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TWO IMPORTANT BOOKS ON RES JUDICATA

*Robert C. Casad**

FEDERAL PRACTICE AND PROCEDURE, VOLUME 18: JURISDICTION AND RELATED MATTERS. By *Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper*. St. Paul, Minn.: West Publishing Co. 1981. Pp. xi, 801. \$30.

RESTATEMENT OF THE LAW SECOND: JUDGMENTS 2d. As adopted and promulgated by the *American Law Institute* at Washington, D.C., June 12, 1980. St. Paul, Minn.: American Law Institute Publishers. 1982. 3 vols. Pp. 1435 approx. (publication forthcoming).

1981 was an important year for the law of res judicata. Two works published last year are a major addition to the literature of the subject.¹ The first of these works, in terms of publication date, is volume 18 of the treatise on *Federal Practice and Procedure*, by Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper. The volume is devoted entirely to the law of res judicata in federal practice and procedure, but the principles it deals with, and the theoretical analysis it provides, are generally applicable. The other work, which was only available in page proof when this review was written, is the American Law Institute's *Restatement (Second) of Judgments*. Although the *Restatement* is the later to be published in final form, it has been before the public in tentative draft for several years. Parts of the Wright, Miller, and Cooper volume were significantly influenced by the *Restatement* project.²

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1. The existing literature appears mainly in periodicals and cases. The only other comprehensive work in general treatise form is 1B J. MOORE, *FEDERAL PRACTICE* (2d ed. 1980). A good single volume work, but of somewhat narrower scope is A. VESTAL, *RES JUDICATA/PRECLUSION* (1969). Still more limited, but (I hope) useful, is R. CASAD, *RES JUDICATA IN A NUTSHELL* (1976).

2. The authors of the treatise acknowledge, for instance, that "[m]uch of this chapter [Basic Principles] has been heavily influenced by the great advances made in the *Restatement Second of Judgments*." P. 5. In turn, however, the *Restatement (Second)* may have been influenced by the authors of the treatise, since both Professors Wright and Cooper were among the advisers

Each of these works is a magnificent product of thought and scholarship. To do justice to either in a book review would require more time and space than are available to me, and would demand erudition possessed by few persons other than the authors themselves. I can do no more than sketch a few of the salient points. These will be, essentially, points about which there is currently general controversy, points on which the two works seem to disagree, or points on which I disagree with one or the other.

Already in 1970, when the *Restatement (Second)* project began, the time was ripe for a major reexamination of the field. The American Law Institute's first *Restatement of the Law of Judgments* was promulgated in 1942. No matter which side one takes in the perennial debate over the proper function of a Restatement — to state what the Law *is* or what it should be³ — it is clear that the first *Restatement* no longer served its function well. For instance, nearly one fourth of the work concerned validity of judgments — matters of jurisdiction. A comprehensive statement of principles of territorial jurisdiction written before the landmark decisions of *International Shoe Co. v. Washington*⁴ and *Mullane v. Central Hanover Bank & Trust Co.*⁵ and their progeny could hardly succeed in stating either what the law is or what it ought to be. The final product of the *Restatement (Second)* project is a good synthesis of what the law is on the subjects that it deals with and what it should be at this point in history. The *Restatement (Second)* is mainly the work of the Reporters, Professor Geoffrey C. Hazard, Jr., principally, and his predecessors (before 1974), Professors (now Justice) Benjamin Kaplan and David Shapiro. The work is, as I have elsewhere declared, a "prodigious achievement."⁶

Structurally, the *Restatement (Second)* follows the basic pattern of the first *Restatement*. In both, there is a brief introductory chapter followed by chapters dealing with validity of judgments (jurisdiction), effects of judgments, persons affected by judgments, and relief from judgments. The *Restatement (Second)* also includes a sixth chapter, which had no counterpart in the earlier work, entitled "Special Problems Deriving from Nature of Forum Rendering Judg-

on the *Restatement (Second)* project. The treatise appeared in time for references to it to be included in the final version of the *Restatement (Second)*.

3. See Martin, *The Restatement (Second) of Judgments: An Overview*, 66 CORNELL L. REV. 404 (1981).

4. 326 U.S. 310 (1945).

5. 339 U.S. 306 (1950).

6. Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 510 (1981).

ment." This chapter deals with the effects of adjudications by administrative tribunals and arbitration panels, criminal judgments in later civil actions, state court judgments in federal court actions, and federal court judgments generally. The *Restatement (Second)*, like its predecessor, does not deal directly with the interstate effects of state court judgments. Since it confines itself basically to the "in-tramural" law of res judicata, it leaves the extraterritorial effects of judgments to the *Restatement (Second) of Conflict of Laws* and the *Restatement of Foreign Relations Law of the United States*. Those who have seen only the tentative drafts should note that although the final version of the *Restatement (Second)* does not differ greatly from the earlier text, the numbering of the sections has changed.

I. JURISDICTION

A. Terminology

The *Restatement (Second)* attempts to express the principles that it enunciates in terminology more appropriate to modern analysis than that in which the first *Restatement* was couched. This effort is apparent in Chapter Two, which deals with judicial jurisdiction. Now that differences between actions in rem and actions in personam have come to be understood as artificial, it is possible for the *Restatement (Second)* to give a simple, all-purpose black-letter statement of the requisites of a valid judgment, which it does in section 1:

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and

- (1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or
- (2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action, as stated in §§ 4 to 9.

The draftsmen deliberately chose the term "jurisdiction of the subject matter" instead of the first *Restatement's* vaguer "competency." There is some ambiguity in the term "jurisdiction of the subject matter" since it is sometimes used to refer to jurisdiction over the res in actions in rem or quasi in rem. But the commentary successfully clarifies that problem. Whatever ambiguity remains is less serious than that contained in "competency,"⁷ and in any event "subject

7. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 105, Comment a, at 316 (1971) ("A court may lack competence either because it has not been given power by the state to entertain the particular action or because there has not been compliance with such requirements as are necessary for the exercise of power by the court."); A. EHRENZWEIG & D. LOUISELL, JURISDICTION IN A NUTSHELL 11 (3d ed. 1973) ("Jurisdiction should generally be distinguished from *venue* or *competency*: the Court's authority to adjudicate cases arising in a certain territory, e.g. 'the Southern District of New York.'"). In one recent case the term

matter jurisdiction" is far more commonly used.

The term "territorial jurisdiction" in the quoted section "refers to the connection between the territorial authority of the court and the action that has been brought before the court" (Introductory Comment to Ch. 2). The use of the general term "territorial jurisdiction of the action" rather than the conventional "jurisdiction over the person," if the action is in personam, or "jurisdiction over the res," if the action is in rem or quasi in rem, seems highly desirable. It recognizes the obsolescence of that historic distinction, and supplies a concept and a term that will facilitate the understanding and reception of post-*Shaffer*⁸ jurisdictional theory. The concept expressed in the new term is essentially the same as that traditionally described as "basis for jurisdiction" or "amenability to jurisdiction." Those terms, however, are very closely associated with the ideas of jurisdiction of the person or res, and those ideas, in turn, reflect the notion, once firmly embedded in our national psyche, that "[t]he foundation of jurisdiction is physical power."⁹ If jurisdictional terminology remains rooted in tradition, the process of adjustment to the new era is likely to be too protracted. We need a term that does not conjure up the notion of physical power, and yet recognizes that jurisdiction emanates from sovereignty, which is allocated in today's world on a territorial basis. "Territorial jurisdiction of the *action*" is, I believe, such a term. If that term were to become one of current and general usage, it would have the added benefit of making it easier for us to talk about jurisdictional questions with lawyers of civil-law countries, who think in terms of "competency over the action" rather than jurisdiction over the person.

Curiously, after phrasing the basic requirement in terms of "territorial jurisdiction of the action," the *Restatement (Second)* shifts back to the traditional terminology in the black-letter propositions amplifying "territorial jurisdiction." Thus, in section 4, the rule says that "a state court may exercise territorial jurisdiction over *persons* in an action if . . ." (emphasis added). Territorial jurisdiction over persons presumably means something different from territorial jurisdiction of the action, but if so the difference is not spelled out. In section 5 there is a total return to the traditional terminology: "A

"competence" was used to refer to limitations on the exercise of personal jurisdiction. See *Stabilisierungsfonds für Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 203 (D.C. Cir. 1981). The term competence or competency has different meanings in civil-law countries, and usage is somewhat variable. See Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 AM. J. COMP. L. 164 (1961).

8. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

9. See *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (Holmes, J.).

state may exercise jurisdiction over a person who has a relationship to the state such that the exercise of jurisdiction is reasonable." The rule then refers to the *Restatement (Second) of Conflict of Laws* to define relationships that will be regarded as sufficient. Section 6 makes the same statement with respect to "Jurisdiction Over Things." This shifting from "territorial jurisdiction of the action" to "territorial jurisdiction of the person" to "jurisdiction of the person" leaves one wondering whether the terms are intended to be synonymous, or whether there are subtle differences between them.

The *Restatement (Second)* does differentiate between "jurisdiction over things" and "attachment jurisdiction" in section 8. The former term relates to actions to determine interests in a thing — actions that would be called in rem or quasi in rem (type one) under the traditional terminology. "Attachment jurisdiction" is used to describe that special type of quasi in rem action whereby the court acquires jurisdiction to adjudicate a personal claim by attaching property subject to its processes.

Despite the occasionally confusing shifts between new and traditional terminology, the Comments to the sections dealing with "Territorial Jurisdiction" (§§ 4-10) are very helpful in explicating the theory and policy concerns reflected in the black-letter principles, and the Reporter's Notes provide ample and up-to-date references to cases and secondary authorities supporting the positions expressed.

B. *Notice Official in Tenor*

There is one troublesome point in Chapter Two of the *Restatement (Second)*. In addition to jurisdiction of the subject matter and "territorial jurisdiction of the action," section 1 requires, as a prerequisite to a valid judgment against a defendant who has not submitted to jurisdiction, that he must have been afforded "[a]dequate notice." Notice and an opportunity to defend are, of course, aspects of due process of law. This constitutional requirement must be met before any American judgment — state or federal — can be considered valid.¹⁰ State or federal procedural law may, however, impose "notice" requirements that go beyond the constitutional minimum. The

10. The Supreme Court has noted:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citations omitted). In this passage, the Court is clearly addressing the process of notification, not the receipt of notice. Actual receipt is not required.

black-letter statement of the "adequate notice" requirement in section 2 recognizes that both constitutional and procedural requirements must be satisfied:

§ 2 Adequate Notice.

(1) Except as stated in subsections (2), (3), and (4), notice is adequate only if:

(a) The notice is official in tenor, and states that the action is pending or about to be commenced and that there is opportunity to be heard concerning it and affords a reasonable time in which that opportunity may be exercised; and

(b) The notice is transmitted in a manner that actually notifies the person being addressed or someone who can adequately represent him, or has a reasonable certainty of resulting in such notice; and

(c) The form of the notice and the method employed for transmitting it sufficiently comply with the procedure prescribed for giving notice.

Subsections (a) and (b) appear to address the constitutional aspect of the notice requirement. Subsection (c) speaks to the additional requirements, if any, that may be imposed by the relevant procedural rules or statutes.

The puzzling feature of this statement of the adequate notice rule is the meaning of the phrase "official in tenor" in subsection (a). The qualifying term "in tenor" seems to suggest that unofficial, unauthorized, or informal notice will satisfy the constitutional requirement if it is "official sounding." If that is the intended meaning, section 2 apparently declares what the law should be rather than what it is. According to *Wuchter v. Pizzutti*,¹¹ which still stands as the leading case, service of process that will validate a judgment must satisfy two requirements: The process and manner of service must be officially authorized by some statute (or court rule), and the form and manner of serving process prescribed by that statute must be reasonably calculated to get actual notice to the defendant.

Wuchter indicates that the due process clause is concerned with the manner of invoking jurisdiction in two different respects. First, and obviously, it is intended to protect the defendant's Hohfeldian right to notice and an opportunity to defend. Second, and not so obviously, it is concerned about how the government conducts itself when it acts to impose unique burdens on persons. Notifying the defendant is not the only function fulfilled by the service of process. Service of process is the event that marks when the defendant becomes subject to the direct authority of the state in a way not shared

11. 276 U.S. 13 (1928).

by other persons. It imposes upon the defendant the burden of doing something about the notice he receives, under pain of losing some liberty or property if he fails to do so. Apart from the defendant's personal constitutional right to notice, the due process clause also imposes restrictions on how a state must act when it imposes unique burdens on persons. One such restriction, *Wuchter* seems to say, is that the steps that can lead to the imposition of such a burden must be formally and officially predetermined and declared rather than determined ad hoc. Did the *Restatement (Second)*, by using the term "official in tenor," rather than just "official," in its statement of the due process requirement, mean to repudiate the idea that due process requires that there be some official prescription of the form of notice and the manner of serving it?

The question is hard to answer. It is clear that the *Restatement (Second)* contemplates that there *will* be a statutory prescription of the form and manner of serving process — hence the provision in subsection (c). But nothing in section 2 indicates whether a statutory prescription is required, unless it is to be found in the phrase "official in tenor."

Examination of the Comments to section 2 does not give a clear answer. The only commentary relating to the "official in tenor" term is included in Comment c, which deals with the different, but related problem of how much deviation from the prescribed procedure can be constitutionally tolerated. The question of the constitutionality of deviation from prescribed procedure and that of unofficial ad hoc procedure run together. The distinction between the two tends to become one of degree, like the difference between judicial lawmaking and statutory interpretation. The *Restatement (Second)* seems to treat them as though they were the same. Perhaps they are, but the case is not entirely convincing.

Comment d, entitled "Actual notice," deals with another, but closely related, problem that "arises when the person to be notified has actually learned of the proceeding despite noncompliance with the notice procedure." Comment d deals, accordingly, not with deficiencies in the prescribed procedure, but with the consequences of deficient compliance:

At one time the rule was that actual notice is sufficient so long as the form of notice has sufficient dignity to indicate to the notified person that he should take it seriously. The decision of the United States Supreme Court in *Wuchter v. Pizzutti* . . . threw doubt on this rule. That decision held that in an in personam action, it is not sufficient to serve process on a statutorily designated local agent of a non-resident defendant; instead, it is necessary to send the non-resident notice by

mail or other means likely to afford him actual notice. In asserting this as a Due Process requirement, however, the Court did not simply say that there was a Constitutional obligation to provide such notice, which in fact had been given in the case before the Court; it seemed to say that there was a Constitutional obligation to have a statute that imposed such an obligation. This approach has been subsequently construed by some courts to mean that strict mechanical compliance with a statutory notice procedure is itself an aspect of the Due Process requirement.

The more discerning cases have recognized that the requirement is adequate notice and that it is fulfilled by actual notice whose tenor indicates it ought to be taken seriously. They thus return to the rule as it was understood before *Wuchter v. Pizzutti* [§ 2, Comment d.]

The difficulty here is that the Comment treats the “actual notice” problem it poses as though it were one of due process, a spin-off from *Wuchter*, when in fact the cases rarely, if ever, consider the problem in that light. The question whether service of process that gives the defendant actual notice is effective to confer jurisdiction, despite the plaintiff’s failure to comply strictly with statutory requirements, nearly always arises in connection with attempts at substituted or constructive service. The question may be raised by a challenge to service before judgment, by a direct attack on the judgment, or by a later collateral attack. The significance of deviation and of actual notice can vary depending upon when the issue is raised. The courts that have demanded strict compliance, regardless of actual notice, both before¹² and after¹³ *Wuchter*, have nearly always done so on the basis of state law — often invoking the rule that statutes in derogation of the common law are to be strictly construed. Perhaps some courts, as indicated in the Comment, misconstrued *Wuchter* as requiring strict compliance as a matter of due process in such cases. None of the cases cited in the Reporter’s Note as “cases after *Wuchter* treating noncompliance with the notice procedure as fatal even when actual notice was imparted” (Reporter’s Note to Comment d) did so, however. All of those cases based the insistence upon strict compliance solely on state law, and none even referred to *Wuchter*.

If the Comment’s statement, “the requirement is adequate notice and that is fulfilled by actual notice whose tenor indicates it ought to be taken seriously” (Comment d), is limited to cases such as Comment d apparently is considering — *i.e.*, where the defects in the process of invoking jurisdiction are “more or less bungled attempts

12. See, *e.g.*, *Berryhill v. Sepp*, 106 Minn. 458, 119 N.W. 404 (1909).

13. See, *e.g.*, *Brace v. Busboon*, 261 Ark. 556, 549 S.W.2d 802 (1977) (construing Texas statute); *Tucker v. Diane Elec., Inc.*, 389 So. 2d 683 (Fla. Dist. Ct. App. 1980).

to follow the statutory procedure" (Reporter's Note to Comment d) — it is doubtful that any court would be so undiscerning as to disagree with it today.¹⁴ If a state interprets its statute liberally when the defendant actually receives all the notice that perfect compliance would give him, it is difficult to see any due process problem. The state has officially prescribed the procedure, and the defendant's right to notice has been protected.

Problems arise, however, if Comment d is read to mean that "actual notice whose tenor indicates it ought to be taken seriously" could also validate an ad hoc procedure. The black-letter statement of the constitutional requirements in section 2(a) and (b) indicates that notice "official in tenor" will be adequate even if the defendant *does not* get notice, as long as the method chosen to transmit it "has a reasonable certainty of resulting in [actual] notice." If section 2 means that an ad hoc process for invoking jurisdiction that sounds official and is served in an official-appearing way, but for which no statutory authorization exists, will satisfy due process even if the defendant *does not* get actual notice, the proposition seems highly questionable. Due process could conceivably be violated even where the question is deviation from a prescribed statutory procedure if the defendant does not get notice; there may be a due process limit on the liberality with which a court may interpret "substantial compliance" with its statute when there is a failure of notice. And ad hoc process may raise due process problems even when it does produce actual notice. A state may authorize some judicial innovation by provisions such as Federal Rule of Civil Procedure 83, and may conceivably authorize private parties to exercise some judgment about the form and manner of serving process. Many states do, as the *Restatement (Second)* points out, permit private parties to type up and deliver the process. But where there is no such authorization, and where the defendant does not get actual notice, due process seems doubly questionable.

The principal support for the proposition that official-sounding ad hoc process may satisfy due process, even if no actual notice is given (if that is the proposition), is a statement in Comment d immediately following the part quoted above:

Indeed such an approach is necessary to accommodate the requirement that the person responsible for effectuating notice has to depart

14. Among recent cases upholding the validity of service under such circumstances, even when the issue is raised before judgment, is *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977). *Contra* *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980).

from normal procedure when he knows the person addressed will not be reached by that procedure. See Comment *f*. By definition, such a departure results in following a procedure that was not prescribed by statute or rule.

Some element of formality in the notice is necessary, however. A person should not be bound to respond to a rumor that he is being sued. The requirement of formality, i.e., that the notice be sufficiently well drawn to seem official, permits an objective distinction to be made between casual information about a suit and notice that is substantially adequate even if technically imperfect. It is not necessary, however, that the notice be issued by an official; applicable law may permit a party or his attorney to issue the notice. [§ 2, Comment d.]

This passage seems to say that validation of ad hoc process is necessary "to accommodate the requirement that the person responsible for effectuating notice has to depart from normal procedure when he knows the person addressed will not be reached by that procedure" (§ 2, Comment d). This "requirement" is incorporated in subsection (2) of the black-letter statement of section 2:

(2) If the party responsible for effectuating notice knows that the person to be notified is so situated or is in such condition that ordinarily employed means of notice will be ineffectual, other means must be used that actually notify, or have a reasonable certainty of resulting in actual notice to, the person or someone who can adequately represent him. [§ 2(2).]

In this subsection, too, the *Restatement (Second)* seems to be projecting what the law should be, if the intended meaning is that private litigants are sometimes constitutionally required to resort to procedures "not prescribed by statute or rule" (Comment d).

There is, of course, a famous statement in *Mullane* that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."¹⁵ It is clear, however, that the Court there was referring to choosing from among alternative prescribed methods, not making up new ones. There are two Supreme Court cases holding that the state, as a civil litigant in proceedings to divest the defendant of specific property, had subjected the defendant to a denial of due process by choosing a method of serving process that it knew would be unlikely to afford the defendant adequate notice.¹⁶ In both cases, an officially prescribed alternative procedure could have been employed. The Court did not suggest that a new procedure should be devised ad hoc. Some state courts have invalidated service of process that conformed to statu-

15. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

16. *Robinson v. Hanrahan*, 409 U.S. 38 (1972) (per curiam); *Covey v. Town of Somers*, 351 U.S. 141 (1956).

tory prescriptions where the plaintiff knew it would probably be ineffectual, and where another prescribed procedure was available that was more likely to reach the defendant.¹⁷ Because there is usually an acceptable alternative prescribed procedure, very few, if any, cases can be cited for the proposition that the plaintiff has a due process duty to make up a procedure, especially when the plaintiff is a private litigant.¹⁸

Perhaps there should be such a requirement. But such a requirement has not yet appeared in the cases. And if there is no such requirement, the principal support for the proposition that official-sounding ad hoc process satisfies due process, even if it does not lead to actual notice, falls.

Of course, the big question here is whether the official prescription requirement of *Wuchter* really does stand independently of the requirement of notice reasonably calculated to reach the defendant. It seems to me that there is more evidence that it does than that it does not. Recent cases that have actually faced the *Wuchter* situation, *i.e.*, where actual notice was supplied even though the statute did not require steps likely to produce such notice, have refused to uphold jurisdiction on due process grounds.¹⁹ There is no reason why the notice procedure has to be prescribed in the statute unless there has to be a statute.²⁰

17. *See, e.g.*, *Republique Française v. Cellosilk Mfg. Co.*, 309 N.Y. 269, 128 N.E.2d 750 (1955). A couple of Oregon cases seem to say there is a constitutional duty to choose the alternative *most* likely to reach defendant, even though both are reasonably likely to produce actual notice. *See Thoenes v. Tatro*, 270 Or. 775, 529 P.2d 913 (1974) (after holding that service was not made at defendant's abode within the meaning of the substituted service statute, court went on to indicate that even if the address where the defendant was served had been his abode, service would have been invalid since the plaintiff knew that the defendant was out of state at school, and could have served him there under the long-arm statute); *Dickenson v. Babich*, 213 Or. 472, 326 P.2d 446 (1958) (implying that service by publication and mailing insufficient when personal service outside the state could have been effected).

18. After looking fairly hard, the only case I could find that comes even close to supporting the proposition is *Murphy v. Helena Rubenstein Co.*, 234 F. Supp. 893 (D.N.J. 1964). It does suggest that jurisdiction over a foreign corporation that had once qualified to do business but later withdrew, leaving no address where process could be served in the state, might be upheld on the basis of ad hoc service that actually notified it. It also suggests that the plaintiff could not rest on service that it knew would not reach the defendant when the plaintiff knew how to reach defendant out of state. Whether the plaintiff's obligation in that respect rested on the Constitution or state law is not clear. In any event, there apparently was an alternative prescribed procedure.

19. *E.g. ABC Drilling Co. v. Hughes Group*, 609 P.2d 763 (Okla. 1980). *Accord Koster v. Automark Indus., Inc.*, 640 F.2d 77 (7th Cir. 1981) (the court there refused to enforce a Dutch judgment on minimum contact grounds, but expressed the view, in response to a *Wuchter* argument, that the Dutch procedure for invoking jurisdiction would not support a judgment where it did not require the Dutch official served to notify defendant, although such notification was routinely made).

20. A recent case has held that service by mail, actually received, does not confer jurisdiction where the statute does not authorize such service. *See Rosemary K. v. Kevin D.C.*, 422

Since the Wright, Miller, and Cooper volume does not deal with personal jurisdiction, we do not know its position on this issue.

II. RES JUDICATA

If we next turn to the main subject of both works, the preclusive effects of judgments, the first thing to note is the terminology. The term "res judicata" is used by some to refer only to the claim preclusive effects of judgments.²¹ To those who employ the term that way, res judicata means one thing; collateral estoppel, or issue preclusion, another. Others use the term "res judicata" to refer to all "things" that may be "adjudicated" in an action, *i.e.*, to both claim preclusion and issue preclusion. The *Restatement (Second)* uses the term in the latter, broader sense (as did the first *Restatement*). The Wright, Miller, and Cooper treatise, too, favors the broader usage (p. 8). Since the broader usage seems the more logical, it may be hoped that the combined effects of these two new works will be to hasten the day when it will displace the other usage entirely.²²

The *Restatement (Second)* and the treatise do differ slightly in their treatment of some preferred usages. To describe that branch of res judicata that refers to the preclusive effect of a prior judgment on a claim presented in a later suit, the treatise apparently favors the term "claim preclusion." It then qualifies its recommendation by noting that it may sometimes be convenient to supplement "claim preclusion" with the traditional terms: merger, referring to the effect of a prior judgment for the claimant, and bar, referring to the effect of a prior judgment against the claimant (pp. 8-9). The *Restatement (Second)*, on the other hand, prefers the traditional terms "merger" and "bar." The *Restatement (Second)* does acknowledge, however, that "the law of merger and bar" is "sometimes referred to as the law of 'claim preclusion'" (Introductory Note to § 24), and the Reporter himself has expressed the view that "merger" and "bar" should have been dropped.²³ Both the treatise and the *Restatement (Second)* adopt the term "issue preclusion," instead of the older "direct estoppel" and "collateral estoppel." The treatise's position seems the more logical: It implicitly expresses the hope that the new usage will

A.2d 1272 (Del. Fam. Ct. 1980). There was no indication that the ruling was constitutionally based, however.

21. See, *e.g.*, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[1], at 622 (2d ed. 1980).

22. Interestingly, however, a leading casebook on civil procedure, co-authored by one of the treatise's writers, prefers a narrower usage. It only notes the existence of the other view. See J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 1029-30 (3d ed. 1980).

23. Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 586 (1981).

some day become settled by general acceptance of "claim preclusion" and "issue preclusion" (p. 6).

A. *Claim Preclusion*

Since the principle of claim preclusion (merger and bar) precludes a later suit on the same "claim" (or cause of action) not only concerning matters that were advanced in the first suit, but also with respect to all other matters that were within the scope of that claim, the most important issue in the law of claim preclusion is that of determining the scope of the claim. On this point, the two works under examination adopt the same approach, the one embodied in section 24 of the *Restatement (Second)*. Instead of giving a conceptual, analytic definition of the dimensions of a "claim," the rule uses terms very similar to those used in the Federal Rules of Civil Procedure to describe what counterclaims are compulsory²⁴ and what cross-claims are permissible.²⁵ The rule thus defines the claim in pragmatic terms relating to the temporal, spatial, or motivational connections between the facts involved in the claims asserted in both actions, as well as to common expectations and trial convenience (§ 24(2)). The deliberate looseness of the rule leaves so much room for evaluation on a case-by-case basis, it could easily become very uncertain in application. However, the comments to section 24 of the *Restatement (Second)*, and the commentary offered by the treatise (§ 4407) to explain the function of the test, and to weigh the conflicting policy interests that are implicated in its application, are lucid and thorough. Copious references to decided cases are included in the *Restatement* Reporter's Notes, and are augmented by the annotations in the treatise. There should thus be no more uncertainty in the application of the rule than in the "same right" or "same wrong" or "same evidence" tests that some courts have purported to follow, and the result should be a much more rational balancing of the interests at stake.

Both works also present very clearly the troublesome problem of the use of claim preclusion against one who was a defendant in the former suit. The approach of the *Restatement (Second)* to this problem does not differ fundamentally from that of the first *Restatement*, but the Comments and Reporter's Notes bring the problem into clearer focus, and accommodate the procedural changes wrought by the Federal Rules of Civil Procedure — most notably the compul-

24. See FED. R. CIV. P. 13(a).

25. See FED. R. CIV. P. 13(g), 14(a), 15(c), 20(a).

sory counterclaim rule, which the first *Restatement* barely noticed. The *Restatement (Second)* rejects the first *Restatement*'s notion that preclusion of claims that were defenses in the first suit should depend upon whether the defense was "legal" or "equitable" (Comment a).

Both works cogently set forth the exceptions to the rules of claim preclusion, and eschew the proposition sometimes seen in the cases that "res judicata will not be applied where it would work an injustice." Their position should draw support from the recent decision of the Supreme Court in *Federated Department Stores, Inc. v. Moitie*.²⁶ Without some indication of what the determinants of "justice" are in this context, the "injustice" exception is meaningless. The approach taken in the *Restatement (Second)* is more precise. Section 26 identifies a number of situations where claim preclusion will not apply. The situations described in subsections (d), (e) and (f) of section 26(1) are stated very generally, but the purpose of providing an exception for such situations shows through the black-letter text, and the Comments and Illustrations dispel most of what uncertainty may remain. The treatise covers basically the same ground, but organizes the cases somewhat differently, and cites some more and different cases (§ 4415).

Anything else that I might say about the treatment of claim preclusion in both of these works would simply be to applaud the thoroughness, clarity, and perception it reflects, and the remarkable scholarship underlying it in both instances.

B. Issue Preclusion

Turning to the "issue preclusion" aspect of res judicata, we can see that the *Restatement (Second)* departs from the terminology of the first *Restatement* (as noted previously). In stating the general rule of issue preclusion, the *Restatement (Second)* makes it clear that the same rule applies, whether the second suit is based on the same claim or a different claim:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. [§ 27.]

The first *Restatement* would have referred to the former as "direct estoppel" and the latter as "collateral estoppel," although its issue preclusion rules were generally expressed in terms of collateral es-

26. 101 S. Ct. 2424 (1981).

toppel. In other respects, the general rule of the *Restatement (Second)* is essentially the same as that of the first, except that it applies to issues of both fact and law, whereas the earlier *Restatement's* general rule applied just to facts.

1. *The General Rule*

Like the first *Restatement* (§ 68), the *Restatement (Second)*'s section 27 limits the application of the rule to issues "actually litigated and determined" (§ 27). Although the treatise, too, regards actual litigation and determination as essential, the matter is not free from uncertainty. Apparently there was some disagreement among the members of the advisory committee:²⁷ The colloquy between two of the nation's leading res judicata scholars, Professor Allan D. Vestal and the *Restatement (Second)* Reporter, Professor Geoffrey C. Hazard, Jr., on this issue is fascinating and illuminating.²⁸ The biggest problem with the actual litigation requirement lies in determining when an issue has been actually litigated. The *Restatement (Second)* gives a definition in Comment d, and provides some illustrations. The meaning is amplified considerably in the treatise (§ 4419), and persons facing questions about the meaning of "actually litigated" and "actually decided" (§ 4420) would do well to consult it.

The general rule also states that the determination of the issue must have been "essential to the judgment" (§ 27) rendered in the first action. This requirement raises a question about issue preclusion where more than one issue was actually litigated and decided in the first suit, either of which would independently support the judgment rendered. In such a case, can it be said that either determination was "essential to the judgment"? The first *Restatement* (§ 68, Comment n) took the position that both determinations were preclusive. Moore's *Federal Practice*, too, endorsed that position.²⁹ The *Restatement (Second)*, on the other hand, while acknowledging that the question is close, takes the position that neither determination should have preclusive effect because neither is essential (Comment i). If the losing party should appeal, however, and the appellate court considers and upholds both determinations, the judgment may be conclusive as to both, according to Comment o.

The treatise's more innovative analysis of the problem examines

27. See Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 470-71 (1981).

28. See *id.* at 470-97 (including an alternative general rule at 496); Hazard, *supra* note 23, at 574-86 (1981).

29. See 1B J. MOORE, FEDERAL PRACTICE ¶ 0.443[5], at 3922-23 (2d ed. 1980).

some alternatives to the views that both determinations are preclusive or that neither is. The treatise apparently favors a compromise solution: Where there are alternative independent findings, issue preclusion should attach only to those findings, if any, that the second court can determine (without extended inquiry) "reflect . . . a careful process of decision" (§ 4421, p. 208). That rule would accommodate the appeal exception from the *Restatement (Second)*'s rule and also better serve the policy of avoiding repetitive litigation. On the other hand, it would make the issue turn on the meaning of "extended inquiry" and "careful process of decision." The authors of the treatise acknowledge that their position "has not won any champions" (§ 4421, p. 204).

2. *Exceptions to the General Rule*

The next section of the *Restatement (Second)*, section 28, covers exceptions to the general rule of issue preclusion. It brings together some exceptions that the first *Restatement* did not recognize, and also reformulates those that it did. Although the phrasing of most of the exceptions is rather broad, here as in other places in the *Restatement (Second)* where broad black-letter rules are given, the terms selected reflect the underlying policies, and the Comments and Reporter's Notes admirably elucidate the considerations that should control the analysis. The "full, fair opportunity to litigate" qualification on the application of issue preclusion is included as an exception in section 28(5)(c). Other relevant considerations, such as change in legal climate, the quality of procedure available in the first and second actions, the allocation of burden of proof, foreseeability, appealability, and the potential impact of nonparties are dealt with in specific subsections.

The treatise deals at length with most of the matters covered by the *Restatement's* exceptions. It discusses, with thorough documentation, the significance of different standards of evidence (§ 4422), the quality of the first decision and the opportunity to litigate (§ 4423), the problem of foreseeability (§ 4424), questions of law and law application (§ 4425), and general "justice" factors (§ 4426). The discussion of foreseeability includes a lengthy and penetrating analysis of the "ultimate fact"/"mediate datum" distinction, and of the famous decision in *The Evergreens v. Nunan*,³⁰ which rests on that distinction and the role that the fact for which preclusion is sought would play in the later suit. Neither the treatise nor the *Restatement*

30. 141 F.2d 927 (2d Cir. 1944), *cert. denied*, 323 U.S. 720 (1944).

(*Second*) regards the *Evergreens* test as satisfactory since the test tends to obscure the real problem, which is the foreseeability of the later use of the matter adjudicated.

Further complications arise if the second suit includes parties who did not appear in the first suit. Section 29 of the *Restatement (Second)* sets out a comprehensive rule to regulate issue preclusion in subsequent litigation between a party to the first suit and a non-party. The first *Restatement* had endorsed the traditional "mutuality" rule. The *Restatement (Second)* rejects mutuality as a general requirement, and declares that "a party precluded from re-litigating an issue with an opposing party . . . is also precluded from doing so with another person" (§ 29). However, the rejection of the mutuality requirement is carefully hedged. The black-letter rule specifically incorporates the "full and fair opportunity to litigate" proviso, as well as the other exceptions to issue preclusion generally from section 28. In addition, section 29 lists eight other factors, including a catchall "other compelling circumstances" factor, that should be considered before determining whether the former party should be held precluded, or, instead, permitted to relitigate the issue against the nonparty. The result is a good blueprint for courts in states that reject the mutuality principle to follow in making that determination. Because the rule identifies and specifies so many considerations, including the final "other compelling circumstances" factor, courts that have heretofore been reluctant to abandon the mutuality rule — perhaps because of a fear of the possibilities for injustice that might open up — may now be encouraged to fall into line with the majority of states (and federal courts) that have abandoned mutuality as a hard and fast requirement.

The treatise, focusing as it does on federal courts, contains a copiously footnoted section clearly analyzing the mutuality problem, its rejection as a rule for federal courts, and the limitations on non-mutual preclusion that the federal cases have recognized and should recognize (§§ 4463-4465).

Sections 30 and 32 of the *Restatement (Second)* take a firm position on another problem that has been quite controversial — whether issue preclusion should be attributed to issues actually litigated (§ 27) where the defendant has made only a "limited appearance" in an action in which the court's jurisdiction was predicated upon jurisdiction over a res rather than over the person. Section 30(3), dealing with judgments in suits that would be traditionally characterized as in rem or quasi in rem (type one), and 32(3), dealing with "attachment jurisdiction," or quasi in rem (type two), state that

the normal rules of issue preclusion apply to matters adjudicated in such suits, even though the defendant is accorded the right of limited appearance. In taking this position, the *Restatement (Second)* resolves an ambiguity in the first *Restatement*, which had apparently taken conflicting positions on the question.³¹

Although it recognizes that the question is close, the *Restatement (Second)* concludes that the balance of the conflicting policy considerations favors application of issue preclusion to matters actually, fully, and fairly litigated in such a proceeding, subject, of course, to the regular exceptions embodied in sections 28 and 29.

The treatise authors apparently reach the opposite conclusion. I think that they are saying that no issue preclusion should result from a limited appearance, any more than claim preclusion should. (The *Restatement (Second)* would agree with them on claim preclusion.) After giving the *Restatement (Second)*'s position on issue preclusion, the treatise declares:

This conclusion so effectively undermines the benefits of a limited appearance, however, that others may reach the opposite conclusion. To the extent that some courts do choose to deny preclusion, this is an area in which other courts should refuse to apply more expansive rules of preclusion. To apply issue preclusion after a limited appearance in a court that would deny preclusion would defeat the power of the first court to establish an effective opportunity for a limited appearance. [§ 4431, p. 298.]

The treatise apparently argues, in other words, that the *Restatement (Second)*'s rule would wholly vitiate the intended effect of rules permitting limited appearances.

It seems to me that the *Restatement (Second)* has the better side in this dispute. Before the decisions in *Shaffer v. Heitner*³² and *Rush v. Savchuk*,³³ the question was much closer than it is now. Now no court can exercise jurisdiction, whether in personam, in rem, or quasi in rem, except under circumstances that would satisfy the due process limitations of *International Shoe*, *Hanson v. Denckla*, and their progeny. If the object of an action that is predicated on jurisdiction over property is to determine interests in that property, the place where the property is situated is universally recognized as an appropriate forum. If issues are actually litigated (§ 23) in the course of the proceeding, it is hard to think of any reason to permit relitigation of those issues other than those factors identified as limitations on

31. Compare RESTATEMENT OF JUDGMENTS § 40, Comment a (1942), with *id.* at § 76(2).

32. 433 U.S. 186 (1977).

33. 444 U.S. 320 (1980).

issue preclusion generally in section 28 of the *Restatement (Second)*. If the object of the action is to enforce a personal claim — the “attachment jurisdiction” situation of section 32 — the court ordinarily will not be permitted to entertain the suit at all unless the connection between the defendant and that forum is such that in personam jurisdiction could have been exercised if a procedure had been available for that purpose. If it would be fundamentally fair to apply issue preclusion to an in personam judgment against that defendant in that action in that court, it is hard to see why the technical difference in the procedure for invoking jurisdiction should lead to a different result when the action is based on attachment jurisdiction. If the forum is too inconvenient, or the stake too low, or if any of the other reasons noted in section 28 for denying issue preclusion are present, relitigation should be permitted, whether the action is brought on personal jurisdiction or jurisdiction over property. But if the defendant had a full and fair opportunity to litigate the issues there, and did, under circumstances that would warrant preclusion if the action were in personam, why should preclusion not also be warranted when the action proceeds by attachment jurisdiction rather than through a long-arm statute? If the *Restatement (Second)*’s provisions for limiting the effects of issue preclusion generally are followed, there is simply no need for a limited appearance doctrine in connection with “attachment jurisdiction” after *Shaffer v. Heitner*. To be sure, there may be some cases where the balance of contacts and conveniences that *International Shoe* calls for would permit the exercise of jurisdiction limited to the property, but would not permit general in personam jurisdiction.³⁴ If there are such cases, however, the exceptions to issue preclusion embodied in section 27 should be sufficient to accommodate them.

3. *Interstate Issue Preclusion*

The treatise provision quoted above does not clearly declare that issue preclusion should not apply to matters litigated on a limited appearance, but it does say that if the court in which the matter was adjudicated allows a limited appearance and denies issue-preclusive effect to matters adjudicated therein, courts in other states should not apply more expansive rules of preclusion to it. If the second court were to apply the more expansive rule, it “would defeat the power of

34. Professor Silberman suggests as such a case one in which the plaintiff is a forum resident and the defendant’s property is there, but where there are no other relevant contacts with the forum state. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 72 (1978).

the first court to establish an effective opportunity for a limited appearance" (§ 4431, p. 298). Since the *Restatement (Second)* focuses on the "intramural" law of res judicata, it does not deal with this problem.

Posing the question as the treatise does — Should a court in the second state be able to defeat the first court's power to establish an effective opportunity for a limited appearance? — diverts attention from what appears to me to be a more fundamental question: Should the first state, by adopting a narrow issue-preclusion rule, be able to force the second state to devote its judicial resources to the relitigation of issues once fully and fairly litigated elsewhere, contrary to the second state's own policy? I have elsewhere expressed the opinion that a second state that follows the *Restatement (Second)*'s general limitations on issue preclusion is not prevented by the full faith and credit clause, 28 U.S.C. § 1738, or the due process clause from ascribing more expansive preclusive effect to the judgment than it would have in the rendering state.³⁵ The first state's "power to establish an effective opportunity for a limited appearance" should be limited so that it may waste only its own judicial resources in relitigating issues already fully and fairly litigated unless other states, acting in pursuit of their own sovereign will, choose to indulge in that same extravagance.

The treatise, in a different section, basically agrees that there should be limits on the extent to which one state's narrow preclusion rules should be allowed to force another state to open its courts to relitigate a fairly litigated issue. The authors offer a compromise.³⁶ If the defendant invokes issue preclusion against a plaintiff in the second suit, the court in the second state should be able to dismiss the claim, despite the fact that the issues could be relitigated under the law of the state where the first judgment was rendered. The dismissal should be without prejudice, however, so as to leave the plaintiff free to relitigate in the original court or in some other forum that would permit it. If the plaintiff sought to preclude the defendant, however, dismissal without prejudice would not offer an appropriate

35. Casad, *supra* note 6, at 528-32.

36. The treatise presents its compromise position, not in discussing limited-appearance preclusion, but in connection with the assertion of preclusion by nonmutual parties in a second action, when the first court would not permit it. The competing policy considerations are, however, essentially the same in the two types of problems.

The *Restatement (Second)* raises the problem of the second court's applying more preclusive effect than the first would when it discusses the preclusive effects of state court judgments in later federal actions. See § 86, Comment e. The Comment recognizes the competing views, but does not seem to prefer one over the other.

solution. In such a case, the treatise argues that the second state should permit relitigation if the first state would (§ 4467, p. 648).

III. COLLATERAL ATTACK ON GROUNDS OF SUBJECT MATTER JURISDICTION

Another point on which the *Restatement (Second)* differs from its predecessor is in its statement of the rule relating to collateral attacks upon judgments for want of subject matter jurisdiction. The first *Restatement* dealt with this question in the often-quoted section 10, which stated that if the court in the first suit determined that it had jurisdiction of the subject matter, no collateral attack would be permitted "unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." Section 10 then gave a nonexclusive list of factors to be considered in striking the policy balance.

The *Restatement (Second)* states the rule more specifically and positively in section 12.³⁷ The rule applies only to contested actions. Although it does not require that the issue of subject matter jurisdiction itself be actually contested and litigated (Comment d), it does require that the prior proceedings involve more than simply a judgment by default. These qualifications on the applicability of the rule, which are basically like those of the first *Restatement*,³⁸ raise two questions.

The first is, How can the issue of subject matter jurisdiction be foreclosed when it was not "actually litigated" in light of the general rule of issue preclusion (§ 27), which treats actual litigation as essential? The answer is that the issue of subject matter jurisdiction is not like other issues. The traditional dogma about subject matter jurisdiction recognized a difference between that issue and issues concerning personal jurisdiction or the merits in the proposition that

37. When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

§ 12. This rule applies to collateral attacks and generally also to proceedings seeking relief from a contested judgment. § 69. Different provisions are made for direct proceedings to obtain relief from a default judgment for lack of subject matter jurisdiction. §§ 65-66.

38. See RESTATEMENT OF JUDGMENTS § 10, Comment c (1942).

subject matter jurisdiction cannot be conferred by the parties by consent, waiver, or estoppel. The *Restatement (Second)* recognizes a difference, too, but takes a more realistic and modern view of the problem. Subject matter jurisdiction is an issue that ought to be litigated in the same suit that produces a judgment on the merits:

Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect. The principle to be applied in this situation is essentially that of claim preclusion, particularly the proposition that a judgment should be treated as resolving not only all issues actually litigated but all issues that might have been litigated. [Comment d.]

This poses a dilemma, however, for claim preclusion applies only to "valid" judgments, and to hand down a valid judgment the court must have jurisdiction over the subject matter. Comment d to section 12 of the *Restatement (Second)* wrestles with this dilemma and concludes that the interests at stake in the subject matter jurisdiction issue are primarily those of society, not the parties. Society's interest in ensuring that one of its courts does not exceed the limits of its subject matter jurisdiction is significantly different if the issue is raised early in the proceeding than if the issue is raised after a contested judgment. On balance, the *Restatement (Second)* concludes that the rule of preclusion after final judgment in a contested action where the issue of subject matter jurisdiction was not actually litigated should be essentially the same as if the issue had been litigated. The issue should not be considered in subsequent litigation unless one of the exceptions to section 12 applies.

The second question is, If rule 12 does not apply to default judgments, what is the rule relating to collateral attack against default judgments on grounds of subject matter jurisdiction? The answer given in the *Restatement (Second)* is far from clear. Comment f to section 12 notes that the same claim preclusion analysis offered to explain foreclosure of the issue after a contested action in which the issue was not raised could apply as well to a default judgment. The Comment recognizes, however, that the policy arguments for conclusiveness of the judgment in the case of default are weaker. The conclusion, if I understand it correctly, is that the state in which the judgment was rendered may permit the issue of subject matter jurisdiction to be raised in a collateral attack on the default judgment, or it may require that any challenges to the judgment on that ground be made directly, by a motion to vacate or some similar procedure. While Professor Karen Moore sees the *Restatement (Second)* as generally supporting the view that would permit collateral attack on de-

fault judgments for want of subject matter jurisdiction, with exceptions,³⁹ the Wright, Miller, and Cooper treatise sees the *Restatement (Second)* as generally opposing it (§ 4428, p. 277 n.13). On the question of which is the preferable view, the *Restatement (Second)* seems mildly to favor the "direct challenge" rule, but without much conviction.

IV. RES JUDICATA IN A FEDERAL SYSTEM

The *Restatement (Second)* and the treatise, finally, make one other major contribution to our understanding of res judicata: They analyze the operation of res judicata principles in the interplay between state and federal courts. The importance of this matter was brought sharply to our attention by the recent Supreme Court decision in *Allen v. McCurry*,⁴⁰ but the subject goes much further than the problem of civil rights litigation presented there. The *Restatement (Second)* addresses the question of the effect of a state court judgment in a subsequent federal action in section 86, and the question of the source of law that determines the res judicata effects of federal judgments in section 87. The first question is basically answered by the full faith and credit statute, 28 U.S.C. § 1738. The answer to the second question is that federal law controls the res judicata effects of federal judgments, although for some purposes federal law may incorporate state doctrine, particularly in diversity cases.

The Wright, Miller, and Cooper treatise provides an extremely thorough, thoughtful, and helpful treatment of the problems of res judicata in a federal system (§§ 4466-4473). The textual analysis penetrates the fog that tends to obscure this subject. The task of clarifying an area that is a confusing mix of full faith and credit, *Erie*, federal supremacy, article III considerations, res judicata, and basic procedure is a formidable one. The treatise does the job admirably, and, characteristically, provides ample citations to cases and periodical literature⁴¹ to assist those who wish to pursue further any particular topic.

39. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 552 (1981).

40. 449 U.S. 90 (1980).

41. The authors acknowledge particularly insights drawn from an article by one member of the Advisory Committee to the *Restatement (Second)*, see p. 618 (citing Professor Ronan Degnan's *Federalized Res Judicata*, 85 YALE L.J. 741 (1976)). This article is cited frequently. Articles of Professor Allan Vestal, another member of the Committee, are also cited with some frequency. See, e.g., Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).

CONCLUSION

Much more could be said about these two important books. In combination, they give us the tools to update, rationalize, and unify the law of judgments, if courts are given the opportunity, and are willing, to consider what they say. Despite disagreements I might have with it on minor points of jurisdiction, I feel that the *Restatement (Second)* merits general acceptance as *the* American law of res judicata. The Wright, Miller, and Cooper treatise can augment it as a general exegesis of the principles of that law. I hope that the authors of the treatise, and the West Publishing Company, will be willing to permit the book that is now volume 18 of a multivolume treatise to be sold separately, with its own index and table of cases, so that it can be made available to those who want a good one-volume book on res judicata, but who perhaps cannot afford that whole magnificent work.