

COMMENT

Binding the World: Full Faith & Credit of State Court Antisuit Injunctions

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INTRODUCTION

The problem of the recognition due to a stay order, or antisuit injunction, outside the forum that rendered it remains unresolved and is among the most troublesome of the open issues in the area of full faith and credit to judgments.

—Hon. Ruth Bader Ginsburg¹

It is undisputed that the court of one state may use its equity powers to enjoin a party from proceeding in the courts of another state.² This happens, for example, where one state court is holding insurance insolvency proceedings, and it wishes to stop claimants from pursuing their claims against the assets of the insolvent insurer in other forums.³ What happens, however, if claimants do pursue their claims in the court of another state? Does the court in the second state have to give the antisuit injunction full faith and credit and deny the claimants access to its procedures?⁴

The question remains unresolved. State courts addressing the issue are split.⁵ Some have held that such an order must be given full faith and

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¹ Hon. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 808 (1969).

² See *Cole v. Cunningham*, 133 U.S. 107, 119 (1890) (noting that weight of authority allows equity courts to restrain persons subject to their jurisdiction from proceeding in suits in other jurisdictions); see also *Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 393-94 (1953) (Frankfurter, J., dissenting) (calling antisuit injunction familiar equitable remedy); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (“It is well settled that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions.”).

³ See, e.g., *Bard v. Charles R. Myers Ins. Agency*, 839 S.W.2d 791, 794-95 (Tex. 1992) (applying Vermont injunction in Texas); *Fuhrman v. United Am. Insurers*, 269 N.W.2d 842, 847 (Minn. 1978) (declining to apply Iowa injunction in Minnesota).

⁴ An antisuit injunction is an injunction restraining parties from pursuing remedies in courts of law. See *Cole*, 133 U.S. at 119.

⁵ Compare *Arizona ex rel. Low v. Imperial Ins. Co.*, 682 P.2d 431, 438 (Ariz. Ct. App. 1984) (giving California injunction full faith and credit), *Bard*, 839 S.W.2d at 794 (giving

credit, while others have held that such an order is to be recognized, if at all, only on principles of comity.⁶ The United States Supreme Court has never ruled on the question.⁷ This Comment examines both approaches and argues that these orders should only receive full faith and credit in very limited circumstances.

This Comment argues that an antisuit injunction must pass a two-part test before it receives full faith and credit. First, the rendering court must have had jurisdiction over the parties being bound. Second, the rendering court must have issued its order before the start of the subsequent litigation.

Part I of this Comment explores the background and history of full faith and credit, antisuit injunctions, and state insurance liquidation proceedings. Part II examines the split among the state courts that have considered the question. Part III argues that antisuit injunctions deserve full faith and credit only in certain limited situations.

I. BACKGROUND

Courts issue antisuit injunctions in a variety of contexts. This Comment examines a common situation that leads state courts to issue broad antisuit injunctions: insurance liquidation proceedings. This section begins by discussing the history of antisuit injunctions and the law regulating them today. It then briefly introduces the concept of bankruptcy, looking particularly at insurance liquidation — a matter left to state regulation. This section concludes by examining the Full Faith and Credit Clause and how the Supreme Court has applied it to antisuit injunctions.

A. Antisuit Injunctions

Proper understanding of this Comment does not require a thorough reading of the history of the common law. Nevertheless, a few words about the origins of antisuit injunctions shed light on how they have

Vermont injunction full faith and credit), and *Am. Star Ins. Co. v. Grice*, 865 P.2d 507, 511-12 (Wash. 1994) (giving Wisconsin injunction full faith and credit), with *Cook v. Delmarva Power & Light Co.*, 505 A.2d 447, 450 (Del. Super. Ct. 1985) (declining to give New York injunction full faith and credit), *Fuhrman*, 269 N.W.2d at 847 (declining to give full faith and credit to Iowa injunction), *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 572 N.Y.S.2d 559, 561 (App. Div. 1991) (enforcing Vermont injunction based on comity), and *Robbins v. Reliance Ins. Co.*, 2001 WL 1346410, at *3 (Tex. App. Nov. 1 2001) (declining to grant full faith and credit to Pennsylvania injunction).

⁶ See cases cited *supra* note 5.

⁷ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 243-44 (1998) (Kennedy, J., concurring).

come to be used today.

1. Historical Origins of Antisuit Injunctions

Antisuit injunctions developed when the chancery courts arose as competitors to the English common law courts.⁸ One of the central tasks of the chancery courts was to relieve litigants of the harsh results that would prevail at law.⁹ Equitable defenses to actions at law developed, and before the merger of law and equity, litigants had to assert these defenses in a separate action in equity.¹⁰ If the chancellor found that the defendant had a good defense to the plaintiff's action at law, then he had to prevent the plaintiff from obtaining her remedy at law.¹¹ The chancellor could not act directly upon the common law judges, who were technically his equals, but he could exercise his in personam jurisdiction and order the plaintiff not to proceed at law.¹² Indeed, the chancellor could order a plaintiff not to proceed in any court, including a foreign one,¹³ and the order was not enforced by the other court, foreign or domestic, but by the equity court itself.¹⁴

2. Modern Usage of Antisuit Injunctions

Following the merger of law and equity, the antisuit injunction no longer serves its original purpose, but continues to be a useful remedy.¹⁵ Antisuit injunctions can often be found in the bankruptcy context where the bankruptcy court has to manage diverse and competing claims.¹⁶ The bankruptcy court may want to enjoin or stay other proceedings to fix the

⁸ 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459 (7th ed. 1956).

⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *61; F.W. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW* 4-5 (1910); 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA* § 49, at 46 (Melville M. Bigelow ed., 13th ed. 1886).

¹⁰ MAITLAND, *supra* note 9, at 1.

¹¹ These injunctions were granted as a matter of course. 3 BLACKSTONE, *supra* note 9, at *443; MAITLAND, *supra* note 9, at 257.

¹² 1 JAMES L. HIGH, *A TREATISE ON THE LAW OF INJUNCTIONS* § 45 (4th ed. 1905); MAITLAND, *supra* note 9, at 257; 1 STORY, *supra* note 9, at § 875 ("A writ of injunction is in no just sense a prohibition to those courts in the exercise of their jurisdiction. . . . The process, when its object is to restrain proceedings at law, is directed only to the parties.").

¹³ MAITLAND, *supra* note 9, at 258; HIGH, *supra* note 12, at § 103.

¹⁴ MAITLAND, *supra* note 9, at 258; HIGH, *supra* note 12, at § 103.

¹⁵ Because equitable defenses can be asserted in an action at law, there is no need for an equity judge to enjoin a suit at law. *See, e.g.*, FED. R. CIV. P. 1.

¹⁶ Equity courts historically used injunctions for this purpose under Creditors' Bills. 1 STORY, *supra* note 9, at § 890; HIGH, *supra* note 12, at §§ 282-303.

number of claims on the assets of the insolvent.¹⁷ A state court holding liquidation proceedings of an insolvent insurer would certainly want to stop the claims, at least temporarily, so that the court can fix the debtor's liabilities.¹⁸ Otherwise, the court would be working with a moving target.

Because these injunctions usually take the form of stays, they often evade judicial review.¹⁹ The trial court's granting or denying the stay may not be appealable as an interlocutory order.²⁰ Even if it is, litigants are not likely to appeal knowing that review could take months, likely exceeding the length of the stay.²¹ Therefore, battles over antisuit injunctions in the trial courts are probably more common than the appellate records indicate.

3. Limitations on Antisuit Injunctions

The antisuit injunction remains a powerful tool of the American judiciary, but it is also a disfavored remedy. For reasons of comity, courts often refrain from issuing antisuit injunctions.²² Moreover, the federal government has limited the use and application of antisuit injunctions in two key ways.

First, the Supreme Court has denied a state court's ability to issue antisuit injunctions preventing litigants from proceeding in a federal court.²³ A state court is powerless to issue such an injunction.²⁴ A state court thus cannot hold someone in contempt for violating the prohibited injunction.²⁵

Second, the Anti-Injunction Act limits when and how federal courts can issue all injunctions.²⁶ The Act prevents federal courts from

¹⁷ See 11 U.S.C. § 105 (giving federal bankruptcy courts broad injunctive powers).

¹⁸ See *supra* note 3.

¹⁹ See, e.g., *Cook v. Delmarva Power & Light Co.*, 505 A.2d 447, 448-50 (Del. Super. Ct. 1985) (considering effect of 180-day stay).

²⁰ An interlocutory order is one that is not dispositive of the case's outcome. BLACK'S LAW DICTIONARY 1123 (7th ed. 1999). Most interlocutory orders are not appealable until final disposition of the case. *Id.*

²¹ Some jurisdictions allow direct appeal from certain interlocutory orders. See, e.g., 28 U.S.C. § 1292 (2000) (allowing direct appeal of preliminary injunctions).

²² *Advanced Bionics Corp. v. Medtronic*, 59 P.3d 231, 237 (Cal. 2002).

²³ *Donovan v. Dallas*, 377 U.S. 408, 412-13 (1964).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 28 U.S.C. § 2283 (2000). The Anti-Injunction Act generally prohibits federal courts from enjoining state courts. See generally 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 121.01-.10 (3d ed. 2001) (discussing Act). It creates only three exceptions to the

enjoining actions in state courts unless Congress has given specific authorization.²⁷ Congress gave this authorization to federal bankruptcy courts.²⁸ Thus, if litigants and the state court proceed in violation of a valid bankruptcy court injunction, the state court's judgment is void.²⁹

4. Jurisdiction and Injunctions

Antisuit injunctions, like all remedies, are also limited by the rendering court's jurisdiction.³⁰ A court can exercise three basic types of jurisdiction: in personam, in rem, and quasi-in rem. An in personam action is one that imposes a personal liability on one litigant in favor of another.³¹ An in rem action determines the rights of all persons to specific property.³² In a quasi-in rem action, the court exercises jurisdiction over the litigant where that person owns a piece of property in that particular forum.³³

The familiar minimum contacts test of *International Shoe* limits jurisdiction in personam.³⁴ The test requires that every defendant to a judgment must have enough contacts with the territory of the forum so

general rule: 1) express authorization by Congress, 2) when necessary in aid of jurisdiction, and 3) to protect and effectuate federal court judgments. § 2283; see 17A MOORE'S FEDERAL PRACTICE § 121.06-.08 (discussing Act).

²⁷ 28 U.S.C. § 2283 (2000).

²⁸ See 11 U.S.C. § 105 (2000) (giving bankruptcy courts broad discretionary powers); 11 U.S.C. § 362(a) (1994) (creating automatic stay upon filing for bankruptcy). Bankruptcy Rule 7065 makes the Federal Rule of Civil Procedure Rule 65 the standard for bankruptcy courts. FED. R. BANKRUPTCY P. 7065; see FED. R. CIV. P. 65. Rule 65 limits injunctions to parties, their agents, or those acting in concert with parties. FED. R. CIV. P. 65. Whether these discretionary injunctions, as opposed to the automatic stay, can extend to non-parties is not clear. See *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942), cert. denied, 317 U.S. 670 (1942) (upholding broadly worded order as to party but noting situation is different where non-party is involved); *In re Pub. Serv. Co. of N.H.*, 848 F. Supp. 318, 327 (D.R.I. 1994), aff'd, 43 F.3d 763, cert. denied, 514 U.S. 1108 (1995) (applying injunction to non-party based on his acting in concert with party to action).

²⁹ See *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000) (noting that actions that violate automatic stay are void); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372-73 (10th Cir. 1990) (holding that violation of automatic stay results in void judgment); *In re 48th St. Steakhouse*, 835 F.2d 427, 431 (2d Cir. 1987), cert. denied, 485 U.S. 1035 (1988) (same).

³⁰ See, e.g., *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (1930) (Hand, J.) (holding that court can only enforce injunction against parties properly before court).

³¹ BLACK'S LAW DICTIONARY 857 (7th ed. 1999).

³² *Id.* at 856.

³³ *Id.* at 857. For a good short definition of all three types of jurisdiction, see *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

³⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945); see also *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 108-09 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

as not to offend "traditional notions of fair play and substantial justice."³⁵ Any court action that tries to reach persons outside this limit is void.³⁶

The Supreme Court initially applied the minimum contacts test only to in personam jurisdiction. But in *Shaffer v. Heitner*, the Court held that exercises of both in rem and quasi-in rem jurisdiction are also subject to the *International Shoe* minimum contacts analysis.³⁷ The *Shaffer* Court rejected as too formalistic the old premise that a court acting in rem acted against the property.³⁸ The Court found instead that an exercise of jurisdiction supposedly over a thing is just a shorthand way of saying jurisdiction over some person's interests in that thing.³⁹

There is one other, more general limitation on the power of state courts. They are unable to regulate lawful conduct outside their borders.⁴⁰ Moreover, a state court's assumption of jurisdiction in rem does not vary this rule.⁴¹

³⁵ *Int'l Shoe*, 326 U.S. at 316. These contacts must be related to the subject of the litigation. *Burger King*, 471 U.S. at 473. This is specific jurisdiction. *Id.* Alternatively, a court can exercise jurisdiction over litigation unrelated to the defendant's contacts with the forum, but only if those contacts were systematic and continuous. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984). This is general jurisdiction. *Id.*

³⁶ *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (noting that this proposition traces back to early English common law); *Hanson*, 357 U.S. at 250; *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 40 (1st Cir. 1991); *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985).

³⁷ *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). The Court's language that "all assertions of state-court jurisdiction" must meet the *International Shoe* test lends itself to this interpretation. *Id.* Circuit courts have generally understood the case this way. *See, e.g., LiButti v. United States*, 178 F.3d 114, 123 (2d Cir. 1999) (holding that in rem jurisdiction requires minimum contacts); *Salazar v. Atl. Sun*, 881 F.2d 73, 76 (3d Cir. 1989) (same); *United States v. Ten Thousand Dollars in United States Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988) (noting that courts and scholars have not questioned *Shaffer's* application to in rem jurisdiction).

³⁸ *Shaffer*, 433 U.S. at 211-12.

³⁹ *Id.* at 207.

⁴⁰ *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-71 (1996) (holding that Tennessee could not impose tort liability for actions outside its jurisdiction); *see also N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (noting that inability of one state to effect contractual abilities of citizens in other states was so obviously required by Constitution that it was rarely litigated and subject of little precedent); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (holding that no state can legislate except with reference to its jurisdiction).

⁴¹ An action in rem, because it deals with property supposedly tied to a locality, has traditionally been a local action. *See Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Proceedings in rem to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."). It would be very anomalous if in rem jurisdiction allowed a court to reach beyond its borders in a way that an in personam action could not.

B. Bankruptcy

Oversimplifying, bankruptcy occurs when an entity or person's assets are not sufficient to meet its debts.⁴² It can occur voluntarily (at the debtor's request) or involuntarily (at a creditor's request).⁴³ Once a creditor or debtor files for bankruptcy, the court may appoint a receiver.⁴⁴ The receiver takes control of and manages the assets of the debtor.⁴⁵ These assets are the bankruptcy "res." In some situations, the court may simply liquidate the company's assets and use the proceeds to satisfy creditor claims.⁴⁶

Most bankruptcy actions in this country occur exclusively in federal courts.⁴⁷ One important exception to this rule is insurance bankruptcy. The bankruptcy of insurance companies is a matter of state law and state courts.⁴⁸

The Uniform Insurers Liquidation Act ("UILA") governs insurance insolvency in many states.⁴⁹ Other states have statutes modeled after the UILA.⁵⁰ The Commissioners promulgated the UILA in 1939 in response

⁴² JAMES MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY 10-12 (1956).

⁴³ *Id.* at 25-26.

⁴⁴ *Id.* at 72.

⁴⁵ *Id.* at 74-75.

⁴⁶ CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 2 (1997).

⁴⁷ 28 U.S.C. § 1334(a) (2000) (giving district court exclusive jurisdiction of all cases under Bankruptcy Code).

⁴⁸ States are given primary regulatory power over insurance companies under the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015 (2000); *see* Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc., 961 F.2d 529, 531 (5th Cir. 1992) (noting that states have primary responsibility for regulating insurance industry). Congress passed McCarran-Ferguson to legislatively overrule a decision of the Supreme Court holding that insurance was interstate commerce and subject to antitrust laws. *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944); *see* *United States v. Fabe*, 508 U.S. 491, 499 (1993) (discussing history of Act). Under McCarran-Ferguson, because the federal bankruptcy laws do not specifically address insurance companies, the state insurance insolvency laws trump them. 15 U.S.C. § 1012(b) (2000) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."); *Fabe*, 508 U.S. at 505-509. Moreover, the Bankruptcy Code itself exempts domestic insurance companies. 11 U.S.C. § 109(b)(2) (2000).

⁴⁹ *See* UNIF. INSURERS LIQUIDATION ACT, 13 U.L.A. 321 (1986 & Supp. 2002) [hereinafter UILA]. Twenty-six states and the Virgin Islands have adopted the UILA. UILA, *Table of Jurisdictions Wherein Act Has Been Adopted*, 13 U.L.A. 123 (Supp. 2002).

⁵⁰ *See* *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 572 N.Y.S.2d 559, 560 (N.Y. App. Div. 1991) (finding that Vermont's statutory scheme was similar in nearly every material respect); *Herstam v. Bd. of Dirs. of Silvercreek Water & Sanitation Dist.*, 895 P.2d 1131, 1134-35 (Colo. Ct. App. 1995) (finding Arizona's statutes to be substantially similar to UILA).

to the Depression.⁵¹ The Depression produced many defunct insurers with assets and claimants spread through many different states.⁵² The unsatisfactory experience of that time demonstrated the need for a uniform act.⁵³

In substance, the UILA requires one state to respect the actions of the receiver/liquidator and court of a reciprocal state that has instituted liquidation proceedings.⁵⁴ A reciprocal state is one that has a statutory scheme that enacts the key concepts of the UILA.⁵⁵ The forum instituting liquidation has a right to deal with all claims and dispose of all property.⁵⁶ The relationship between the requirements of the UILA and the Full Faith and Credit Clause has confused some courts, as will be discussed further below. The general rule, however, is that the UILA requires an adopting state to respect the actions of courts of a reciprocal state.⁵⁷ The UILA, however, is a matter of state law, and it cannot enlarge or contract a constitutional or federal statutory requirement.⁵⁸

C. Full Faith and Credit

The Constitution has only one clause governing the interstate recognition of judgments: the Full Faith and Credit Clause.⁵⁹ It 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 the Congress may by general Laws prescribe the Manner in which such Acts,

⁵¹ UILA, *Prefatory Note*, 13 U.L.A. 322 (1986).

⁵² *Id.*

⁵³ *Id.* at 322-23. This experience demonstrated that the normal limitations of full faith and credit also applied to state actions in bankruptcy. See *Cole v. Cunningham*, 133 U.S. 107, 113-16 (1890) (discussing state bankruptcy proceedings and concluding that state insolvent law has no extraterritorial operation).

⁵⁴ Although receivership and liquidation are very distinct actions or procedures of the bankruptcy process, they will be used more or less interchangeably in this Comment. Because a court can issue an antisuit injunction whether in receivership or liquidation, the distinction is not relevant to the issue discussed in this Comment.

⁵⁵ UILA § 1(7), 17 U.L.A. 329 (1986).

⁵⁶ §§ 2-4, 17 U.L.A. 332-45 (1986).

⁵⁷ §§ 4-5, 17 U.L.A. 344-46 (1986). See *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 572 N.Y.S.2d 559, 560-61 (App. Div. 1991) (finding Vermont was reciprocal state and its injunction should be recognized in interests of comity).

⁵⁸ The Full Faith and Credit Clause and its implementing statute define the minimum amount of respect due to extraterritorial judgments. The Supremacy Clause prevents state law from doing anything less than that demanded by federal full faith and credit. A state is free to give more recognition than required by federal law, but it does so only on the basis of comity. See *infra* Part I.C.

⁵⁹ U.S. CONST. art. IV, § 1.

Records and Proceedings shall be proved, and the Effect thereof."⁶⁰ The Full Faith and Credit Clause is not the most celebrated section of the Constitution.⁶¹ One commentator noted that interest in the Clause has emerged only periodically, with long periods of dormancy.⁶² But the Full Faith and Credit Clause is a constitutional workhorse.

At the most basic level, the operation of the Clause is easy to understand. All state courts must give a judgment the same effect it would have in the rendering court.⁶³ Put another way, the recognizing forum ("F-2") must grant the rendering forum's judgment ("F-1") the same preclusive effect it would have in the jurisdiction of F-1. The F-1 judgment cannot simply be executed upon in F-2. However, it is not just *prima facie* evidence of the controversy's merits.⁶⁴ Rather, the judgment is conclusive evidence of the case's merits. It must be treated as a conclusive decision on the merits with one important exception.⁶⁵

⁶⁰ *Id.*

⁶¹ This was noted by Justice Robert Jackson who called full faith and credit "both important and obscure to the profession" in his 1944 Cardozo lecture to the New York City Bar Association. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 3 (1945).

⁶² See Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 754 (1988) (arguing that cyclical interest in full faith and credit rose and fell according to ability of great moral issues or concerns of federalism to sustain public's attention). A recent period of interest occurred when one state, Hawaii, appeared ready to allow homosexuals to legally marry. Whether these marriages would receive full faith and credit in the other 49 states became a rather hot topic for commentary. See, e.g., Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 350 (1998) (concluding that full faith and credit requires recognition of valid same sex marriages and that Congress cannot constitutionally alter this); Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 850 (1999) (arguing that validity of marriage should be judged by law of domicile and not place of celebration); Kaleen S. Hasegawa, *Re-Evaluating the Limits of the Full Faith and Credit Clause After Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747, 751 (1999) (arguing that *Baker's* closure of public policy exception requires recognition of valid same-sex marriages); F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 561-62 (suggesting compromise whereby contractual elements of marriage are recognized and other elements are not).

⁶³ 28 U.S.C. § 1738 (2000) ("And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985); *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818). By this statute Congress has exercised its authority under the Constitution to proscribe the effect of foreign records and proceedings.

⁶⁴ See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 241-42 (1998) (Scalia, J., concurring) (noting that full faith and credit makes judgments conclusive evidence of matter adjudged).

⁶⁵ See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996).

The exception is that F-1 can only bind parties over which it had properly obtained jurisdiction.⁶⁶ F-2 can therefore inquire whether F-1 had subject matter jurisdiction over the controversy.⁶⁷ It can also inquire whether F-1 had personal jurisdiction over the parties.⁶⁸ If F-1 lacked jurisdiction to issue its order or enter judgment, then no full faith and credit is due in a sister state's courts (or indeed in other courts in F-1's own jurisdiction).⁶⁹ Without proper jurisdiction, any decision of F-1 is void because it violates the Due Process Clause.⁷⁰

This model works fairly well when F-1 has entered judgment for money damages and a litigant brings that judgment into F-2. The model is less satisfactory when F-1 has issued an equitable decree, like an injunction, that a litigant brings into F-2.⁷¹ As is discussed more fully below, courts and commentators have struggled to deal with the recognition of equitable decrees.

1. Full Faith and Credit and Equity

As mentioned above, the full faith and credit afforded equitable decrees has been an unclear area of the law.⁷² Neither the text of the Full Faith and Credit Clause nor 28 U.S.C. § 1738, the statute adopted by the first Congress to enforce the Clause, indicates any distinction between law and equity.⁷³ The Clause speaks of acts, records, and proceedings without any further specification.⁷⁴ The statute does the same.⁷⁵ Thus, there is no textual evidence for treating equitable and legal judgments differently.⁷⁶

⁶⁶ *Baker*, 522 U.S. at 233; *Cole v. Cunningham*, 133 U.S. 107, 118-19 (1890).

⁶⁷ *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05 (1982); *Nevada v. Hall*, 440 U.S. 410, 421 (1979); *Durfee v. Duke*, 375 U.S. 106, 109-10 (1963).

⁶⁸ *Underwriters*, 455 U.S. at 704-05; *Baker*, 522 U.S. at 247 (Kennedy, J., concurring).

⁶⁹ *Underwriters*, 455 U.S. at 705; *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Nevada*, 440 U.S. at 421 (1979); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958).

⁷⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *see also Vanderbilt v. Vanderbilt*, 354 U.S. 416, 420 (1957).

⁷¹ *See Baker*, 522 U.S. at 244 (Kennedy, J., concurring) (discussing treatment of various specific remedies including orders for conveyance of land outside ordering court's jurisdiction).

⁷² *Id.*

⁷³ *See Willis L.M. Reese, Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 183 (1957) (noting lack of textual distinction and arguing that no distinction should be made in application).

⁷⁴ U.S. CONST. art. IV, § 1.

⁷⁵ 28 U.S.C. § 1738 (2000).

⁷⁶ *See Reese, supra* note 73, at 183.

Nevertheless, courts have consistently hesitated in granting full faith and credit to equitable decrees.⁷⁷ Thus, whether a state court could compel the conveyance of land situated in another state was a question of much concern in an earlier time.⁷⁸ After a long hiatus, the Supreme Court handed down an important decision on full faith and credit of equity decrees: *Baker v. General Motors Corp.*⁷⁹

2. *Baker v. General Motors Corp.*

Baker marked the Supreme Court's return to the question of full faith and credit of equitable decrees.⁸⁰ At issue in *Baker* was a Michigan antitestimonial injunction that General Motors was trying to use to prevent a third party witness from testifying in a Missouri products liability case.⁸¹ The Supreme Court unanimously held that the Michigan order did not deserve full faith and credit.⁸²

Baker began as a products liability suit, where the plaintiffs attempted to subpoena the third party witness subject to the Michigan order.⁸³ The district court declined to give the Michigan order full faith and credit, citing a supposed public policy exception to full faith and credit and Missouri's public policy in favor of presenting all relevant evidence.⁸⁴ The Eighth Circuit panel reversed, holding that the policy cited by the district court was counterbalanced by Missouri's policy in favor of

⁷⁷ See Price, *supra* note 62, at 756 (considering issue of how full faith and credit applies to state court equity decrees and labeling issue as confusing).

⁷⁸ See Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 621 (1954) (discussing problem).

⁷⁹ 522 U.S. 222 (1998).

⁸⁰ *Baker*, 522 U.S. at 226; see also Holly A. Whittier, *Baker v. General Motors, Corp.: Injunction Granted in One State Barring Employee from Testifying Against Former Employee Does Not Bar Testimony in Another State When Given Pursuant to Court Order*, 28 U. BALT. L.F. 17, 17-18 (1998) (discussing *Baker* decision).

⁸¹ *Baker*, 522 U.S. at 226.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 230. Before the *Baker* decision, the existence of a public policy exception to full faith and credit was widely accepted. See Smith v. Super. Ct., 41 Cal. App. 4th 1014, 1024 (1996) ("This public policy exception 'is implied from the nature of our dual system of government, and recognizes that consistently with the full faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another.'") (citing Milwaukee County v. White Co., 296 U.S. 268, 273 (1935)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 103 (1969) (recognizing exception to full faith and credit where enforcement of judgment would improperly interfere with important interest of recognizing forum); 6 WITKIN, CALIFORNIA PROCEDURE, ch. VI, § 395B (2003) (recognizing same exception).

honoring sister state judgments.⁸⁵ The circuit court did not question the existence of a public policy exception to full faith and credit.⁸⁶

The Supreme Court unanimously, albeit in three separate opinions, reversed, holding that the Michigan decree was not entitled to full faith and credit in Missouri.⁸⁷ The three opinions all agreed that there was no public policy exception to full faith and credit.⁸⁸ Beyond that, however, there was much disagreement.

The two concurrences, one written by Justice Scalia and the other by Justice Kennedy, both criticized the majority for making the case too complicated.⁸⁹ Both concurrences claimed that the Court could have decided the case on basic full faith and credit principles.⁹⁰ Interestingly, they cited different basic principles.⁹¹

The majority opinion, written by Justice Ginsburg, is more complicated in its approach than either concurrence.⁹² One aspect of the holding is simple — there is no roving public policy exception to full faith and credit as cited by both the district and circuit courts.⁹³ However, the opinion then seemingly establishes two broad exceptions

⁸⁵ *Baker* 522 U.S. at 230-31.

⁸⁶ *Id.*

⁸⁷ *Id.* at 226 (Ginsburg, J.); *Id.* at 242 (Scalia, J., concurring); *Id.* at 251 (Kennedy, J., concurring).

⁸⁸ *Id.* at 226 (Ginsburg, J.); *Id.* at 242 (Scalia, J., concurring); *Id.* at 251 (Kennedy, J., concurring).

⁸⁹ Scalia, joined by no other justices, said the case was decided by the principle that “the judgment of a state court cannot be enforced out of state by an execution issued within it.” *Id.* at 241 (Scalia, J., concurring). That is to say, the Michigan judgment was only “grounds for an action” in Missouri. *Id.* at 242. It would be evidence, perhaps conclusive, in that Missouri action. *Id.*

Justice Scalia’s complaint appears to be merely procedural. The problem could have been cured by General Motors suing Elwell on the Michigan judgment in a separate action in Missouri. *Id.* According to Scalia, the Michigan judgment would not be “reexaminable on [its] merits,” so the Missouri court would have no choice but to enter an injunction of its own enjoining the witness from testifying. *Id.* It is unlikely that the Court, probably including Scalia, would have found this an acceptable result. Their objections to the order seem to go beyond the way General Motors attempted to enforce it.

Justice Kennedy decided the case on jurisdictional grounds. *Id.* at 246-47 (Kennedy, J., concurring). The Bakers had not been parties to the Michigan proceeding and were not subject to jurisdiction there. *Id.* They would not be bound to the judgment as a matter of Michigan law. *Id.* at 248. Because Missouri only had to give the decree the same effect it had in Michigan, which was none as to the Bakers, no full faith and credit was due.

⁹⁰ *See supra* note 89.

⁹¹ *See supra* note 89.

⁹² *Baker*, 522 U.S. at 233.

⁹³ *Id.*

of its own.⁹⁴

Justice Ginsburg noted that sister state courts have denied enforcement to injunctions in two situations. First, when they purport to accomplish some official act within the exclusive authority of that other state. Second, when they interfere with litigation over which the rendering forum had no authority.⁹⁵ Ginsburg denied that this establishes a broad exception to full faith and credit.⁹⁶ But the plain meaning of her words does seem to create an exception to the basic rule.⁹⁷

Applying this new rule to the facts in *Baker*, Ginsburg concluded that the Michigan judgment could not reach beyond that controversy to control proceedings against General Motors brought in other States, by other parties.⁹⁸ Further, the Michigan judgment could not preclude other courts from deciding what witnesses should testify and what evidence is admissible.⁹⁹ Thus, the Michigan decree fit squarely into Ginsburg's two "exceptions" and received no full faith and credit.

3. *Baker's* Application to Antisuit Injunctions

Baker's language applies to the issue of antisuit injunctions, but the nature of that application is unclear.¹⁰⁰ The majority opinion specifically mentions antisuit injunctions twice. First, it notes that antisuit injunctions regarding litigation in other forums have not controlled F-2's own actions, even if F-1 does not violate due process by issuing them.¹⁰¹ Second, a footnote accompanying this statement further states that the Supreme Court has yet to rule on whether an F-2 that ignores these orders violates the Full Faith and Credit Clause.¹⁰²

⁹⁴ See *id.* at 243 (Kennedy, J., concurring) (arguing that majority opinion created two broad exceptions to general rule).

⁹⁵ *Id.* at 235.

⁹⁶ *Id.* at 239 n.12.

⁹⁷ See *id.* at 243 (Kennedy, J., concurring) (arguing that majority created two broad exceptions to full faith and credit).

⁹⁸ *Id.* at 238.

⁹⁹ *Id.*

¹⁰⁰ Compare *Baker*, 522 U.S. at 236 n.9 (noting that Court has not ruled on question of whether full faith and credit is to be given to antisuit injunctions), with *Baker*, 522 U.S. at 244-45 (Kennedy, J., concurring) (arguing that majority opinion in fact decides this issue, not properly before Court).

¹⁰¹ *Baker*, 522 U.S. at 236.

¹⁰² *Id.* at 236 n.9. Ginsburg then cites her own previously written law review article. *Id.* (citing Ginsburg, *supra* note 1).

These two comments are ambiguous. The first exception would seem to not require full faith and credit to antisuit injunctions that purport to stop litigation already begun in another forum.¹⁰³ Indeed, Justice Ginsburg took this position in her own earlier law review article, which she cites in *Baker*.¹⁰⁴

The Court, however, declined to expressly endorse this view. Ginsburg's opinion states only that the Court has never considered the full faith and credit due antisuit injunctions against pending litigation.¹⁰⁵ Perhaps anything said about antisuit injunctions would have been strictly dicta in *Baker*, but it would have gone a long way towards clearing up this "murky" area of the law.¹⁰⁶

II. STATE COURT TREATMENT OF ANTISUIT INJUNCTIONS

The Supreme Court has yet to provide definitive guidance on the full faith and credit recognition of antisuit injunctions by state courts.¹⁰⁷ State courts have confronted the issue in the liquidation context on a number of occasions. Their decisions reveal a clear split of authority, with no apparent majority or minority view.¹⁰⁸ There are a number of decisions which state that an antisuit injunction issued by a liquidation court must receive full faith and credit and a number that hold that recognition is not required.¹⁰⁹

¹⁰³ Justice Kennedy seems to believe that the majority opinion may do just that. He notes that the Supreme Court has not had occasion to consider the issue of full faith and credit recognition of antisuit injunctions, and that state courts are split. *Baker*, 522 U.S. at 244 (Kennedy, J., concurring). He criticizes the majority for announcing a rule that touches on this subject in a case when it does not have to. *Id.* at 245.

¹⁰⁴ Ginsburg, *supra* note 1, at 829-30. Other commentators have disagreed with this position. See Reese, *supra* note 73, at 198 (arguing that antisuit injunctions generally should receive no full faith and credit because they are "forbidden infringement" of important state interest); Comment, *Full Faith and Credit to Foreign Injunctions*, 26 U. CHI. L. REV. 633, 642 (1959) (arguing that antisuit injunctions are no different than any other type of judgment).

¹⁰⁵ *Baker*, 522 U.S. at 236 n.9.

¹⁰⁶ Ginsburg, *supra* note 1, at 823.

¹⁰⁷ See *supra* notes 100-102 and accompanying text.

¹⁰⁸ E.H. Schopler, Annotation, *Extraterritorial Recognition of, and Propriety of Counterinjunction Against, Injunction Against Actions in Courts of Other States*, 74 A.L.R.2d 828 (1960).

¹⁰⁹ Compare *Fuhrman v. United Am. Insurers*, 269 N.W.2d 842, 847 (Minn. 1978), *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 572 N.Y.S.2d 559, 561 (App. Div. 1991), and *Cook v. Delmarva Power & Light Co.*, 505 A.2d 447-449-50 (Del. Super. Ct. 1985), with *Arizona ex rel. Low v. Imperial Ins. Co.*, 682 P.2d 431, 438 (Ariz. Ct. App. 1984), and *Bard v. Charles R. Myers Ins. Agency*, 839 S.W.2d 791, 794 (Tex. 1992), and *Am. Star Ins. Co. v. Grice*, 865 P.2d 507, 511-12 (Wash. 1994).

A. *State Decisions that Grant Full Faith and Credit to Bankruptcy Antisuit Injunctions*

Several states give full faith and credit to antisuit injunctions issued by sister state liquidation courts.¹¹⁰ They adopt two distinct approaches. The first is based on the provisions of the UILA. The second is based on the nature of receivership or liquidation proceedings — an in rem approach.

1. The UILA Approach

The first approach conflates the requirements of the UILA with the Full Faith and Credit Clause. The most explicit example of this was *Herstam v. Board of Directors of Silvercreek Water and Sanitation District*.¹¹¹ *Herstam* involved the application of an Arizona receivership order in Colorado.¹¹² The order enjoined anyone with any interest in the matter from going forward with any claim against the Arizona insolvent insurer.¹¹³ The defendants were a municipal sanitary district and its board with debts outstanding against a Colorado land development corporation that had a loan agreement with the Arizona insolvent.¹¹⁴ The sanitary district had warned the receiver that unless the receiver paid past debts it would disconnect water taps. The cost to reconnect the taps would be \$100,000.¹¹⁵ In response, the receiver filed an action in a Colorado state court seeking a preliminary injunction to stop the sanitary district from taking any steps to disconnect the water taps.¹¹⁶ After a hearing, the court granted the receiver's request for a preliminary injunction.¹¹⁷ The Colorado Court of Appeal affirmed the lower court's decision.¹¹⁸

The Court of Appeal held that the Arizona order deserved full faith and credit and focused entirely on the UILA. The court held that, because Colorado was a reciprocal state to Arizona under UILA, the Arizona order was entitled to full faith and credit. Thus, the receiver

¹¹⁰ See cases cited *supra* notes 5 & 109.

¹¹¹ 895 P.2d 1131, 1136-37 (Colo. App. Ct. 1995).

¹¹² *Herstam*, 895 P.2d at 1133.

¹¹³ *Id.* at 1133. The actual text of the order states: "all customers, principals, investors, creditors, stockholders, lessors, and other persons except for the Receiver." *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1133-34.

¹¹⁸ *Id.* at 1139.

was able to apply for an injunction.¹¹⁹ For this proposition, the court cited the UILA statutes, as adopted in Colorado.¹²⁰ For the *Herstam* court, Colorado's adoption of the UILA compelled full faith and credit recognition.¹²¹

2. The In Rem Approach

The in rem approach relies on the nature of the receivership/liquidation proceedings.¹²² The injunction is binding because the liquidation court has jurisdiction over the bankruptcy res; it is acting in rem.¹²³ *Bard v. Charles R. Myers Insurance Agency, Inc.* illustrates this approach.¹²⁴

Charles Myers, a Texas resident, wrote and sold insurance policies for Ambassador Insurance Company ("Ambassador"), a Vermont company.¹²⁵ Ambassador had financial difficulties, and a Vermont court placed the company in receivership and then ordered liquidation.¹²⁶ The court appointed the Vermont Insurance Commissioner as receiver and liquidator.¹²⁷ The court's liquidation order contained a paragraph enjoining any legal or equitable action against Ambassador both in and out of Vermont and also enjoining the bringing of any counterclaim or

¹¹⁹ *Id.* at 1136.

¹²⁰ *Id.* This approach is probably the result of the court's confusing the concepts of comity with that of full faith and credit. Comity is within the discretion of the states. See 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 779 (1994) (discussing doctrine of comity as applied internationally). Full faith and credit is what is required by the Constitution and its implementing statute. The requirements of full faith and credit cannot be either reduced or supplemented by state law. That two states are reciprocal states under the UILA may trigger provisions of the statute. The state statute may require recognition of the F-1 order. This is still a matter of comity. The state has chosen to recognize the orders of certain other states, to create more orderly insolvency proceedings. The reciprocal nature of the act shows that the states would only recognize the foreign orders on a tit-for-tat basis. By adopting the UILA a state must recognize orders of reciprocal states and, in turn, those states must honor theirs. None of this, however, has anything to do with full faith and credit — the opinions of a number of state courts notwithstanding.

¹²¹ *Herstam*, 895 P.2d at 1136.

¹²² See *Donovan v. Dallas*, 377 U.S. 408, 413 (1964) (arguing that in rem proceedings is exception to normal rule preventing interference with concurrent jurisdiction over same controversy); *Moody v. Alabama ex rel. Payne*, 329 So.2d 73, 80 (Ala. 1976) (noting that insurance liquidation is in rem or quasi-in rem proceeding).

¹²³ See *Moody*, 329 So.2d at 80.

¹²⁴ 839 S.W.2d 791 (Tex. 1992).

¹²⁵ *Id.* at 792.

¹²⁶ *Id.* at 792-93.

¹²⁷ *Id.* at 792.

set off in an action brought by the liquidator.¹²⁸

The Vermont Commissioner, as liquidator, filed a suit against Myers in a Texas court, and Myers brought counterclaims.¹²⁹ The trial court, over the liquidator's objections, allowed the counterclaims to move forward.¹³⁰ Myers received a rather sizable jury award.¹³¹ After the Court of Appeals affirmed,¹³² the Texas Supreme Court reversed, ruling that the Vermont injunction barred Myers's counterclaims.¹³³ The Texas Supreme Court held that the Vermont antisuit injunction had to receive full faith and credit in Texas.¹³⁴ The court relied heavily on a Supreme Court case, cited for the proposition that full faith and credit is due "injunctions against suit in other states that may interfere with the receivership process."¹³⁵ Though not fully developed by the Texas court, this seems to be a statement of the "first in time rule."

An Arizona court (cited by *Bard*) explained the first in time rule as creating exclusive jurisdiction in the first court to exercise jurisdiction over the insolvent insurer.¹³⁶ In *Bard*, the Vermont court first ordered Ambassador into receivership in November 1983.¹³⁷ Myers's Texas claims were not filed until May 1986, after the Vermont court had

¹²⁸ *Id.* at 793.

¹²⁹ In his counterclaims, Myers alleged that Ambassador's pre-receivership management had conspired to prevent Myers from placing some insurance risks with their company. *Id.* at 793.

¹³⁰ *Id.* at 794.

¹³¹ Myers ultimately received \$382,447.90 in compensatory damages, \$50,500 in attorney's fees, and \$1.2 million in punitive damages. *Id.* at 794. The Texas jury must have found Ambassador's conduct to be reprehensible, judging from the punitive damage award.

¹³² *Id.* at 794.

¹³³ *Id.* at 797.

¹³⁴ *Id.*

¹³⁵ *Id.* at 795 (citing *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guaranty Ass'n*, 495 U.S. 691, 716 (1982)). This is an overly broad construction of *Underwriters'* actual holding. The *Underwriters* court was very careful to find that both subject matter and personal jurisdiction were valid, using the standard analysis. *Underwriters*, 495 U.S. at 705. *Underwriters* does not create an exception to the jurisdictional rule for orders from liquidation or bankruptcy proceedings. *See id.* ("If that court did not have jurisdiction over the subject matter or relevant parties, full faith and credit need not be given."); *see also* *Robbins v. Reliance Ins. Co.*, 2001 WL 1346410, at *3 (Tex. App. Nov. 1 2001) (giving same interpretation of *Underwriters*).

¹³⁶ *Arizona ex rel. Low v. Imperial Ins. Co.*, 682 P.2d 431,433 (Ariz. Ct. App. 1984) (quoting *Moody v. Alabama ex rel. Payne*, 329 So.2d 73 (Ala. 1976)) ("[I]t appears to be the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation that the Court first assuming jurisdiction may maintain and continue to exercise that jurisdiction to the exclusion of any other court.")

¹³⁷ *Bard v. Charles R. Myers Ins. Agency*, 839 S.W.2d 791, 792 (Tex. 1992).

assumed jurisdiction.¹³⁸ But the final liquidation order containing the antisuit injunction was not issued until March 1987, after Myers had filed his counterclaims.¹³⁹ This first in time rule allows F-1 to require any claimant, regardless of jurisdiction, to pursue her claims only in F-1.¹⁴⁰ As the first court to assume jurisdiction, F-1 can issue an antisuit injunction against the potential claimants. All F-2 courts must give this injunction full faith and credit regardless of the stage of any pending litigation before them.¹⁴¹

B. State Decisions that Decline to Give Full Faith and Credit to Bankruptcy Antisuit Injunctions

There are few reported decisions of state courts that have denied full faith and credit to antisuit injunctions issued by sister state insolvency courts.¹⁴² Of these only one was decided after the *Baker* decision: *Robbins v. Reliance Insurance Co.*¹⁴³ While *Robbins* is, like *Bard*, a Texas decision,¹⁴⁴ it takes a markedly different position from its predecessor.¹⁴⁵

The underlying action in *Robbins* was a suit for accidental death benefits under an insurance policy, issued by Reliance Insurance ("Reliance"), a Pennsylvania company.¹⁴⁶ The trial court granted summary judgment to the insurer, finding that it owed no benefits.¹⁴⁷ The plaintiff appealed the decision.¹⁴⁸

¹³⁸ *Id.* at 793.

¹³⁹ *Id.* There is no indication that the Vermont court had issued antisuit injunctions in any of its preliminary orders. The liquidator's summary judgment motion before the Texas trial court relied on the final order. *Id.* at 794.

¹⁴⁰ The Texas Supreme Court never stopped to consider whether *Bard* was a party to the Vermont action producing the injunction or whether he was subject to jurisdiction of a Vermont court. *Bard*, 839 S.W.2d at 791. He seems to have received notice of the Vermont court's action, but he does not seem to have actually intervened. *Id.* at 793. His contacts with Vermont through the insurance business may have been enough to allow Vermont to exercise personal jurisdiction. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1956) (holding that California suit involving insurance company's sole contract there did not offend Due Process Clause). But the Texas court never considered this analysis.

¹⁴¹ See *Bard*, 839 S.W.2d at 794; *Imperial Ins. Co.*, 682 P.2d at 438; *Moody*, 329 So.2d at 76.

¹⁴² *Cook v. Delmarva Power & Light Co.*, 505 A.2d 447, 449-50 (Del. Super. Ct. 1985); *Fuhrman v. United Am. Insurors*, 269 N.W.2d 842, 847 (Minn. 1978); *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 175 A.D.2d 632, 572 N.Y.S.2d 559 (N.Y. App. Div. 1991); *Robbins v. Reliance Ins. Co.*, 2001 WL 1346410 *3 (Tex. App. Nov. 1 2001).

¹⁴³ *Robbins*, 2001 WL 1346410.

¹⁴⁴ *Id.*; *Bard*, 839 S.W.2d 791.

¹⁴⁵ *Robbins*, 2001 WL 1346410, at *1.

¹⁴⁶ *Id.* at *1-2.

¹⁴⁷ *Id.* at *1.

¹⁴⁸ *Id.*

In the middle of the appeals process, however, Reliance became insolvent.¹⁴⁹ The state of Pennsylvania began rehabilitation proceedings.¹⁵⁰ As a part of those proceedings, a Pennsylvania court issued an order purporting to stay in all states all proceedings involving Reliance.¹⁵¹ On the basis of the Pennsylvania order, Reliance asked the Texas appellate court to stay the appeal.¹⁵²

The Texas Court of Appeals held that, even if Pennsylvania had the authority under its own law to issue the antisuit injunction, it was not entitled to receive full faith and credit in Texas.¹⁵³ Plaintiff Robbins was not a party to the Pennsylvania rehabilitation proceedings.¹⁵⁴ He was not subject to the jurisdiction of a Pennsylvania court.¹⁵⁵ Therefore, the Pennsylvania court lacked authority to bind Robbins, and its order did not receive full faith and credit.¹⁵⁶

In its analysis of the full faith and credit issue, the *Robbins* court discussed *Baker* at some length.¹⁵⁷ The *Robbins* court suggested that *Baker* places all antisuit injunctions outside the realm of full faith and credit.¹⁵⁸ But ultimately it relied on *Baker's* holding that full faith and credit is not required when F-1 lacked jurisdiction over the subject matter or the relevant parties.¹⁵⁹

Not surprisingly, in trying to get the *Robbins* court to enforce the stay, the insurer relied on *Bard*.¹⁶⁰ *Bard* was binding precedent for the Texas Court of Appeals, decided just nine years before by the Texas Supreme Court.¹⁶¹ The *Robbins* court, however, swiftly distinguished *Bard*, arguing

¹⁴⁹ *Id.* at *7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *3 (stating date of Pennsylvania order was May 29, 2001).

¹⁵² *Id.*

¹⁵³ *Id.* at *2.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *4.

¹⁵⁷ *Id.* at *4-6.

¹⁵⁸ *Id.* at *5 ("The Supreme Court observed [in *Baker*] that it had not yet ruled on the credit due to a state court injunction barring a party from maintaining litigation in another state, although State courts that have dealt with the question have in the main, regarded anti-suit injunctions as outside the full faith and credit ambit.")

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *3 (citing *Bard v. Charles R. Myers Ins. Agency*, 839 S.W.2d 791, 792, 797 (Tex. 1992)).

¹⁶¹ *Bard*, 839 S.W.2d at 791. The Texas Court of Appeals followed *Bard* in a 1996 decision, *Bryant v. Shields, Britton & Fraser*, 930 S.W.2d 836, 840, 842 (Tex. App. 1996). The plaintiff in *Bryant* had notice of the foreign liquidation proceedings, but never intervened or made himself a party to the action. *Bryant*, 930 S.W.2d at 842-43.

that *Bard* did not involve whether the rendering forum had jurisdiction over the subject matter and parties.¹⁶² It also stated that *Bard* is consistent with *Baker*.¹⁶³

Bard ignores the jurisdictional analysis used by the *Robbins* court.¹⁶⁴ As discussed above, it seems likely that the plaintiff in *Bard* was not a party to the action producing the stay and would not have been subject to the rendering court's jurisdiction.¹⁶⁵ The most likely reading of *Bard* is that the antisuit injunction receives full faith and credit regardless of jurisdiction.¹⁶⁶ This would conflict with *Baker* (as well as past Supreme Court precedent).¹⁶⁷ The *Robbins* court came to the right conclusion but did so by disregarding the past precedent of its own state.

III. PROPOSED SOLUTION

The full faith and credit effect of state court antisuit injunctions is uncertain.¹⁶⁸ The Supreme Court has yet to speak to the effect of foreign antisuit injunctions.¹⁶⁹ And state courts are split.¹⁷⁰ The question remains: how does the recognizing forum treat antisuit injunctions under principles of full faith and credit? To decide whether a foreign antisuit injunction is entitled to full faith and credit, the F-2 court must make two inquiries. The first is jurisdictional: does the order properly bind the parties? The second is based on the recent *Baker* decision and informed by principles of federalism: did the F-1 court issue the injunction before F-2 assumed jurisdiction over its case? This section first examines the Due Process Clause requirement that an antisuit injunction can only bind parties properly before the issuing court. It then demonstrates that the state courts that have granted full faith and credit effect to foreign

¹⁶² *Robbins*, 2001 WL 1346410, at *3.

¹⁶³ *Id.*

¹⁶⁴ *See supra* note 141.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (noting requirement that rendering court must have jurisdiction over parties and subject matter).

¹⁶⁸ *See Ginsburg, supra* note 1, at 808, 830 (advocating legislative guidance); Reese, *supra* note 73, at 198 (arguing that antisuit injunctions generally should receive no full faith and credit because they are "forbidden infringement" of important state interest); Comment, *Foreign Injunctions, supra* note 104, at 642 (arguing that antisuit injunctions are no different than any other type of judgment); Comment, *Extraterritorial Recognition of Injunctions Against Suit*, 39 YALE L.J. 719, 721 (1930) (stating that majority of courts disregard foreign antisuit injunctions).

¹⁶⁹ *Baker*, 522 U.S. at 236 n.9.

¹⁷⁰ *See supra* note 5.

antisuit injunctions have ignored this requirement. Finally, it argues that, even if the parties were properly before the issuing court, full faith and credit requires that the courts issue the injunction before the suit is filed in F-2.

A. The Due Process Clause Limits the Binding Effect to Parties to the Order

Baker reaffirmed the basic rule that an injunction only binds parties to the action.¹⁷¹ Even if a party is among those named by the F-1 order, if that court lacks jurisdiction over the party or the party lacks notice of the action, the order does not bind her.¹⁷² Simply stated, a court cannot bind the world.¹⁷³ This rule prevents recognition of the broadest antisuit injunctions, such as those that enjoin suits against any insureds of an insolvent insurer.¹⁷⁴ The insureds were likely not parties to the receivership action and are not bound by the order. This part of the test is satisfied by looking at the face of the injunction and applying the normal jurisdictional rules.

Courts, however, cannot stop by looking merely at the face of the order. Instead, courts must determine who is actually bound by the application of the order in their forum. This is a practical inquiry.¹⁷⁵ Similar to the plaintiff in *Baker*, if the party practically being bound was not a party to the earlier action, the court's order cannot bind her in a subsequent suit.¹⁷⁶

Proponents of granting full faith and credit to these antisuit injunctions may argue from necessity. They will argue that to do its job

¹⁷¹ *Baker*, 522 U.S. at 238; *Martin v. Wilks*, 490 U.S. 755, 761 (1989); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). An injunction can be applied to a few select non-parties, such as those in privity with a party or where needed to protect the court's jurisdiction. See FED. R. CIV. P. 65(d); *Martin*, 490 U.S. at 761.

¹⁷² *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42-43 (1st Cir. 2000); *Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996); *Alemite Mfg. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.).

¹⁷³ *Alemite*, 42 F.2d at 832 ("[N]o court can make a decree which will bind anyone but a party; . . . it cannot lawfully enjoin the world at large, no matter how broadly it words its decree . . . [I]ts jurisdiction is limited to those over whom it gets personal service . . .").

¹⁷⁴ See *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436-39 (1934) (holding that equity court exceeds its powers by binding anyone who has actual notice of decree).

¹⁷⁵ *Baker*, 522 U.S. at 250 (Kennedy, J., concurring) (noting that Court looks to practical effect of judgment to determine its preclusive reach); *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (holding that state courts cannot enjoin litigants from suit in federal courts).

¹⁷⁶ In *Baker*, General Motors contended that enforcing the injunction bound only the witness, and that the injunction prevented Baker from calling a witness was simply a collateral effect. Brief of Respondent General Motors at 39, *Baker* (No. 96-653). The Court rejected this argument. *Baker*, 522 U.S. at 250-51 (Kennedy, J., concurring).

properly, a state court holding bankruptcy proceedings for a large insurance company must stop, at least temporarily, litigation in other forums. To be effective, these antisuit injunctions need to receive full faith and credit. Congress has recognized that the federal bankruptcy courts need these powers and has given them broad powers to stay litigation in other forums.¹⁷⁷ State courts holding insurance insolvency proceedings arguably need these same powers, especially as the insolvency of a large insurer can affect litigation in many other forums.¹⁷⁸

This argument overdramatizes the situation by overlooking several important factors. First, litigants have an important incentive to obey the commands of the bankruptcy court. It has control of the insurer's assets. Any claims, like those the successful plaintiff hopes to have, must go through the bankruptcy court. If the plaintiffs have ignored the direction of the bankruptcy court to stay the suit or bring it in the bankruptcy forum, then the plaintiffs may lose their rights as creditors.¹⁷⁹ Thus, self-interest will limit the situations in which litigants ask sister state courts to ignore antisuit injunctions.

Second, the necessity argument also ignores the UILA's adoption in most states.¹⁸⁰ States have already recognized the difficulties inherent in handling the bankruptcies of large companies with assets, property, and creditors in many jurisdictions.¹⁸¹ The UILA commands cooperation between enacting jurisdictions.¹⁸² As discussed above, some courts have explicitly relied on the UILA to recognize antisuit injunctions, even if they might erroneously label such recognition "full faith and credit."¹⁸³

¹⁷⁷ Federal bankruptcy courts have broad injunctive powers, including an automatic stay that begins upon filing. 11 U.S.C. § 105 (2000) (providing discretionary power); 11 U.S.C. § 362(a) (2000) (providing that filing petition operates automatic stay).

¹⁷⁸ This whole argument is premised on the fallacy that because a power ought to exist, it does. What judgments receive full faith and credit is determined by the admittedly unhelpful constitutional language, and more importantly, Supreme Court precedent.

¹⁷⁹ See *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000) ("actions taken in violation of the automatic stay are void"); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372-73 (10th Cir. 1990) (holding that violation of automatic stay results in void judgment); *In re 48th St. Steakhouse, Inc.* 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988) (same).

¹⁸⁰ See *supra* notes 48-57 and accompanying text.

¹⁸¹ See *supra* notes 50-52.

¹⁸² See *supra* notes 53-55.

¹⁸³ See *supra* notes 111-121 and accompanying text.

B. The State Courts Granting Full Faith and Credit Have Wrongly Ignored Due Process Requirements

State courts that have granted full faith and credit to bankruptcy antisuit injunctions, whether on in rem or UJLA grounds, have wrongly ignored the jurisdictional requirements of the Due Process Clause. The jurisdictional requirements are not window dressing; they are constitutional mandates under the Due Process Clause.¹⁸⁴ A court order that attempts to bind parties beyond the court's jurisdiction violates the due process rights of those parties and is void.¹⁸⁵ To hold that the Constitution requires those due process requirements, yet also requires sister states to honor injunctions that ignore them, is untenable. It is fundamental black letter law that an injunction only binds parties to the original action or those in privity or acting in concert with them.¹⁸⁶ That the original action may have been a receivership or liquidation proceeding is irrelevant, as it cannot circumvent constitutional due process requirements.

Proponents of the in rem approach may argue that the Due Process Clause allows in rem jurisdiction and that state courts holding insolvency proceedings are exercising such jurisdiction.¹⁸⁷ The state liquidation court has a right to control the debtor's assets, the bankruptcy res, and prevent anyone from interfering with it.¹⁸⁸ By pursuing claims against the bankrupt insurer or claims for which the insurer must ultimately indemnify its insured, the plaintiff is interfering with the bankruptcy court's jurisdiction over the res. Moreover, the insurer may have an obligation to defend its insured in litigation; thus moving forward immediately creates a liability for the insurer.

This argument must ultimately fail, however, for two reasons. First, in rem jurisdiction is subject to the same limits as in personam jurisdiction. The Supreme Court's decision in *Shaffer v. Heitner* brought in rem

¹⁸⁴ See *supra* notes 33-35.

¹⁸⁵ *Id.*

¹⁸⁶ *Martin v. Wilks*, 490 U.S. 755, 761 (1989) ("[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process") (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

¹⁸⁷ See 2 RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 625.1(b) (3d ed. 1959) ("The appointment of a receiver is predicated on an equity action in personam, although the result is broadly speaking, an action in rem.").

¹⁸⁸ See *id.* ("If the appointing court makes a formal injunction against any one interfering with the court's control and possession of the property within its territorial jurisdiction, then any one, whether a party to the cause or not, having knowledge of the injunction or even of the appointment and interfering, may be disciplined by the court.").

jurisdiction under the *International Shoe* minimum contacts umbrella.¹⁸⁹ The Court held that assertions of in rem jurisdiction, like in personam jurisdiction, have to meet the standards set forth in *International Shoe*.¹⁹⁰ It rejected the old, formalistic approach that a court acting in rem really acted against the property.¹⁹¹ So to be bound to an injunction issued by a court holding proceedings in rem, a litigant must still have minimum contacts with that forum.

Second, in rem jurisdiction allows a court to determine the property rights of persons as to property within its territorial jurisdiction.¹⁹² The common law has traditionally understood suits in personam as not interfering with a court's jurisdiction in rem.¹⁹³ This includes jurisdiction over property that may eventually be sought to satisfy the claim.¹⁹⁴

In an insurance bankruptcy case, the links between litigants in F-2 to the res in F-1 are more or less tenuous depending on the claims involved. The plaintiff may assert a claim in F-2 against an insured of the insolvent F-1 insurer.¹⁹⁵ In this situation, the plaintiff may never assert a claim against the bankruptcy res.¹⁹⁶ The claim is against the insured, who may have rights against the insolvent insurer. Even if asserting a claim directly against the insurer in F-2, the plaintiff has no legal claim against the insurer's assets until the F-2 litigation produces a final judgment.

It is important to remember that the plaintiffs' claims are property rights.¹⁹⁷ This right is intangible, and jurisdiction over an intangible

¹⁸⁹ *Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹⁹⁰ *Id.* at 212.

¹⁹¹ *Id.* at 207, 207 n.22.

¹⁹² See *supra* note 31 and accompanying text.

¹⁹³ See *Fuhrman v. United Am. Insurers*, 269 N.W.2d 842, 846 (Minn. 1978) ("Thus, an action in personam to establish the extent of an insolvent's liability on a claim is held not to interfere with the receivership res"); see also *Buck v. Colbath*, 70 U.S. 334, 345 (refuting assertion that court, having obtained jurisdiction of subject matter and parties of suit, thereby excludes all other courts from right to adjudicate upon other matters having close connection with those before first court or even requiring decision of same questions); *Calhoun v. Lanoux*, 127 U.S. 634, 639-40 (1888) (holding that state court's exercise of in personam jurisdiction did not interfere with federal appointment of receiver in related matter); 2 CLARK, *supra* note 187, at § 542.

¹⁹⁴ 2 CLARK, *supra* note 187, at § 542.

¹⁹⁵ For an example of a case of this type, see *Cook v. Delmarva*, 505 A.2d 447 (Del. Super. Ct. 1985).

¹⁹⁶ He may be able to sue the insurer directly if he chooses to, but if the insured has ample cash he would have no reason to look to an insolvent insurer. Of course, the insured is very interested in the assets of the insurer.

¹⁹⁷ See *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 613 N.W.2d 849, 872 (Wis. 2000) (stating that cause of action is vested property right in Wisconsin upon discovery of injury); *Estate of Kerouac*, 966 P.2d 191, 194 (N.M. App. 1998) (noting that cause of action is

cannot be exerted through control over a physical thing.¹⁹⁸ Jurisdiction over an intangible can “only arise from control or power over the persons whose relationships are the source of the rights and obligations.”¹⁹⁹ In rem jurisdiction is not a magic wand allowing a court to reach out and grab any controversy remotely touching on the res involved. It does not allow courts to control extraterritorial behavior unrelated to the property.²⁰⁰

C. Existing Caselaw and Principles of Federalism Only Require Recognition of Antisuit Injunctions Issued Prior to Assumption of Jurisdiction

Even if the parties being bound to an antisuit injunction satisfy the jurisdictional requirements, full faith and credit is still not due automatically. Full faith and credit should only be due to F-1 injunctions issued before suit was brought in F-2. This requirement is based on the “interference with pending litigation” exception in *Baker* and principles of federalism.²⁰¹

This rule is not the same as the first in time rule in *Bard*.²⁰² The *Bard* rule required that F-2 courts honor the orders of the first forum to assume receivership jurisdiction, no matter when the orders themselves were issued.²⁰³ In *Bard*, the Vermont antisuit injunction received full faith and credit even though it was issued after the relevant claims were filed in the Texas court.²⁰⁴ Under this Comment’s test, the Texas court did not have to grant full faith and credit to the Vermont order because the litigants filed their Texas claims before the Vermont court issued its order.

inheritable property right in New Mexico); *Lott v. Haley*, 370 So.2d 521, 524 (La. 1978) (noting that cause of action for redress of injury is vested property right).

¹⁹⁸ *Estin v. Estin*, 334 U.S. 541, 548 (1948).

¹⁹⁹ *Id.*

²⁰⁰ See *Hanson v. Denckla*, 357 U.S. 235, 250 (1958) (noting that in rem jurisdiction of state court is limited by state’s own power and coordinate authority of sister states); *Overby v. Gordon*, 177 U.S. 214, 222 (1900) (holding that in rem jurisdiction is limited to regulating property within state); *Roller v. Murray*, 76 S.E. 172, 174 (W. Va. 1912) (holding that judgments in rem have force or effect only upon property that lies within limits of state or country in which they were rendered).

²⁰¹ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 239-40 (1998) (holding that injunction granted by Michigan court could not bar individual from testifying in proceedings pending in another jurisdiction).

²⁰² See *supra* note 137 and accompanying text.

²⁰³ *Bard v. Charles L. Myers Ins. Agency*, 839 S.W.2d 791, 795 (Tex. 1992).

²⁰⁴ The final liquidation order containing the injunction was issued March 10, 1987. *Bard*, 839 S.W.2d at 793. The Texas counterclaim was filed in May 1986. *Id.*

The *Baker* decision and principles of federalism compel this result. As discussed above, *Baker* created an exception to the Full Faith and Credit Clause — to orders that interfere with pending litigation.²⁰⁵ This exception operates to deny full faith and credit to an antisuit injunction issued after a suit had already begun in F-2. There is no greater interference with litigation than preventing it from going forward entirely. And while the *Baker* court declined to state explicitly that this exception applies to antisuit injunctions,²⁰⁶ no rational construction of the opinion would fail to apply the exception to them.²⁰⁷

Federalism principles would also lead to the result achieved by applying the *Baker* exception. Many full faith and credit decisions note the truism that full faith and credit works to vary state sovereignty.²⁰⁸ Courts often quote the Supreme Court's description of full faith and credit — that “[i]t substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.”²⁰⁹ But this is not a license to interfere at will in the affairs of sister states.

Antisuit injunctions historically worked only as a function of the in personam jurisdiction of the court.²¹⁰ Thus, an equity court in England could forbid a litigant from pursuing a remedy in a foreign court only because that litigant was subject to the court's own equitable enforcement powers.²¹¹ The foreign court was not compelled to use its own powers to enforce the order. The Full Faith and Credit Clause would turn this on its head. If full faith and credit were required, then the F-1 court would be essentially co-opting the equity powers of the F-2 court and using them against litigants already properly before the F-2 court.²¹²

²⁰⁵ *Baker*, 522 U.S. at 235.

²⁰⁶ *See id.* at 236 n.9.

²⁰⁷ Justice Kennedy criticized the majority in *Baker* for announcing such a rule affecting antisuit injunctions without having a case concerning one before it. He opined that “[s]ubjects which are at once so fundamental and so delicate as these ought to be addressed only in a case necessarily requiring their discussion, and even then with caution lest we announce rules which will not be sound in later application.” *Id.* at 243 (Kennedy, J., concurring) (noting existing split among state courts as to duty to recognize foreign antisuit injunctions).

²⁰⁸ *See, e.g., id.* at 232.

²⁰⁹ *Estin v. Estin*, 334 U.S. 541, 546 (1948); *see Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935) (using similar language about altering states' status as independent sovereigns).

²¹⁰ *See supra* notes 12-14 and accompanying text.

²¹¹ *Id.*

²¹² *See Baker*, 522 U.S. at 236 (noting that sanctions for violating injunction are normally

Concern over vertical federalism has led to the significant curtailment of antisuit injunctions in the federal-state context.²¹³ The ability of federal courts to enjoin litigants in state courts has been severely curtailed by Congress through the Anti-Injunction Act.²¹⁴ Antisuit injunctions also raise serious problems for horizontal federalism.

Traditionally, courts have relied on principles of comity when two or more courts are exercising jurisdiction over the same or similar claims.²¹⁵ Under these rules, the later courts would defer to the first court to obtain jurisdiction.²¹⁶ Once jurisdiction had attached in more than one court, however, then both would continue to exercise that jurisdiction. Requiring full faith and credit of any antisuit injunction, regardless of when issued, would radically revise these traditional rules. It would allow one court to seize control of a controversy to the exclusion of all others. If both courts issue competing antisuit injunctions, the litigants may be effectively without a remedy.²¹⁷ And considering the relatively lax current rules regarding personal jurisdiction and choice of law, requiring recognition could allow one jurisdiction to significantly assert its control over persons and events in another. This violates the basic notion of horizontal federalism.²¹⁸ The Full Faith and Credit Clause

administered by issuing court).

²¹³ See *Donovan v. Dallas*, 377 U.S. 408, 413-14 (1964) (holding that state court antisuit injunction would abridge right created by Congress of access to federal court).

²¹⁴ 28 U.S.C. § 2283 (2000).

²¹⁵ See *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (holding that state and federal courts can exercise concurrent jurisdiction over same controversy until first judgment is obtained); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (holding that fundamental corollary of concurrent jurisdiction is that parallel proceedings of same claim should be allowed to proceed until one reaches judgment); see also Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS 66, 76 (2001) (noting that states are abandoning former rules of self-restraint); cf. Eric Roberson, Comment, *Comity Be Damned: The Use of Antisuit Injunctions Against the Courts of a Foreign Nation*, 147 U. PA. L. REV. 409 (1998) (discussing same trend as to antisuit injunctions against suits in foreign nations).

²¹⁶ See HIGH, *supra* note 12, at § 50.

²¹⁷ A remedy is effectively denied because if either party proceeds in one court, she faces contempt charges in the other court. See *Laker Airways*, 731 F.2d at 927 (discussing this phenomenon); see also *Peck v. Jenness*, 48 U.S. 612, 625 (1849) (reasoning that if both competing courts issue injunctions then if either litigant goes forward in one court then she faces contempt sanctions in other court).

²¹⁸ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-71 (1996) (holding that Tennessee could not impose tort liability for actions outside its jurisdiction); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504-05 (1939) (stating that full faith and credit does not enable one state to legislate for another or to project its laws across state lines); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (noting that no state can legislate except with reference to its jurisdiction).

alters, but does not destroy, the states' status as independent sovereigns. A rule granting full faith and credit to antisuit injunctions without reference to when issued would go a long way to destroying states' remaining sovereignty.

CONCLUSION

When state courts hold insurance insolvency proceedings, they often issue antisuit injunctions attempting to halt litigation against the insolvent insurer or its insureds. States are split on whether these injunctions must receive full faith and credit recognition in the courts of other states, and the Supreme Court has not spoken. This Comment proposed a two-step test that an antisuit injunction must pass before any full faith and credit is required. First, the parties attempting to be bound must have been properly before the rendering forum. Second, the injunction must have been issued before jurisdiction had attached in the recognizing forum. These rules would still permit state courts to use this useful remedy, while limiting its application to prevent running afoul of the Due Process Clause and state sovereignty.
