are at odds, especially in the context of parallel antitrust regulation by both the federal and state governments. *See, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985); Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (9th Cir. 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert.*

res judicata[6] and exclusive federal jurisdiction.[7] Historically, the courts, deeming the two principles to be mutually exclusive, have based their

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denied, 444 U.S. 1078 (1980). *See generally* Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653 (1974); Note, *The Res Judicata Effect of Prior State Court Judgments in Sherman Act Suits: Exalting Substance Over Form*, 51 FORDHAM L. REV. 1374, 1374-75, nn.3-4 (1983).

Among the other areas in which res judicata and exclusive federal jurisdiction may clash are cases involving patents, *see, e.g.*, Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929); bankruptcy, *see, e.g.*, Brown v. Felsen, 442 U.S. 127 (1979); *In re* Houtman, 568 F.2d 651 (9th Cir. 1978); and securities regulation, *see, e.g.*, Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960). *See generally* Note, *Exclusive Federal Court Jurisdiction and State Judgment Finality - The Dilemma Facing the Federal Courts*, 10 SETON HALL L. REV. 848 (1980); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967). *See also* Dickinson, *Exclusive Federal Jurisdiction and the Role of the States in Securities Regulation*, 65 IOWA L. REV. 1201 (1980); Note, *Res Judicata and Collateral Estoppel in Bankruptcy Discharge Proceedings*, 37 WASH. & LEE L. REV. 281 (1980).

[6]Res judicata, also known as "claim preclusion," provides that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). *See also* Kremer v. Chemical Construction Corp., 456 U.S. 460-61, n.6 (1982). *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981).

The elements essential for the application of res judicata include: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both suits, and (3) an identity of the parties or their privies in both suits. Nash County Board of Education v. Biltmore Co., 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

The doctrine of res judicata is often confused with the doctrine of collateral estoppel, which provides another means by which a prior suit can affect a current suit. Collateral estoppel, also known as issue preclusion, "bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530, 535-36 (5th Cir. 1978); *see also* Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).

Like res judicata, collateral estoppel requires a prior suit between parties or privies to the present suit and a final judgment on the merits in that suit. Unlike res judicata, however, application of collateral estoppel does not require that the cause of action in both suits be the same. The only requirements for collateral estoppel are that the issue common to both suits actually was litigated in the first suit and that its adjudication was essential to the judgment in the first action. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981).

The purposes of the doctrine of res judicata are to promote fairness to the defendant, to preserve judicial resources by bringing adjudication to a conclusion with reasonable promptness, and to prevent inconsistent decisions in separate actions on the same claim. *See* Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347, 1350 (9th Cir. 1983); F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 11.2 at 531-32 (2d ed. 1977).

[7]Whereas res judicata seeks to promote judicial economy and consistency, exclusive federal jurisdiction promotes the uniform national application of a law. Congress has granted the federal courts exclusive jurisdiction to decide claims arising under certain federal laws. *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4470 (1981).

One of the goals of this grant of exclusive federal jurisdiction is the uniform interpretation of federal laws through review by judges who have expertise in administering the federal laws and who have a sensitivity to the national concerns which the federal laws are intended to address. F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 11.2 at 530 (2d ed. 1977).

decisions on their evaluation of whether a federal antitrust action, considered to be within the exclusive jurisdiction of the federal courts,[8] can constitute the same claim or cause of action[9] as a state suit brought in state court.[10] Until recently, courts have generally asserted that exclusive jurisdiction considerations precluded the possibility of res judicata being applied.[11] Since 1981, three courts of appeals have held that applying res judicata is appropriate where doing so would significantly compromise the underlying purposes of neither res judicata nor exclusive federal jurisdiction.[12] In these instances, the two policies, previously thought to be irreconcilable, were harmonized. In contrast to the earlier suits[13] where exclusive federal jurisdiction considerations generally prevailed, these recent appellate court decisions have favored applying res judicata to preclude the federal suit.[14] The Supreme Court reviewed the most recent of these cases.

In its review, the Supreme Court had the opportunity to establish definitive standards to be applied uniformly by the lower courts in determining when a federal antitrust suit following a state action should

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[8]Unlike the statutes in several other areas of law (*see supra* note 5), the federal antitrust statutes do not explicitly state that federal courts have exclusive jurisdiction over federal antitrust actions. However, the United States Supreme Court has held that enforcement of federal antitrust laws is within the exclusive jurisdiction of the federal courts. *See, e.g.*, General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U.S. 261, 287 (1922); Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440-41 (1920). *See also* State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658 (9th Cir. 1972).

[9]Res judicata is to be applied to preclude a subsequent action only where the same claim was, or could have been, brought in a previous suit between the parties or their privies. *See* Brown v. Felsen, 442 U.S. 127, 131 (1979).

[10]The dilemma, neatly stated by one commentator, is that "[n]either legislative history nor judicial pronouncement [indicates] whether Congress's grant of an exclusive remedy [under the antitrust laws] rests upon a policy so strong as to immunize the federal courts from the effect of state court judgments." Comment, *Exclusive Federal Jurisdiction: The Effect of State Court Findings*, 8 STAN. L. REV. 439, 447 (1956). *But see infra* note 121 and accompanying text.

[11]*See, e.g.*, Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967); Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); Straus v. American Publishers' Ass'n, 201 F. 306 (2d Cir. 1912). *See also infra* notes 34-51 and accompanying text.

[12]*See* Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985); Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (9th Cir. 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

[13]*See, e.g.*, Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967); Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955) (collateral estoppel).

[14]*See* Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985); Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (9th Cir. 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

be precluded. The Supreme Court adopted a test[15] based on the Full Faith and Credit Statute,[16] an approach completely unlike those utilized in any appellate court decision in the antitrust context.[17] Unfortunately, the Court did not totally settle the issue because it failed to give guidance on how to apply its test.[18] As a result, federal district courts can be expected to use methods and reach decisions as varied as those prior to the Supreme Court pronouncement.

A review of the cases reveals the wide variety of factors, considerations, and approaches used by the courts when confronted with the issue of the preclusive effect of a state court judgment on a subsequent federal antitrust suit. This Note will discuss the various historical approaches to this question, will analyze the Supreme Court's 1985 decision on the issue, and will recommend an appropriate method of implementing the Supreme Court's approach.

II. Historical Development

The courts' analyses in the early cases can be divided into three categories. In *Straus v. American Publishers' Association*,[19] the court based its determination primarily on equitable considerations rather than on a reasoned balancing of res judicata and exclusive federal jurisdiction considerations, noting that the plaintiff's original choice to file the action in state court should preclude him from bringing substantially the same suit in the federal forum.[20] In a second line of cases, *Lyons v. Westinghouse Electric Corporation*,[21] *Cream Top Creamery v. Dean Milk*

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[15]Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985). *See also infra* note 121, and text accompanying notes 119-124.

[16]28 U.S.C. § 1738 (1982) provides in pertinent part that authenticated Acts by state legislatures or "records and judicial proceedings" of state courts: "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." The full faith and credit statute requires, therefore, that federal courts give preclusive effect to prior state court judgments. *See generally* Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 Ind. L.J. 59 (1982).

The full faith and credit statute should be distinguished from the Full Faith and Credit Clause, article IV, section 1 of the United States Constitution, which states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State," and generally requires that state courts give preclusive effect to the judgments of courts in other states.

[17]While the circuit courts of appeals generally have approached the issue involved in the seven principal cases analyzed (*see* cases cited *supra* note 4) as a confrontation between exclusive federal jurisdiction and res judicata (or, as in *Lyons*, collateral estoppel), these courts generally have given little, if any, attention to the full faith and credit statute, 28 U.S.C. § 1738.

[18]*See infra* notes 131, 140-43 & 151-52 and accompanying text.

[19]201 F. 306 (2d Cir. 1912).

[20]*See infra* text accompanying notes 27-33.

[21]222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

Company,[22] and *Hayes v. Solomon*,[23] the courts found exclusive federal jurisdiction considerations compelling. These courts reasoned that, because the state court could not adjudicate federal antitrust suits, the claims in the two actions were different. Therefore, because res judicata applied only where the same claim was involved in two actions, exclusive federal jurisdiction required that the second suit not be precluded. Finally, in *Nash County Board of Education v. Biltmore Company*,[24] *Derish v. San Mateo-Burlingame Board of Realtors*,[25] and *Marrese v. American Academy of Orthopaedic Surgeons*,[26] the courts determined that a state claim could be equivalent to a federal antitrust action if the state and federal statutes were similar enough in terms of damages, standard of liability, and procedural safeguards. If the state and federal claims were equivalent, these courts said, res judicata should apply to preclude the federal suit.

A. Straus v. American Publishers' Association: *A Scout for the Proponents of Choice*

The first case to address the res judicata question in the federal antitrust context was decided in 1912. In *Straus v. American Publishers' Association*,[27] Straus sued American Publishers' Association in the Supreme Court of New York, alleging an illegal conspiracy by the publishers comprising the Association.[28] Although the state court prohibited certain activities of the Association and awarded damages to Straus, the court order did not prohibit the Association from all the activities Straus had alleged were illegal.[29] While Straus was appealing this state court decision to the United States Supreme Court, he brought suit in federal district court against many of the same defendants alleging federal antitrust violations. The federal district court held that res judicata precluded the federal suit, and Straus appealed.[30]

The Second Circuit Court of Appeals applied res judicata principles to bar the federal suit, based primarily on the fact that the plaintiff in both suits originally had his choice of bringing suit in the state or federal court.[31] Having elected to sue in state court, the plaintiff should not

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[22]383 F.2d 358 (6th Cir. 1967).

[23]597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[24]640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

[25]724 F.2d 1347 (9th Cir. 1983).

[26]726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985).

[27]201 F. 306 (2d Cir. 1912).

[28]Straus alleged that the publishers comprising the Association were illegally conspiring to supply materials only to distributors who agreed to sell the materials at the suggested retail price. *Id.* at 308.

[29]The court order only prohibited the Association from interfering with Straus's purchases of uncopyrighted materials, but did not extend to the Association withholding copyrighted materials from Straus. *Id.*

[30]*Id.* at 309.

[31]*Id.* at 310.

later be permitted to sue in federal court.[32] The court dismissed as unimportant the exclusive federal jurisdiction argument.[33]

B. Proponents of Exclusive Federal Jurisdiction

The federal appeals courts' next opportunity to address the res judicata claim in the federal antitrust context again fell to the Second Circuit. That court, unconcerned with exclusive federal jurisdiction in the *Straus* case decided forty-three years earlier, deemed this principle important enough in *Lyons v. Westinghouse Electric Corporation* to hold that the earlier state suit did not preclude a federal action.[34] Although the issue in *Lyons* involved collateral estoppel, the Second Circuit Court of Appeals' decision that a state court's factual determinations in a prior state antitrust suit had no effect on a subsequent federal antitrust action[35] had a far-reaching impact on later courts' decisions to apply res judicata to preclude a subsequent federal antitrust suit.[36] Although the court could have distinguished *Lyons* from *Straus*, it did not do so and, some commentators argue, overruled *Straus*.[37]

In the *Lyons* case, Westinghouse originally had sued Lyons in state court for breach of contract. As a defense, Lyons alleged that Westinghouse had violated state antitrust laws. The state trial court held for Westinghouse, indicating that Lyons had failed to prove the antitrust charges. While Lyons' appeal of the state action was pending, he sued Westinghouse in federal court on federal antitrust charges. The federal district court stayed the federal proceedings until disposition of the state appeal. Westinghouse appealed the stay. The Second Circuit Court of Appeals ordered the district court to proceed with the trial because the state appeal could have no effect on the federal action.[38]

In reaching its decision, the *Lyons* court indicated that collateral estoppel[39] clearly did not apply because of the grant to the federal courts of exclusive jurisdiction over federal antitrust actions.[40] This rule applied,

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[32]*Id.*

[33]"The fact that the judgment in the state court depended upon the state statutes and that the complaint in this case is founded on the federal statute, which is not within the jurisdiction of the state court, makes no difference," the unanimous court declared. *Id.* at 310.

[34]222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

[35]*Id.* at 190.

[36]*See, e.g.*, Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967).

[37]*See, e.g.*, Note, *The Res Judicata Effect of Prior State Court Judgments in Sherman Act Suits: Exalting Substance Over Form*, 51 FORDHAM L. REV. 1374, 1382-83; Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 53 VA. L. REV. 1360, 1367 (1967).

[38]*Lyons*, 222 F.2d at 190.

[39]*See supra* note 6.

[40]222 F.2d at 189. *Lyons* involved the Clayton and Robinson-Patman acts rather than the Sherman Act which was involved in *Straus* and in most post-*Lyons* res judicata cases. *See supra* note 2.

the court stated, "at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong."[41] "[E]ffective and uniform" enforcement of federal antitrust laws "would best be achieved by an untrammelled jurisdiction of the federal courts," the court declared.[42] In this case, it concluded that the drawbacks inherent in holding two sets of trials—one state and one federal—were more than offset by the benefits of allowing the federal courts to exercise jurisdiction uninhibited by previous state court rulings.[43]

The Sixth Circuit Court of Appeals continued to emphasize the significance of exclusive federal jurisdiction determining the effect of a prior state court action on a subsequent federal antitrust suit in *Cream Top Creamery v. Dean Milk Company*.[44] Cream Top Creamery sued Dean Milk Company in state court on a state unfair competition charge. The suit was dismissed with prejudice, and Cream Top sued Dean in federal court on federal antitrust charges.[45] The Sixth Circuit Court of Appeals, citing *Lyons*, pointed out that federal courts have exclusive

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[41]222 F.2d at 189. The holding by the Second Circuit Court of Appeals directly conflicted with a 1929 United States Supreme Court ruling in Becher v. Contoure Laboratories, Inc. 279 U.S. 388 (1929). In *Becher*, an inventor sued in state court on a state contract action after his employee surreptitiously obtained a patent on an item invented by the employer. The court imposed on the employee a constructive trust of the patent in favor of the inventor. The employee subsequently sued the inventor in federal court alleging patent infringement. *Id.* at 389-90. Although enforcement of patent laws was within the exclusive jurisdiction of the federal courts, *id.* at 390, the Supreme Court held that the employee was estopped to challenge the facts found in the state suit, even though such estoppel effectively determined the outcome of the federal patent case. *Id.* at 391-92. "That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue," the Court said. *Id.* at 391.

The Second Circuit, in a weak attempt to differentiate *Becher* from *Lyons*, asserted that *Becher* dealt only with giving effect to specific "constituent facts," whereas *Lyons* involved "the entire congeries of such facts, taken as a unit." *Lyons*, 222 F.2d at 188. Estoppel should apply to the *Becher* facts, but not to those in *Lyons*, the Second Circuit claimed. *Id.*

In a later case involving bankruptcy, an area within the exclusive jurisdiction of the federal courts, the United States Supreme Court held that res judicata would not apply to preclude an action in federal bankruptcy court following a state collection suit. Brown v. Felsen, 442 U.S. 127, 138-39 (1979). The court noted in dicta, however, that "collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues [decided in the previous state action] in bankruptcy court." *Id.* at 139, n.10.

[42]222 F.2d at 189.

[43]*Id.* at 190. The court also acknowledged that the plaintiff in the federal suit had been the defendant in the state suit. *Id.* at 189. Unlike the plaintiff in *Straus*, the federal plaintiff in *Lyons* did not have the opportunity to choose the original forum for the action. *Id.* Some commentators have argued that Judge Hand should have differentiated *Lyons* from *Straus* on this basis and have criticized him for failing to do so. *See, e.g., Exalting Substance Over Form, supra* note 37, at 1382-83; *Prior State Court Determinations, supra* note 37, at 1367.

[44]383 F.2d 358 (6th Cir. 1967).

[45]*Id.* at 360-61.

jurisdiction over federal antitrust actions[46] and that the state court could not have granted the relief sought by Cream Top in the federal action.[47] The second suit was not precluded because the state case "did not and could not have involved a claim under the federal anti-trust statutes" and, therefore, "the dismissal with prejudice in the state action could not have adjudicated Dean's alleged violations of these statutes."[48]

In *Hayes v. Solomon*,[49] the Fifth Circuit Court of Appeals agreed that a decision in a state contract action did not preclude a subsequent federal antitrust action under res judicata principles, and that res judicata applied only to claims " 'then capable of recovery' in the first action."[50] Res judicata did not apply because the state court could not have provided the federal antitrust damages sought in the second action, the court said.[51]

C. Nash *and Its Progeny—Res Judicata Wins the Battle*

Cream Top Creamery and *Hayes* represented the state of the law until 1981. In that year, the Fourth Circuit, in *Nash County Board of Education v. Biltmore Company*,[52] held that a state antitrust action could have a res judicata effect on a subsequent federal antitrust suit if the two actions were based on the same fact situation and if the state and federal antitrust laws were the same.[53]

In *Nash*, the attorney general of North Carolina brought an antitrust action in state court against Biltmore Company and eight other dairies, alleging conspiracy to restrain price competition in violation of state law and seeking injunctive relief and treble damages. A consent judgment was issued. Shortly thereafter, the Nash County Board of Education, in its own behalf and seeking to represent a class including those school districts that had purchased dairy products from the offending companies, sued in federal court the same dairies as had been named in the attorney

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[46]*Id.* at 363. The court went on to quote the Second Circuit Court of Appeals' decision in International Railways of Central America v. United Fruit Co., 373 F.2d 408, 419 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967), which stated that "the utmost effect the prior judgment could have had . . . would . . . have been as an estoppel on questions of fact actually litigated." *Cream Top Creamery*, 383 F.2d at 363. The estoppel did not apply here because "there were no findings of fact and no adjudication of the case on its merits in the State Court action." *Id.*

[47]383 F.2d at 363.

[48]*Id.*

[49]597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[50]*Id.* at 984 (quoting United States v. Pan-American Petroleum Co., 55 F.2d 753, 782 (9th Cir.), *cert. denied*, 287 U.S. 612 (1932)).

[51]597 F.2d at 984. The court further stated that the state trial court lacked jurisdiction over the federal antitrust claim and, citing *International Railways*, the *Hayes* court stated: "A plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for state or federal antitrust relief does not bar a subsequent federal antitrust suit." 597 F.2d at 984.

[52]640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

[53]*Compare supra* notes 27-33 and accompanying text.

general's state suit. Nash sought only treble damages. The district court granted the defendants' motion for summary judgment, ruling that the federal suit was barred under the doctrine of res judicata. The Board appealed.[54]

Using a three-element test of "(1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits,"[55] the Fourth Circuit Court of Appeals determined that res judicata applied to preclude the federal suit.[56] The court first cited authority indicating that a consent judgment constituted a final judgment on the merits,[57] thus satisfying the first element.[58] The third requirement was also met because in the state suit the attorney general had represented the Nash County Board of Education and other school districts which purchased milk products from the defendants.[59]

The primary issue in this case, as in most similar federal antitrust suits, was whether the federal antitrust count constituted the same "cause of action" or claim as the state suit. The *Nash* court noted that the term "cause of action" has no standard application and "depend[s] largely on the facts of each case . . . . [I]n some cases, it has depended for its application on whether the facts in the two cases are the same; in other cases, on whether the same primary right is asserted."[60] Here, the court said, regardless of which test was used, the causes of action in both suits were the same.

Although courts in previous suits had held that a federal antitrust suit constituted a different cause of action from a state antitrust action,[61] the *Nash* court asserted that "the identity of two actions, as intimately tied together as these two, [would] not be destroyed in the *res judicata* context simply because the two suits are based on different statutes."[62] The court pointed out that, except for the federal interstate commerce requirement, the two statutes were identical.[63] The real issue in determining whether res judicata applied was whether the two suits "involve[d] the same 'operative facts' and the same basic 'delict' or wrong."[64]

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[54]640 F.2d at 486.

[55]*Id. See supra* note 6.

[56]640 F.2d at 487.

[57]*See generally*, Note, *Civil Procedure, Res Judicata: Exclusive Federal Jurisdiction and State Court Consent Judgments, Fourth Circuit Review*, 39 WASH. & LEE L. REV. 501 (1982).

[58]640 F.2d at 486-87.

[59]*Id.* at 495-96.

[60]*Id.* at 487-88.

[61]*See, e.g., Cream Top Creamery*, 383 F.2d 358 (6th Cir. 1967). *See also supra* notes 34-51.

[62]*Nash*, 640 F.2d at 488.

[63]*Id.*

[64]*Id.*

The Fourth Circuit distinguished *Nash* from *Hayes v. Solomon*[65] and *Cream Top Creamery v. Dean Milk Company*,[66] by indicating that the state antitrust law in North Carolina, like the federal statute, allowed for treble damages, while the applicable state antitrust laws in *Hayes* and *Cream Top Creamery* failed to provide for treble damages.[67] The *Nash* court held that a suit brought in state court under North Carolina's antitrust statute, modeled after the federal statute and including the same right to treble damages, precluded a subsequent federal antitrust suit in federal court.[68]

In the case of *Derish v. San Mateo-Burlingame Board of Realtors*,[69] decided in December of 1983, the Ninth Circuit Court of Appeals followed the Fourth Circuit by holding that a prior state antitrust action barred the state plaintiff from bringing a subsequent federal antitrust suit. The Derishes brought suit in state court against the San Mateo-Burlingame Board of Realtors and others, alleging violations of the state antitrust statute.[70] The trial court dismissed the complaint with prejudice, and the appellate court affirmed. The California Supreme Court declined to review the appellate court decision.[71]

Following the trial court decision, the Derishes filed a Sherman Act suit in federal court against the defendants in their state action.[72] When the state court decision became final, the Board and the other defendants moved to dismiss the federal suit on res judicata grounds. The district court denied the motion, but certified the question for interlocutory appeal.[73] The Ninth Circuit reversed the lower court decision, holding that the dismissal with prejudice in the prior state action barred the federal antitrust suit.[74]

The Derishes had argued that res judicata did not apply because the state and federal actions did not involve the same claim.[75] In determining whether the same claim was involved in both actions, the court considered four questions:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second

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[65]597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[66]383 F.2d 358 (6th Cir. 1967).

[67]640 F.2d at 490.

[68]*Id.*

[69]724 F.2d 1347 (9th Cir. 1983).

[70]The Derishes had sold their house through a broker who used a multiple listing service operated by the San Mateo-Burlingame Board of Realtors. After the sale, the Derishes brought their state action against the Board. In their complaint, the Derishes alleged that limiting the use of the listing service to licensed real estate brokers and salesmen violated the Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700-60 (West 1964 & Supp. 1983). 724 F.2d at 1348.

[71]724 F.2d at 1348.

[72]*Id.*

[73]*Id.*

[74]*Id.*

[75]*Id.* at 1349.

> action; (2) whether substantially the same evidence was presented in the two actions; (3) whether the two suits involved infringement of the same right; and (4) whether the two suits arose out of the same transactional nucleus of facts.[76]

These questions, the court stated, were "tools of analysis, not requirements, because identity of claims 'cannot be determined precisely by mechanistic application of a simple test.' "[77] Focusing on the four questions, the court determined that the state and federal suits "involved the same transactional nucleus of facts, and . . . that substantially the same evidence" would be required in both actions.[78] In determining whether the two suits involved the infringement of the same right, the court said its test would be whether the state and federal statutes "set the same standards for defining unreasonable restraints and imposing liability . . . ."[79] Res judicata should not be applied, the court stated, if the federal law imposed stricter liability standards than those in the state law.[80] The court noted that the federal and state antitrust actions involved here were similar and that the Derishes had not identified any difference in the substantive law of the two statutes. The Derishes' rights under both laws were the same.[81]

Regarding the remaining question posed, the *Derish* court said the Board's "right . . . to be free from this claim as established in the state suit would be destroyed or impaired by the federal suit."[82] Therefore, the court concluded, answers to all four questions supported a res judicata finding.[83]

In analyzing exclusive federal jurisdiction considerations, the court said there were times res judicata should not be applied.[84] The *Derish* case, however, "[did] not involve such factors that would persuade us, without further analysis, to forego res judicata and find an implied exception" to the federal full faith and credit statute.[85] Therefore, the court said, it must go on to "balance the general policies behind exclusive

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[76]*Id.*

[77]*Id.* (quoting Abramson v. University of Hawaii, 594 F.2d 202, 206 (9th Cir. 1979)). The *Derish* court noted that exclusive federal jurisdiction added "another dimension" to this case, 724 F.2d at 1349, and asserted that "[i]t is by weighing these competing policies of exclusive federal jurisdiction and res judicata that a proper decision may be reached." *Id.*

[78]724 F.2d at 1349.

[79]*Id.* at 1350.

[80]*Id.*

[81]*Id.*

[82]*Id.*

[83]*Id.*

[84]As an example, the court cited cases involving discharge of a debt in bankruptcy where "Congress clearly specified the exclusive jurisdiction of the bankruptcy court in this area." *Id.* at 1351.

[85]*Id. See infra* notes 119-21 and accompanying text for a discussion of the Supreme Court's interpretation of the full faith and credit statute.

federal jurisdiction against those of res judicata.''[86] The state case would not hinder uniform interpretation of the Sherman Act because the state case would not be precedent in federal antitrust cases.[87] Further, the traditional ''expertise of federal judges'' argument[88] was met because state court judges were experienced in trying antitrust claims, applying federal law collaterally in state cases.[89] The remedies under both the federal and state laws were the same,[90] as were the opportunities for a jury trial and for discovery proceedings consistent with federal due process requirements.[91] Therefore, the court concluded, the policies supporting exclusive federal jurisdiction would not be ''heavily implicated'' if the federal suit were precluded.[92]

On the other hand, the policies supporting res judicata would be heavily implicated.[93] These policies included removing most of the trial from crowded court dockets, sparing the Board from paying much of the expense involved with defending a claim against which it already had defended, upholding '' '[t]he principles of comity and repose embodied' ''[94] in the federal full faith and credit statute,[95] avoiding possible inconsistent results in the state and federal trials, and fostering ''[c]onsidered reliance on both state and federal judiciary to resolve disputes.''[96] The *Derish* court ultimately concluded that ''[w]hen both state and federal law offer a plaintiff equally sharp teeth for enforcing the same claim he may indeed have but 'one bite at the apple.' ''[97]

In January, 1984, just one month after *Derish* was decided, the Seventh Circuit Court of Appeals followed the Fourth and Ninth circuits in precluding a federal antitrust suit after the federal plaintiff had brought a state action against the same defendant based on the same fact situation. In *Marrese v. American Academy of Orthopaedic Surgeons*,[98] the court

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[86]724 F.2d at 1351.

[87]*Id.*

[88]*See supra* note 7.

[89]*Derish*, 724 F.2d at 1351-52.

[90]*Id.* at 1351.

[91]*Id.* at 1352. The court distinguished previous cases in which courts did not apply res judicata, *see, e.g.*, Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967), by indicating that, in those cases, the state law did not provide for treble damages as did the federal law. 724 F.2d at 1351 (citing Hayes v. Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir. 1967); Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2d Cir. 1955)). Here, the state and federal damage provisions were the same, 724 F.2d at 1351, as was the right to a jury trial. *Id.*

[92]724 F.2d at 1351.

[93]*Id.* at 1352.

[94]*Id.* (citing Kremer v. Chemical Construction Corp., 456 U.S. 461, 463 (1982)); *see infra* note 119.

[95]*See supra* notes 6 & 10 and *see infra* notes 175-181 and accompanying text.

[96]*Derish*, 724 F.2d at 1352.

[97]*Id.*

[98]726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985).

extended the *Nash* and *Derish* reasoning to a situation in which the original state suit was not an antitrust suit but rather was a state contract action.

In *Marrese*, two orthopedic surgeons, Drs. Marrese and Treister, sought admission to the American Academy of Orthopaedic Surgeons. Their applications were rejected without a hearing and the doctors sued, alleging breach of contract and due process violations. The state appellate court ordered Treister's complaint[99] dismissed for failure to state a claim, and the state supreme court denied leave to appeal. After losing in the state appellate court, the doctors brought a federal antitrust suit seeking damages and injunctive relief. The federal district court denied the Academy's motion to dismiss the claim based on res judicata and refused to certify the res judicata question for immediate appeal. When the Academy, in violation of a court order, refused to cooperate in pretrial discovery, the district court held the Academy in criminal contempt. The Academy appealed the contempt citation and the underlying refusal to dismiss the federal suit on res judicata grounds.[100]

The Seventh Circuit noted that Drs. Marrese and Treister could have alleged state antitrust violations in their state suit but did not do so.[101] In language reminiscent of the "choice of forum" reasoning in *Straus*,[102] the *Marrese* court pointed out other options which the doctors originally had open to them: they could have brought state or federal antitrust suits or they could have brought both federal and state antitrust suits simultaneously in federal court, joining the state claims through pendent jurisdiction.[103]

The plurality opinion in *Marrese*[104] acknowledged that while the state and federal statutes involved in *Nash* were virtually identical,[105] the

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[99]Dr. Marrese was not a party to Dr. Treister's appeal, but Marrese's suit was stayed pending the outcome of Treister's appeal. After the appeal was denied, Marrese's suit was dismissed. *Id.* at 1151.

[100]*Id.* at 1151-52.

[101]*Id.* at 1152.

[102]*See supra* text accompanying notes 27-33.

[103]726 F.2d at 1152.

[104]As noted by Judge Cudahy, Judge Posner's opinion in *Marrese* was joined by a majority of the nine-member panel on the second issue in the case involving the validity of a contempt judgment after the order on which the citation was based was deemed invalid. However, on the res judicata issue, two judges joined Judge Posner, and two judges joined Judge Cudahy's stinging dissent on the res judicata issue, which charged that "[t]he plurality opinion is in fact an aggressive *tour de force*—going well beyond existing law—in the abdication of federal jurisdiction." *Id.* at 1174 (Cudahy, J., dissenting). Judge Eschbach wrote a concurrence and dissent, concurring on discovery but dissenting on res judicata, *id.* at 1162 (Eschbach, J., concurring and dissenting); Judge Bauer concurred in the result, *id.* (Bauer, J., concurring), and Judge Flaum dissented on discovery but concurred on res judicata, although Judge Flaum reached a res judicata finding through an entirely separate route from Judge Posner, *id.* at 1163 (Flaum, J., concurring and dissenting). The final count was five judges favoring a res judicata finding—although no more than three could agree on the reasoning—and four against it.

[105]*See supra* text accompanying note 63.

statutes here were not.[106] Nevertheless, the statutes did not need to be identical for res judicata to apply. Instead, the decisions should be based on "the specific provisions of the state and federal statutes, read in light of the specific allegations of the complaint. If, applied to the particular case, the state and federal standards are the same, it should not matter that applied to some other case they might be different."[107]

The court considered two possible areas in which the standards might be different. First, the court observed that the liability standards, although different when applied in some cases, were the same here.[108] Second, the damage provisions of the two laws were considered. Under federal law, violations were subject to an automatic tripling of actual damages; the state statute, on the other hand, provided that damages awarded could be *up to* three times the amount of actual damages, but only if the violation was willful.[109] Although the doctors requested damages in their state suit, damages were only sought on a state contract theory.[110] However, the court noted that the doctors' "federal antitrust suit contain[ed] no reference to the facts underlying the breach of contract claim."[111] This and other facts[112] in the case satisfied the *Marrese* court that the doctors were not concerned about treble damages.[113] The plurality concluded that a state antitrust suit would have been a "perfect substitute" for the federal antitrust action.[114]

The court began with the premise that because the doctors could have joined a state antitrust action with their other state claims, a federal antitrust action should be precluded if the state and federal antitrust laws were "materially identical."[115] It concluded that the "materially identical" standard was met.[116] Therefore, the court held, based on res judicata principles, the doctors were barred from bringing the federal suit.[117]

III. The Supreme Court Decision in *Marrese*: The Full Faith and Credit Statute Controls

The United States Supreme Court, in reversing the Seventh Circuit's decision in *Marrese v. American Academy of Orthopaedic Surgeons*,[118]

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[106]726 F.2d at 1155.

[107]*Id.*

[108]*Id.*

[109]*Id.* at 1155-56. Compare the great reliance placed on equivalent state and federal damage provisions in *Derish*, *see supra* note 91, with the relative insignificance the *Marrese* court placed on the differences in state and federal damage provisions.

[110]726 F.2d at 1156.

[111]*Id.*

[112]The court cited the fact that the doctors filed the federal antitrust action more than four years after the contract action was filed and the doctors' supposed concern that they could not show any actual damages—a prerequisite for collecting treble damages—as indicators that they were not really interested in recovering damages. *Id.*

[113]*Id.*

[114]*Id.*

[115]*Id.* at 1153.

[116]*Id.* at 1156.

[117]*Id.*

[118]105 S. Ct. 1327 (1985).

reiterated the test regarding preclusion of a federal suit following a state action developed in its 1982 decision in *Kremer v. Chemical Construction Corporation*[119] and followed in 1984 in *Migra v. Warren City School District Board of Education*,[120] and extended its applicability to a claim

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[119]456 U.S. 461 (1982). In *Kremer*, the Supreme Court had faced the confrontation of res judicata principles and section 1738 in the context of the concurrent jurisdiction of federal and state courts in employment discrimination cases. Rubin Kremer, the employee charging discrimination, was one of a number of workers laid off by his employer. Unlike many of his co-workers who were laid off at the same time, Kremer was not rehired. He filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) which lacked jurisdiction over the charge until the appropriate state agency, the New York State Division of Human Rights, had had sixty days to handle the matter. The discrimination charge was referred to the state agency, which concluded that no probable cause for a finding of discriminatory practices by the employer existed. Kremer pursued his claim through the administrative and judicial review procedures established by state law. The determination of the state agency was affirmed at each stage. During the pendency of the state judicial review, Kremer again filed with the EEOC, which reached the same finding as had the state agency. He then brought in the district court a claim under Title VII which ultimately was dismissed on res judicata grounds. *Id.* at 463-66.

Beginning with section 1738 as the basis for its analysis and decision, the Supreme Court in *Kremer* noted that section 1738 required "federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Id.* at 466 (footnote omitted). Citing a New York statute, the Supreme Court determined that state law would preclude the federal litigation under Title VII. *Id.* at 466-67.

Having determined that the action was precluded under state law, the final inquiry required examining Title VII to ascertain whether an express or implied exception to section 1738 existed which would allow the federal suit to advance. *Id.* at 468. The Court found no express exception or repeal of Section 1738 in the language of Title VII. *Id.* at 469-70. Furthermore, the Supreme Court noted that "[s]ince an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatability between Title VII and § 1738 is enough to answer our inquiry." *Id.* at 470. To the contrary, the Court determined that the state antidiscrimination laws were integral to the legislative scheme established by Congress. *Id.* at 468-69. Finally, the legislative history revealed no indication of a congressional intent for Title VII to repeal section 1738 and its effect. *Id.* at 470-76.

As an aside, the Supreme Court noted that the concepts of comity and federalism underlying section 1738 are not "compromised" by applying preclusion rules to Title VII cases:

> On the contrary, stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality not only would violate basic tenets of comity and federalism . . . , but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.

Id. at 478 (*citing* Board of Regents v. Tomanio, 446 U.S. 478, 491-92 (1980)).

[120]104 S. Ct. 892 (1984). In *Migra*, the Supreme Court was confronted with the same concerns faced in *Kremer*, except now in the context of an allegation of constitutional rights violations asserted under 42 U.S.C. §§ 1983 and 1985.

In the prior state court suit, Ethel Migra, a teacher whose appointment was withdrawn shortly after its renewal, asserted a breach of contract claim and a wrongful interference with contractual relations claim against the school board and its individual members. The state court reinstated Migra to her teaching position, awarded her compensatory damages,

within the *exclusive* jurisdiction of the federal court.[121] The Court's two-step analysis looks first to the law of the state in which the state court judgment was rendered. If that state's law would allow a subsequent federal antitrust suit, the second suit is permitted. If the state law would preclude the second suit, the federal court then must perform the second step in the test. At this stage, the court must determine whether the antitrust statute underlying the second suit provides for actions under that statute to be exempted from the provisions of the Full Faith and Credit Statute.[122] If the court finds an express or implied exception

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but dismissed any claim regarding the liability of the individual board members. Subsequently, Migra filed an action in federal court, asserting that her due process and equal protection rights had been violated. Her federal claims arose under the first, fifth, and fourteenth amendments to the Constitution and under sections 1983 and 1985. The federal court dismissed the federal action based on res judicata and statute of limitations. *Id.* at 894-95.

After briefly reviewing the concepts regarding the effect of state court judgments and their preclusive effect under state law enunciated in *Kremer* and Allen v. McCurry, 449 U.S. 90, 96 (1980), the Supreme Court restated the appropriate test that "*in the absence of federal law modifying the operation of [section] 1738*, the preclusive effect in federal court of petitioner's state-court judgment is determined by Ohio law." 104 S. Ct. at 896 (emphasis added). Thereafter, the court examined whether section 1983 created an exception to section 1738, focusing on the decision of *Allen v. McCurry*, which had decided the question as to issues actually litigated in the state court proceeding. *Id.* at 896-97. Finding the reasoning of *Allen* equally applicable to both issue preclusion and claim preclusion, the court held that section 1983 did not "override" section 1738 and that Ohio law must determine the claim preclusive effect of the prior state court judgment. *Id.* at 898.

The Supreme Court then examined the development of the claim preclusion law in Ohio, noting the recent broadening of its applicability. *Id.* at 898-99. Nonetheless, the specific issue confronting the Supreme Court had not been addressed in Ohio. Recognizing that the role of interpreting Ohio preclusion law belonged in the federal district court rather than in the Supreme Court, the *Migra* court remanded the case to the federal district court. *Id.* at 899.

[121]105 S. Ct. at 1332. None of the Supreme Court's earlier decisions had specifically applied the two-part analysis implicitly required by section 1738 to a claim within the exclusive jurisdiction of the federal courts. However, the court reached its decision without addressing any special characteristics or special interests of exclusive federal jurisdiction which may support a different analysis or may dictate the weighing of different concerns. Rather, the court first noted that state res judicata law had precluded a subsequent action under patent law, a law within the exclusive jurisdiction of the federal courts, although the Supreme Court had reached this decision without application of section 1738. *Id.* (citing Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929)). Second, while recognizing that it *had not* determined whether Title VII claims were limited to federal jurisdiction, the Supreme Court nonetheless stated that *Kremer* "implie[d] that absent an exception to [section] 1738, state law determines at least the issue preclusion effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." 105 S. Ct. at 1332. Finally, the court relied on *Kremer* for its determination that section 1738 requires the preclusive effect of a state court judgment to be ascertained through the application of state law. *Id.* After stating these three concepts, the Supreme Court summarily concluded "that the basic approach adopted in *Kremer* applies in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts." *Id.*

[122]28 U.S.C. § 1738 (1982).

to these provisions, the court hearing the second suit need not give full faith and credit to the judgment in the first action; therefore, the second suit is permitted.[123] If no exception is found, full faith and credit must be afforded to the initial judgment and the second action is precluded.[124]

The Seventh Circuit Court of Appeals erred, the Supreme Court held, when it failed to consider whether the law of Illinois, the state in which the initial suits by Drs. Marrese and Treister were brought, would preclude the second suit. Instead, both the plurality opinion[125] and Judge Flaum's concurrence[126] incorrectly "express[ed] the view that Section 1738 [the Full Faith and Credit Statute] allows a federal court to give a state court judgment greater preclusive effect than the state courts themselves would give it."[127] Because the lower courts had failed to determine whether Illinois state law required preclusion of the federal Sherman Act suit, the Supreme Court remanded the case to the district court to determine whether, under Illinois law, the federal action would be barred.[128]

Although the majority declined to examine whether Illinois law would preclude the subsequent federal suit and refused to determine whether an express or implied exception to section 1738 applied under the Sherman Act,[129] it felt compelled to launch into a discussion of state preclusion rules. In its discourse, the majority, without citing a single case, suggested that the rule espoused in the Restatement (Second) of Judgments was generally followed, and the Court proceeded to determine the "appropriate" interpretation of the Restatement rule.[130] However, in its generalities, the Court provided few guidelines for the federal district court faced with determining the state preclusion law in a situation as yet unconfronted by most states.[131]

In a well-reasoned concurrence, Chief Justice Burger agreed with the two-step test set forth by the majority, but criticized the majority for its failure to provide guidance to the federal district court. Likewise, the Chief Justice disagreed with the majority's interpretation of the effect and implementation in the antitrust context of the preclusion

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[123]105 S. Ct. at 1333.

[124]*Id.*

[125]726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded*, 105 S. Ct. 1327 (1985).

[126]*Id.* at 1162 (Flaum, J., concurring).

[127]105 S. Ct. at 1334.

[128]*Id.* at 1335.

[129]The Supreme Court in *Kremer* had no difficulty in determining the preclusive effect of the state law judgment under state law, 456 U.S. at 466-67, and determining whether an express or implied repeal of section 1738 was established under Title VII. *Id.* at 468-76. Furthermore, the Supreme Court in *Migra* restated the *Kremer* rule so that the federal issue required resolution first. 104 S. Ct. at 896. After resolving the question of the applicability of section 1738 on claims arising under 42 U.S.C. § 1983 and finding no implied or express repeal thereunder, the court remanded the decision to the district court for resolution of the state preclusion law issue. *Id.* at 899.

[130]105 S. Ct. at 1333.

[131]*Id.*

rule espoused by the majority as that generally accepted by the states.[132]

IV. *Marrese*: More Questions Than Answers

In developing its two-part test regarding the preclusive effect of the state suit, the Supreme Court focused on distinctly different sources at each stage of the test, although relying on the full faith and credit statute as the foundation for each step. First, the Court looked to the original state court judgment.[133] Second, the Court considered the statute underlying the substantive federal claim in the second suit.[134] The Supreme Court's decision to extend its two-step test to areas of exclusive federal jurisdiction[135] such as antitrust was not unreasonable.[136] The Court may be faulted, however, for failing to provide meaningful guidance for lower courts which must apply this test.[137]

A. "Divining" the Effects of State Court Judgments

The Court's first consideration was the original state court judgment. The Court apparently believed that the possible res judicata effect of a judgment, as determined by the law of the state in which the judgment was rendered, was akin to being itself an element of the judgment. Although Congress could statutorily *limit* a state court judgment's preclusive effect as it related to a subsequent federal action, the Supreme Court, citing its 1984 decision in *Migra v. Warren City School District Board of Education*,[138] asserted that federal courts could not give the state judgment preclusive effect beyond that which had originally become a part of that judgment.[139]

Having established that state law should be applied, however, the Supreme Court gave no clear guidance for discerning the state's res judicata law relative to the preclusion of a subsequent federal antitrust

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[132]*Id.* at 1335-37. (Burger, C.J., concurring).

[133]*Id.* at 1332. Section 1738 " 'commands a federal court to accept the rules chosen by the State from which the judgment is taken.' " *Id.* (quoting Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982)).

[134]*Id.* at 1333. The second part of the test specifically looks to section 1738 by requiring the court to determine whether the statute underlying the suit provides for an exemption to the full faith and credit statute.

[135]105 S. Ct. at 1334.

[136]The end result of the extension of the *Kremer* analysis to claims within the exclusive jurisdiction of the federal courts is not itself problematic and should eliminate the variety of approaches—although not the differing applications—which the lower courts have adopted in initially applying claim preclusion to antitrust settings. *See supra* text accompanying notes 19-117. However, the majority's superficial analysis and application of earlier cases and their implications does not naturally lead to the conclusion reached by the Court nor does it consider the special concerns of exclusive federal jurisdiction. *See supra* note 121.

[137]*See infra* text accompanying notes 140-41 & 151-52.

[138]104 S. Ct. 892 (1984).

[139]105 S. Ct. at 1334.

suit. While the Court readily acknowledged that "a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court,"[140] the Court nevertheless directed the district court to rely on Illinois' general preclusion principles to determine the effect of an earlier state judgment on the subsequent litigation.[141] Although the Supreme Court declined to determine Illinois' stance regarding the res judicata effect of its state court judgments,[142] in dictum, the Court observed:

> [w]ith respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts . . . ." Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts.[143]

Although this language clearly is dictum, the Court's use of such broad, unsupported statements is troublesome for several reasons. First, the Court, by characterizing the Restatement provision as one of "jurisdictional competency," strongly suggests that a judgment from a state court in a state where this Restatement provision has been adopted can never preclude an action within the exclusive jurisdiction of the federal courts because the state court lacked jurisdiction to hear the federal claim.[144] This simplistic approach totally ignores the sound reasoning in

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[140]*Id.* at 1332.

[141]*Id.* at 1335. Interestingly, two of the Seventh Circuit judges in *Marrese* had examined the Illinois preclusion law, applied it to the situation confronting the court, and reached opposite conclusions. Judge Cudahy's dissenting opinion recognized a jurisdictional competency requirement in Illinois law which, he concluded, resulted in the non-preclusion of the federal antitrust suit. 726 F.2d 1150, 1177 (7th Cir. 1984)(Cudahy, J., dissenting). However, under Judge Flaum's analysis, examination of Illinois res judicata principles would result in the preclusion of the subsequent federal antitrust suit. *Id.* at 1164 (Flaum, J., concurring and dissenting).

[142]105 S. Ct. at 1335.

[143]*Id.* at 1333. The Restatement (Second) of Judgments provision which the majority opinion cites as the general rule establishes that a claim is not precluded if:

> [t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limiation on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action. . . .

RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

[144]The conclusion reached by the majority opinion is based on the illustration to the Restatement (Second) of Judgments provision:

> A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

Restatement (Second) of Judgments § 26 at 237, comment c, illustration 2 (1980).

Nash County Board of Education v. Biltmore Company[145] and *Derish v. San Mateo-Burlingame Board of Realtors*[146] in which the courts carefully analyzed the applicable state and federal statutes and determined that, where the two statutes were virtually identical, the plaintiff could not properly assert that he had been "unable to rely on a certain theory" or "to seek a certain remedy." If the state antitrust statute mirrors the federal law, the plaintiff may effectively rely on the same theories or seek the same remedies in state court as he could in federal court. If res judicata principles have any validity, there is no sound reason to suggest that a plaintiff, who has his choice of court systems in which to bring his initial suit, ought to have a second opportunity to relitigate functionally the same claim by suing in federal court.

A second point of concern is that the Supreme Court's assertion that the "jurisdictional competency" requirement embodied in the Restatement has "generally" been adopted by the states is totally unsupported.[147] Interestingly, the Court cites to a Restatement provision as if it were law, while providing not even one citation indicating that *any* state has adopted this provision.[148]

Finally, by suggesting that the Restatement provision represents the law in most states, a district court faced with applying the *Marrese* decision might reasonably assume that the Restatement provision should be applied unless there are clear indications that the state in which the original state judgment was rendered would reach a different result. The high Court made this view plain when it stated, again unsupported by case law, that "[u]nless application of Illinois preclusion law suggests, *contrary to the usual view*, that petitioners' federal antitrust claim is somehow barred, there will be no need to decide in this case if there is an exception to [section] 1738."[149] Clearly it is inappropriate for the Supreme Court to dictate to states what their common law should be and how it should be interpreted by making unsupported statements concerning the "general" or "usual" view of the law.

These problems were recognized and addressed by Chief Justice Burger in his thoughtful concurrence.[150] Although the majority directed the district court to determine whether the second suit would be precluded under Illinois law, the concurrence noted that the majority provided "no guidance . . . as to how the District Court should proceed if it finds state law silent or indeterminate on the claim preclusion question."[151] The majority's "refusal to acknowledge this potential

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[145]640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *see supra* notes 55-68 and accompanying text.

[146]724 F.2d 1347 (9th Cir. 1983); *see supra* notes 75-97 and accompanying text.

[147]105 S. Ct. at 1333.

[148]*Id.*

[149]105 S. Ct. at 1333 (italics provided).

[150]*Id.* at 1336-37 (Burger, C.J., concurring).

[151]*Id.* at 1336.

problem appears to stem from a belief that the jurisdictional competency requirement of *res judicata* doctrine will dispose of most cases like this."[152] Even in a state which required jurisdictional competency as an element of res judicata, this requirement might be met constructively even though the federal action was within the exclusive jurisdiction of the federal courts. Such would be the case where "state law provides a cause of action that is virtually identical with the federal statutory cause of action."[153]

Under the majority's interpretation of the "usual view" of state preclusion laws, the similarity of the state and federal antitrust statutes would be irrelevant. Alternatively, a court using the sound reasoning of the concurrence would consider the statutes' similarity as highly significant where the state which rendered the original judgment had not determined the preclusive effect of the state court judgment on a subsequent federal action. Because most states would not have had reason to address the issue of the preclusive effect of a judgment of one jurisdiction relative to a subsequent suit in a different jurisdiction,[154] the concurrence asserted that "it may be consistent with [section] 1738 for a federal court to formulate a federal rule to resolve the matter."[155]

In arguing for a federal rule to be used when the state preclusion law on the issue is not settled, the concurring opinion recognized the competing interests which must be balanced to fashion such a rule.[156] The interests, predictably, are the same ones addressed by the courts in *Nash County Board of Education v. Biltmore Company* and *Derish v. San Mateo-Burlingame Board of Realtors* and by the Seventh Circuit Court of Appeals in *Marrese*: the principles underlying exclusive federal jurisdiction and res judicata.[157] While the concurrence espoused a "full and fair opportunity" test when the "state statute is identical in all material respects with a federal statute within exclusive federal jurisdiction,"[158] the underlying principles of the competing interests may have to be balanced to ascertain when a party has had a "full and fair opportunity" to litigate or when the state and federal statutes are "identical in all respects."

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[152]*Id.*

[153]*Id.*

[154]105 S. Ct. at 1332. *See also id.* at 1336-37 (Burger, C.J., concurring).

[155]*Id.* at 1337 (Burger, C.J., concurring).

[156]The concurrence noted:

> If state law is simply indeterminate, the concerns of comity and federalism underlying [sction] 1738 do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently and not as means of harassing defendants with repetitive lawsuits, as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights.

Id.

[157]*See supra* notes 5-7 and accompanying text.

[158]105 S. Ct. at 1337 (Burger, C.J., concurring).

Courts faced with balancing these competing interests should be guided by the considerations and analyses of the courts of appeals in *Nash County Board of Education v. Biltmore Company,*[159] *Derish v. San Mateo-Burlingame Board of Realtors*[160] and *Marrese.*[161] In those cases, the courts expressly or impliedly balanced the policies underlying the principles of res judicata and exclusive federal jurisdiction.[162] It is critical that the federal district court analyze and balance these principles when determining state preclusion law in the absence of any law on the subject to determine if the party was given a "full and fair opportunity" to litigate his rights under the federal statute.[163] Although the balancing must be somewhat fact-sensitive, certain factual commonalities in antitrust cases may reveal when one policy will, or should, prevail over the other.

Among the principles underlying res judicata are fairness to the defendant and preservation of judicial resources by "bring[ing] an adjudication to a final conclusion with reasonable promptness and within reasonable limits of cost."[164] Clearly, any time a federal trial follows a similar state action, these policies will be compromised to some extent. Simply conducting the second trial expends judicial resources and costs the parties both time and money. Because the same claims are involved in the two suits where state and federal antitrust and procedural laws are substantially the same, the policies underlying res judicata would be compromised if the second suit were not precluded. Nonetheless, because the second suit will always compromise the policies underlying res judicata, the most significant factors the court should consider in the balance are the policies behind exclusive federal jurisdiction and the extent to which they are affected by the second suit or its preclusion.

Reasons suggested for giving federal courts exclusive jurisdiction over federal antitrust actions include the need for uniform interpretation of federal antitrust law, the expertise of federal judges to handle these suits, and the desire to provide the specified federal remedies and federal procedures relating to the right to a jury trial and liberal discovery provisions.[165] These policies may not always be implicated by applying res judicata to preclude the federal antitrust suit.

Under the reasoning outlined in *Derish*, uniform enforcement of federal antitrust laws would not be implicated if the federal suit were precluded because the state courts' rulings on their own laws would have no precedential effect on the interpretation of federal antitrust laws.[166] If a court precluded the federal suit, however, the federal plaintiff

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[159]640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981).

[160]724 F.2d 1347 (9th Cir. 1983).

[161]726 F.2d 1150 (7th Cir. 1984), *rev'd and remanded,* 105 S. Ct. 1327 (1985).

[162]*See supra* text accompanying notes 52-117.

[163]105 S. Ct. at 1337 (Burger, C.J., concurring).

[164]F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 11.2, 530 (2d ed. 1977).

[165]*Derish*, 724 F.2d at 1351-52.

[166]*Id.* at 1351.

would have to settle for the state court's interpretation of state antitrust laws. Even if the state law mirrored the federal law, that particular plaintiff would have been denied the benefit of the uniform enforcement of the federal law. Nevertheless, this inequity would be offset in a situation where the federal plaintiff had brought the state suit as well. There, the plaintiff's action in bringing the state suit first cost him his chance to bring the federal claim.[167] But where the federal plaintiff was the state defendant,[168] the inequity to him would not be offset by the original choice of forum factor. In such a situation, exclusive federal jurisdiction factors would be compromised if the federal suit were precluded.

The argument that the expertise of federal judges is needed in federal antitrust cases carries less weight than it once may have carried because state court judges have increased opportunity to develop expertise in trying antitrust cases. One means by which state judges develop this expertise is when a defendant in a state action asserts a federal antitrust violation as a defense.[169] Also, state judges try state antitrust cases involving laws similar to the federal statutes.[170] Therefore, this policy behind exclusive jurisdiction will seldom provide a strong reason not to apply res judicata in the second action.

If state and federal antitrust and procedural laws are materially identical or similar, the exclusive federal jurisdiction policy of providing the benefits of substantive and procedural laws would not be compromised by applying res judicata. The boundaries outlining how closely the state statute must mirror the federal law have not yet been drawn. While the concurrence encouraged the adoption of a "similarity" standard of "identical in all material respects," this standard still would leave open questions regarding the "materiality" of any variations between the state and federal antitrust statutes. The three appellate courts addressing this issue, faced with state statutes which were progressively more dissimilar to the federal antitrust law, each determined that the appropriate similarity standard was met. In *Nash*, for example, the state statute was identical to the federal law except for the federal requirement of interstate commerce, which was not present in the state law.[171] The California law considered in *Derish*, although apparently not identical to the federal statute, was "similar"

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[167]*See, e.g.*, Straus v. American Publishers' Ass'n, 201 F. 306 (2d Cir. 1912).

[168]*See, e.g.*, Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

[169]*See* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 347 (1978).

[170]*Derish*, 724 F.2d at 1351-52.

[171]*Nash*, 640 F.2d at 488.

Similarly, Indiana's antitrust law, IND. CODE §§ 24-1-2-1 to -2-12 (1982), has been patterned after the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982), and courts are admonished to look to the federal law in construing Indiana's statute. *See* Orion's Belt, Inc. v. Kayser-Roth Corp., 433 F. Supp. 301 (S.D. Ind. 1977).

to the Sherman Act, and both laws provided the same rights.[172] In *Marrese*, however, the circuit court had said the federal and state statutes only had to be equivalent "not in gross but with reference to the specific provisions of the state and federal statutes, read in light of the specific allegations of the complaint."[173] This expansive language opens the door to very liberal rulings precluding federal antitrust suits. The mischief which can be achieved by this approach was amply illustrated in *Marrese*. There, although the state and federal damage provisions were different, the court said this difference was insignificant because the plaintiffs really were not interested in collecting damages.[174] This questionable reasoning should not be extended. Nonetheless, the "equivalency" or "nonequivalency" of the state and federal antitrust laws, especially in terms of remedies, represents a significant factor which should tilt the balance in favor of res judicata or exclusive federal jurisdiction, although the court may construe the statutes broadly or focus only on certain "pertinent" portions to support the desired policy and decision.

In almost every situation involving a second suit, the policies supporting res judicata—fairness to the defendant and preservation of judicial resources—will be implicated to some extent. On the other hand, the policies behind exclusive federal jurisdiction—uniform interpretation of federal laws and the protection of federal remedies and procedures—may tilt the balance in favor of allowing the second suit in instances where the state and federal antitrust statutes are not truly "identical in all material respects" or where the federal plaintiff was the defendant in the prior suit.

Although the balancing of the competing interests involved in determining whether a party has had a "full and fair opportunity" to litigate his rights under the federal antitrust statute does not provide a concrete standard, it does provide needed guidance to the courts confronted with the difficult task of determining the first step mandated by the Supreme Court in *Marrese*.

B. The Full Faith and Credit Exception: A Decision for Another Day

The second part of the Supreme Court's test is directed toward the statute underlying the federal action. The courts must now decide whether actions brought under the federal antitrust laws are to be excepted from the requirements of section 1738.

At this stage in the analysis, section 1738 will bar federal suits filed subsequent to litigation in state courts concerning the same operative facts unless a court finds an exception to the Full Faith and Credit

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[172]*Derish*, 724 F.2d at 1350.

[173]*Marrese*, 726 F.2d at 1155.

[174]*Id.* at 1156.

Statute in the federal statute.[175] Quoting its 1982 decision in *Kremer v. Chemical Construction Corporation*, the Supreme Court stated in *Marrese* that " 'an exception to [section] 1738 will not be recognized unless a later statute contains an express or implied repeal.' "[176] In determining whether such an exception exists, the court should look to "the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action."[177] However, in the final analysis, "the primary consideration must be the intent of Congress."[178]

The Supreme Court refused to determine whether Illinois state law precluded Dr. Marrese's federal antitrust claim,[179] and therefore decided that it did not have to reach the issue whether the Sherman Antitrust Act precluded the subsequent suit because if Illinois law would permit the second suit, the existence of an exception to section 1738 would be irrelevant because the inquiry would end at that point and the suit would be permitted. The court's failure to determine the state law issue, however, need not have ended its inquiry. Where state law would preclude the subsequent suit, the determination of whether an exception to section 1738 exists determines whether the federal antitrust suit will be allowed. Further, although the Supreme Court made clear in *Marrese* that state law must be applied *first*,[180] where there is an exception to section 1738, the second suit will always be permitted, regardless of state law.

The order of the two steps makes no difference in the result. If the section 1738 determination were made before the state law decision, the court would simply allow the second suit if an exception to section 1738 existed and would look to state law to decide the issue if no section 1738 exception applied. Regardless of the order in which the steps are taken, the second suit would be precluded only if *both* the state law and section 1738 determinations would preclude the second suit; if it would be permitted under *either* step of the test, the second suit would be allowed.

The Supreme Court's failure to address the section 1738 exception question raises the possibility that the district court, on remand, will do its best to apply Illinois law to determine whether the second *Marrese* suit is precluded, only to discover that this determination was irrelevant because the Sherman Act provides an implied exception to section 1738,

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[175]Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985). *See also supra* notes 122-124 and accompanying text.

[176]105 S. Ct. at 1332 (quoting Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982)). For a discussion of *Kremer*, see *supra* note 119.

[177]105 S. Ct. at 1335.

[178]*Id.*

[179]The refusal of the Supreme Court in *Marrese* to decide whether state law precluded the second suit is in sharp contrast with the Court's *Kremer* decision in which it apparently felt no reluctance to determine the preclusive effect of the appropriate state law. *See supra* note 120.

[180]105 S. Ct. at 1335.

thus permitting the second suit regardless of Illinois res judicata law.[181]

IV. Conclusion

The Supreme Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons* provided an opportunity for the Court to enunciate definitively the approach which the lower courts should use to determine when to preclude a federal antitrust suit following a state court judgment and, more generally, when the courts should preclude exclusive federal jurisdiction actions. Although the Supreme Court outlined a two-part test in *Marrese*, its remand of the case to the district court with little meaningful guidance regarding the test's application virtually ensures that the courts, applying the two-part test as they deem appropriate, will continue to take varying approaches, and reach differing results, in making these res judicata determinations.

Where state law is unclear, a court deciding whether state law precludes a subsequent federal antitrust suit would be well-advised to consider the factors balanced by the courts of appeals in *Nash County Board of Education v. Biltmore Company*, *Derish v. San Mateo-Burlingame Board of Realtors*, and *Marrese* and implicitly approved in the "full and fair opportunity" to litigate standard set out in Chief Justice Burger's *Marrese* concurrence. These considerations provide a sounder and more realistic basis for approaching the res judicata question in the exclusive federal jurisdiction context than do the simplistic generalities described by the majority in the Supreme Court's *Marrese* decision. Fortunately, the majority's generalities were mere dictum; by taking a more considered approach to applying the two-part test than was implied by the Supreme Court, courts may yet fulfill the high Court's mandate while still considering the important policies underlying res judicata and exclusive federal jurisdiction to yield fair, equitable, and well-reasoned preclusion decisions.

Mark A. Bailey

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[181]This possible result would be avoided if the Court were to follow the method it used to apply the two-part test in Migra v. Warren City School District Board of Education, 104 S. Ct. 892 (1984). There the Supreme Court looked *first* to whether a section 1738 exception applied; finding none, the Court then looked to whether state law would preclude the second suit.