NORTH CAROLINA LAW REVIEW

Volume 55
Number 1 *Bicentennial Issue*

Article 12

9-1-1976

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ancing these interests as transcending the public interest in allocative efficiency, the decision may represent injudicious tampering. On the other hand, if one views the balancing process and the benefits of allocative efficiency as concerns of comparable magnitude, then the net benefit from the tradeoff may not be apparent for some time.

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Civil Procedure—Collateral Estoppel: The Fourth Circuit Squeezes an Oversized Judgment Through a Narrow Issue

Collateral estoppel[1] is a procedural doctrine whereby essential issues that have been decided in a prior action are treated as conclusive in any subsequent proceeding, thus foreclosing a party from relitigating the same issue.[2] Among the policy objectives collateral estoppel furthers are safeguarding against inconsistent results and avoiding needless litigation. The seductiveness of these ends, however, should never obscure the necessity for careful analysis of whether the issue asserted as collaterally estopped was both actually determined and substantially identical with the present one, lest a litigant be unfairly denied his day in court. In *Azalea Drive-In Theatre, Inc. v. Hanft*,[3] the Fourth Circuit held that a seemingly ambiguous finding by a state court in an action to recover on a promissory note that an affirmative defense of duress based upon an alleged threat of a group boycott had not been established was conclusive as to whether the threat was in fact made in a subsequent affirmative antitrust action brought by the defendant in a federal district court.

Azalea Drive-In Theatre, plaintiff in the federal action, leased films from defendant distributors under agreements providing for payment of a percentage of the box office receipts. These agreements also authorized periodic inspections to insure that the theatre was not

1. Also known as a species of res judicata or issue preclusion.

2. *The Restatement of Judgments* defines the rule as follows: "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." RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973).

3. 540 F.2d 713 (4th Cir. 1976).

underreporting its receipts. Such inspections were performed by the accountant for the distributors' law firm, who concluded that the theatre had misrepresented its receipts by as much as $240,000. The parties managed to negotiate a settlement for $70,000, and Azalea executed a promissory note for this purpose.[4]

When Azalea failed to make the first payment, the distributors initiated a suit in a Virginia state court to recover on the note.[5] Azalea set forth three affirmative defenses: (1) that the note was given without consideration, (2) that it was given by their president under duress, he having been threatened by the accountant with a group boycott by the distributors unless he agreed to the settlement, and (3) that the note was obtained in violation of federal antitrust laws.[6] The state judge struck the third defense and an antitrust counterclaim on the ground that the enforcement of the antitrust laws was under exclusive federal jurisdiction. He then tried the case without a jury, and received testimony from both sides on whether a group boycott had in fact been threatened.[7]

In the judge's findings of fact and conclusions of law he framed one of the questions of ultimate fact to be: "Was there sufficient and convincing evidence of duress on the part of the plaintiffs to the detriment of the defendants?"[8] For all questions posed, including the preceding, he gave only the general answer, "[a]s the trier of the facts, the Court decides same in favor of the plaintiffs,"[9] and granted judgment for plaintiffs.

Meanwhile, Azalea had filed a claim in the Federal District Court for the Eastern District of Virginia against the distributors charging a Clayton Act violation and the use of "monopolistic and economic threat, coercion and duress" in obtaining the note.[10] After the state court rendered its judgment, the distributors amended their answer to assert that Azalea was collaterally estopped from again litigating the question of the alleged threat and attendant duress. The district court, noting the lack of specific findings, ruled that the doc-

4. *Id.* at 714.

5. *Id.* The state trial court decision is unreported. The statement of facts concerning that proceeding is taken from the summary by the Fourth Circuit.

6. *Id.*

7. *Id.*

8. *Id.* at 716 n.2.

9. *Id.*

10. *Id.* at 714; Azalea Drive-In Theatre, Inc. v. Sargoy, 394 F. Supp. 568 (1975) (mem.).

trine should not apply since it was possible that the state judge found that a threat was made without finding that it constituted duress.[11] Azalea then prevailed in the jury trial.

On appeal, the Fourth Circuit, through Chief Judge Haynsworth, reversed on the ground that the core factual dispute, namely whether or not a threat of group boycott had been made, was the same in each suit.[12] Believing that the state judge in deciding the facts for the distributors must have found that no threat had been made, the court concluded that under established principles collateral estoppel should have been invoked. The court also rejected Azalea's claim that application of collateral estoppel in the federal suit would compromise its seventh amendment right to a jury trial since no such right had been available in the former suit on the note by determining that the policies underlying collateral estoppel are not overborne simply because the form of the fact finding process in the first forum is unlike that of the second.[13]

Judge Butzner vigorously dissented on three separate grounds. He based the first on an analysis of the difference between the state claim of duress and the federal claim of an antitrust violation: to prove duress Azalea had to establish not only that the accountant threatened a group boycott, but also that such a threat was unlawful under state law and "was sufficient to overcome the will of a person of ordinary firmness,"[14] while to make out a per se antitrust violation only a threat of a group boycott need be proven. Since the ground of decision was unclear on the record, the judge could have found that no threat had been made, or, alternatively, that the threat had been made but that it was not unlawful or that it fell short of overcoming the will of Azalea's president. Thus collateral estoppel should not apply for the reason that the dispositive matter litigated and determined might have been only one of several possibilities, and it had not been clearly shown to be only the existence or not of the threat. A second factor that he asserted to weigh against collateral estoppel was the fact that Azalea had to prove by "clear and convincing" evidence the duress defense while the antitrust claim entailed only the ordinary civil burden of proof of a preponderance of

11. 540 F.2d at 714; 394 F. Supp. at 575.
12. 540 F.2d at 714.
13. *Id.* at 715.
14. *Id.* at 716 (Butzner, J., dissenting).

the evidence.[15] Lastly, Judge Butzner asserted that the application of collateral estoppel would be a compromise of Azalea's seventh amendment right to a jury trial on the antitrust claim.[16]

Prior cases illustrate those situations in which the invocation of collateral estoppel is deemed inappropriate. *Russell v. Place*,[17] cited by the dissent,[18] refused to allow collateral estoppel to foreclose a party who had been found guilty of infringement of a patent from contesting the validity of that patent in a subsequent suit when the patent consisted of two claims and it could not be discerned on which claim the first judgment had been rendered. The rule stated in its holding has never been questioned:

> [I]t must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.[19]

Thus, reasoning by speculative inference from an ambiguous record is not permitted to show that the issues are the same. There must be demonstrable evidence from which such a conclusion, and no other, necessarily follows.

Closely related to this concept is the mirror situation in which the first judgment rests on alternative grounds, either of which by itself would justify the result, and the determination of each or all of them is evident from the record. Under these circumstances, unlike the *Russell* situation, what issues were actually decided is known. Although this knowledge might seem to vitiate the argument against collateral estoppel based on uncertainty, the recent trend is to deny preclusion in this situation also. The Tentative Draft of the *Restatement (Second) of Judgments*, contrary to the first *Restatement*,[20] takes the view that neither of two alternative determinations by itself should be

15. *Id.* at 717.
16. *Id.* at 718.
17. 94 U.S. 606 (1876).
18. 540 F.2d at 715.
19. 94 U.S. at 608.
20. RESTATEMENT OF JUDGMENTS § 68, Comment n (1942). "Where the judg-

conclusive in a subsequent suit.[21] The recent case of *Halpern v. Schwartz*[22] refused to give collateral estoppel effect in an action for objections to discharge of a party who had been adjudicated bankrupt on three separate grounds, any one of which would have been conclusive standing alone, when only one of the grounds required a finding of actual intent to defraud, which was the issue in the second suit. After surveying the authorities and concluding that they were not overwhelmingly compelling either way on this close question, the court offered the rationale that, "if the court in the prior case were sure as to one of the alternative grounds and this ground by itself was sufficient to support the judgment, then it may not feel as constrained to give rigorous consideration to the alternative grounds,"[23] implying that in such a situation the "full and fair consideration" generally required of the issue in the first instance may be lacking.[24]

Another limiting factor in regard to collateral estoppel is a change in the burden of proof. Usually this circumstance arises when the first action is criminal in nature and the second civil; an acquittal in the former under the "beyond a reasonable doubt" standard will not preclude relitigation of the issues in the latter under the "preponderance of the evidence" standard.[25] In *Helvering v. Mitchell*[26] a defendant who had been acquitted on a criminal tax evasion charge was held not to be immune from a civil suit to collect a deficiency based on

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ment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment." *Id.* See Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942), for support of the first *Restatement* position.

21. RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment i (Tent. Draft No. 1, 1973). "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." *Id.*

22. 426 F.2d 102 (2d Cir. 1970).

23. *Id.* at 105.

24. *But cf.* Irving Nat'l Bank v. Law, 10 F.2d 721 (2d Cir. 1926).

> The defendant's position comes to this: That a finding is not res judicata, if the court could have reached the same result by other reasoning. . . . But the principle has never been carried so far as to discredit findings which are collateral only if the cause had been disposed of upon other principles than those which the court had a mind to apply. On the contrary, if a court decides a case on two grounds, each is a good estoppel.

Id. at 724. Judge Learned Hand's last sentence could be taken as standing for the contrary view, but the case may be distinguished in that the alternative ground asserted by the defendant was only a hypothetical one, and not included in the first court's findings. *See* Halpern v. Schwartz, 426 F.2d 102, 107 n.4 (2d Cir. 1970).

25. A conviction, however, may serve as an estoppel, since satisfaction of the higher burden of proof must necessarily logically include satisfaction of the lower one.

26. 303 U.S. 391 (1938).

the same set of alleged facts. The court stated that "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata.* The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the accused.' "[27] This principle has also been applied further down the burden of proof spectrum when an administrative proceeding follows a civil suit.[28]

A corollary to this precept is that a party who loses on a claim in which one element to be proven is some specific intent or other subjective state on the part of his adversary will not be estopped from litigating a different claim based on the same act, but in which intent is immaterial. In *One Lot Emerald Cut Stones & One Ring v. United States,*[29] a case also illustrating the criminal-civil dichotomy,[30] the Government was not estopped from pressing a civil forfeiture proceeding for imported merchandise not included in a declaration and entry under the tariff laws even though defendant had been acquitted on criminal charges stemming from the same importation. The court reasoned that for a criminal conviction the Government had to prove a willful intent to defraud as well as the act of unlawful importation. An acquittal could have entailed a finding that the act was done but that the intent was lacking. Since in a forfeiture action the Government had only to prove that the property was imported without a declaration, the criminal acquittal could not be accepted as a conclusive

27. *Id.* at 397 (quoting Lewis v. Frick, 233 U.S. 291, 302 (1914)). *See also* Harper v. Blasi, 112 Colo. 518, 151 P.2d 760 (1944), noting that the same testimony might be insufficient to support a guilty verdict against a criminal defendant but nevertheless suffice to discharge the lower burden of proof necessary for a verdict against a civil defendant. *Id.* at 521-22, 151 P.2d at 761. *But see* Coffey v. United States, 116 U.S. 436, 443 (1886), in which the Government was estopped from litigating a civil action for seizure of untaxed liquor after it had failed to obtain a conviction in a criminal trial for attempt to defraud the United States of the tax on it.

28. In Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), a longshoreman first sued a shipowner for negligence in connection with injuries sustained aboard ship. The shipowner impleaded the employer, and it was determined that the longshoreman had in fact sustained no injury when he fell. The court held that collateral estoppel should not apply on the question of injury when the longshoreman subsequently sought compensation from his employer under the Longshoremen's and Harbor Workers' Compensation Act because a lesser quantum of proof is necessary to establish a claim in that proceeding and the administrative policy is to resolve all doubtful fact questions in favor of the injured employee. Strictly speaking, the court did not base its holding solely on the difference in burden of proof, but also because the nature of evidence and procedural rules are in general more "free-wheeling" in administrative proceedings. *Id.* at 188.

29. 409 U.S. 232 (1972).

30. *Id.* at 235.

finding that this act was not done.[31] A slight modulation on this theme is when the intent must still be proven in the second suit, but the burden of proof is less. The proposed *Restatement*, which supports the general rule of excepting collateral estoppel in the case of a changed burden of proof,[32] provides a hypothetical illustration:

> A brings an action against B to recover on a promissory note. B defends on the ground that he was induced by A's friend to give this and other notes in the series, but fails to establish fraud by clear and convincing evidence as required by law. After judgment for A, the law is changed to provide that in such cases fraud need be proved only by a preponderance of the evidence. In an action by A on another note in the series, B is not precluded from asserting the defense of fraud.[33]

Thus, the requirement of proof of intent in the first suit not only aborts an estoppel in the second suit when by a qualitative change in the burden of proof intent is not an essential element, but also when by a quantitive change intent is still an essential element, but the necessary quantum of proof is less.

The underlying justification for denying collateral estoppel when the burden of proof changes is that the policy of preventing inconsistent results is inoperative in such a case.[34] Differing results under differing burdens of proof are neither contrary to logic nor repugnant to considerations of fairness; indeed, considerations of procedural integrity may occasionally compel a different result in such a case.

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31. *Id.* at 234-35. The concern in this analysis with the ambiguity of the first determination also echoes the rule of Russell v. Place, 94 U.S. 606 (1876). *See* text accompanying notes 17-19 *supra.*

32. RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 1, 1973) provides:

> Exceptions to the General Rule of Issue Preclusion.
>
> . . . .
>
> (d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action
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> . . . .

33. *Id.* § 68.1, Comment on Clause (d), Illustration 11.

34. *But cf.* Harding v. Carr, 79 R.I. 32, 83 A.2d 79 (1951). In this action for injuries sustained in an auto accident, plaintiff was estopped from asserting that the driver of defendant's car had his permission, when in an earlier suit against defendant's insurer plaintiff failed to show such permission. Collateral estoppel was applied over a dissent, even though in the second action the burden would have shifted entirely to the owner to rebut the presumption of permission. The court stated: "The principle of estoppel as here involved is based on the *adjudication* of an identical and ultimate issue and not on the question of which party may legally have the burden of proving or disproving such issue." *Id.* at 43, 83 A.2d at 84.

Another situation in which collateral estoppel may be denied, which entails consideration of policies extrinsic to the general policies of collateral estoppel, and concerning which there is less agreement, is when a right to jury trial attaches to the second suit but not the first. In *Rachal v. Hill*[35] the Fifth Circuit concluded that the reasoning of the Supreme Court's ruling in *Beacon Theatres, Inc. v. Westover*[36]—that the seventh amendment right to jury trial requires that legal issues must be tried first before a jury when both legal and equitable issues are to be tried in the same suit—also mandates that the right to jury trial may not be lost by operation of collateral estoppel to issues in an entirely separate suit.[37] Thus, Rachal, who had been issued an injunction in connection with a manipulative stock scheme in an action initiated by the Securities and Exchange Commission, was not estopped from litigating the issue of the scheme when stockholders subsequently pressed forward a derivative suit against him averring the same scheme.[38]

The *Rachal* decision has been generally disapproved. Only one case appears to have followed it.[39] The *Restatement*, probably in response, has taken the contrary position.[40] *Crane Co. v. American Standard, Inc.*,[41] though distinguishing *Rachal* on the facts in that the estoppel in *Crane* was mutual, questioned in dictum the correctness

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35. 435 F.2d 59 (5th Cir. 1970).

36. 359 U.S. 500 (1959).

37. 435 F.2d at 64.

> In light of the great respect afforded in *Beacon Theatres* . . . and its progeny, for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action.

Id.

38. The court seemed to narrow its holding by emphasizing that the asserted estoppel was non-mutual, *i.e.*, the party seeking to assert it was not an adversary in the first suit. *See* note 37 *supra*. It is fair to read *Rachal* as signifying that when the estoppel is mutual, then the jury trial issue should not abort it. The distinction seems rather cabalistic; perhaps the court thought that the right to jury trial somehow renews itself at the appearance of new adversaries.

39. Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990 (S.D.N.Y. 1971). This holding appears even broader than *Rachal*, since a right to jury trial was present in the first suit, but was waived.

40. RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment d (Tent. Draft No. 1, 1973). "The determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to a jury in that subsequent action if collateral estoppel did not apply." *Id.*

41. 490 F.2d 332 (2d Cir. 1973).

of the *Rachal* holding.[42] In addition, two cases whose factual patterns seemed to be appropriate for a *Rachal* analysis did not even refer to the issue.[43] One article has attacked the *Rachal* holding as a leap of faith from the Supreme Court's interpretation of the seventh amendment that does unwarranted violence to the policies of collateral estoppel.[44]

One consideration not directly raised in the *Azalea* opinion is that the policies underpinning the grant of exclusive jurisdiction to the federal courts of the administration of the antitrust laws mandate, under the rule announced by Learned Hand in *Lyons v. Westinghouse Electric Corp.*,[45] that determination of antitrust issues decided in state court proceedings not be binding on the federal courts. In *Lyons* defendant in a state court breach of contract action lost on a defense alleging antitrust violations in the marketing of lamps. Defendant then sued in federal court, averring the same antitrust violations. Although acknowledging that the state court determination would ordinarily be treated as an estoppel,[46] the court nevertheless stated:

> [T]he grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that make up the wrong.[47]

The policy reason offered for this distinction was that the grant of exclusive jurisdiction evidenced a congressional intent that the antitrust laws be uniformly administered,[48] even though it may be permissible

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42. *Id.* at 343 n.15.

43. Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969), and Paramount Transp. Sys. v. Local 150, Int'l Bhd. of Teamsters, 436 F.2d 1064 (9th Cir. 1971) (per curiam), both allowed collateral estoppel on the issue of liability in damage actions under the National Labor Relations Act after the unions had been found guilty of secondary boycotts under the Act by the National Labor Relations Board in actions for injunctions. The Fifth Circuit in *Rachal* did not bother to distinguish its own decision in *Painters*. The Ninth Circuit was probably not yet aware of *Rachal* when it handed down *Paramount*.

44. Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971). The authors stress the waste of judicial resources incurred by retrying complex issues in arguing that neither the seventh amendment as interpreted by the Supreme Court nor considerations of fairness should produce such a result. *Id.* at 458.

45. 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

46. *Id.* at 188.

47. *Id.* at 189; *cf.* Scott, *supra* note 20, at 18-19 (litigants should not be precluded from retrying issues in a court having jurisdiction over the matter when such issues were incidentally decided by a court that would not have had jurisdiction to decide such issues in an action brought expressly to determine them, even though the judgment in the initial suit is still valid).

48. 222 F.2d at 189.

for state courts incidentally to decide antitrust issues when they arise in a defense to a contract action.[49] One commentator has also cited the seventh amendment right to jury trial, setting the burden of proof, and the choice of forum as important legislative considerations in the federal administration of antitrust law.[50]

A cursory reading of *Lyons* might imply that collateral estoppel by a state court judgment is never appropriate in a federal antitrust action. In distinguishing the situation in *Lyons* from that in *Becher v. Contoure Laboratories, Inc.*,[51] however, Hand seemed to concede that prior state court determinations of pure fact, as opposed to those of law or mixed fact and law, may be conclusive. After quoting from *Becher* that " '[e]stablishing a fact and giving a specific effect to it by judgment are quite distinct,' "[52] he made the somewhat cryptic ob-

49. *Id.* at 190. Of course, the *Azalea* case may be distinguished in that the trial judge refused to entertain the antitrust defense, citing the federal courts' exclusive jurisdiction in the area. Although counterclaims and affirmative treble damages suits based on the federal antitrust laws cannot be heard in state courts, such courts may nevertheless, in their discretion, entertain defenses based on them. As the court stated in *Lyons v. Westinghouse*: "We think that the state court had undoubted jurisdiction, notwithstanding § 15 of Title 15, U.S.C.A., to decide the merits of the first defence . . . ." 222 F.2d at 187. Such defenses are appropriate only when the alleged antitrust violations "inhere" in the contract itself and the contract is intrinsically illegal. *Id.* at 187-88. *See* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755 (1947). Nevertheless, state courts are not bound to entertain such defenses in any case, since, "[o]bviously, state law governs in general the rights and duties of sellers and purchasers of goods . . . ." Kelly v. Kosuga, 358 U.S. 516, 519 (1958). It appears that if in the instant case the note would not have been obtained but for a threat of group boycott, a per se antitrust violation, *see* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 & n.5 (1959), then it could plausibly be argued that the illegality "inhered" in the note itself. Nevertheless, the decision by the Virginia Supreme Court on appeal in Azalea Drive-In Theatre, Inc. v. Sargoy, 215 Va. 714, 720, 214 S.E.2d 131, 136 (1975), that "[t]he alleged federal antitrust violation was collateral to the main issue in plaintiff's motion for judgment, and it was not a viable defense in this action" rendered the matter moot. *Cf.* Medusa Corp. v. Gordon, 496 F.2d 249 (6th Cir. 1974) (violation of antitrust laws held not to be a valid defense under Michigan law).

50. Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1365, 1383 n.85 (1967).

51. 279 U.S. 388 (1928). *Becher* involved a machinist's contract to construct a machine, whereby he agreed to keep information entrusted to him secret and not to make use of it himself. He breached this trust by obtaining a patent for the invention on his own, and his employer obtained from a New York court a decree holding the machinist a trustee *ex maleficio* of the invention and commanding him to assign the patent to the employer. When the machinist turned around and sued the employer for infringement of the patent, the Supreme Court held that he was estopped from asserting the claim by the state decree. One ground of distinction from *Lyons* could have been that the court ruled that the suit was not one arising under the patent laws at all. The court stated that the cause of action was based on either breach of contract or wrongful disregard of confidential relations, both of which are independent of the patent law. *Id.* at 391.

52. 222 F.2d at 188 (quoting 279 U.S. at 391).

servation that this proposition suggests that "the distinction [is] between the finding of one of the constituent facts that together make up a claim and the entire congeries of such facts, taken as a unit; an estoppel is good as to the first but not as to the second."[53] The upshot of this statement seems to be that state court determinations of discrete, concrete facts, separable from the major premise of a legal theory based on antitrust law, may properly be invoked for estoppel, since such determinations are made independently of an issue of law under exclusive federal jurisdiction, and the federal court may still exercise its prerogative to apply the federal law to the established facts in order to rule on the merits of the claim as a whole.[54]

If the majority decision in *Azalea* is deemed to have impliedly rejected the countervailing arguments presented by the dissent, then the decision may retard the developing law of collateral estoppel as well as undermine already firmly established principles. The statement that "the factual dispute in the federal court was exactly the same as the factual dispute in the state court"[55] is misleading. Certainly whether a threat of group boycott was made was a threshold question in both. But stating the obvious does not develop the analysis far enough; it must also be conclusively shown that the factual question was actually decided in the former. In view of the ambiguity of the trial judge's findings, the conclusion that "[w]hen the state trial judge stated that he found the facts in the plaintiff's favor, he must have found that no threat had been made,"[56] simply does not necessarily follow from the premise that the factual dispute was the same.

The state judge's findings are only a bit more enlightening than a general verdict.[57] His finding for plaintiffs on the stated issue—"Was there sufficient and convincing evidence of duress on the part of the

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53. *Id.* The distinction may be made more lucidly by the *Becher* opinion itself:

> That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and . . . we can see no ground for giving less effect to proof of such a fact than any other.

279 U.S. at 391-92.

54. *See* Note, *supra* note 50, at 1384, pointing out that limiting collateral estoppel effect to factual determinations safeguards against contravention of any substantial federal interest.

55. 540 F.2d at 714.

56. *Id.*

57. General verdicts, with their lack of specific findings, are a great impediment to the application of collateral estoppel. This could be remedied by a more widespread use of special verdicts and interrogatories.

plaintiffs to the detriment of the defendants?"[58]—though framed as a single issue, must be viewed as a multiple finding. Admittedly, it could mean that no threat was made, but it could also mean that the threat was not unlawful under state law,[59] that the threat was insufficient to overcome the will of a person of ordinary firmness,[60] that defendants' proof was not sufficiently clear and convincing on the elements of the defense,[61] or some combination of these variables. If the finding is viewed as intending only one or several of these possible conclusions, then it should come squarely within the rule of *Russell v. Place* that collateral estoppel effect should not be given to ambiguous findings.[62] Even if it is viewed as implying all of them, including that no threat was made, the rule of *Halpern v. Schwartz*, that a putative estoppel based on any of alternative sufficient determinations should not be allowed,[63] still should preclude any estoppel. The requirement that Azalea prove not only that a threat was made, but also that such threat was sufficient to overcome its vice-president's will, makes the situation analogous to that of *One Lot Emerald Cut Stones*, in which it was held that if a subjective element is essential to the first claim, but not the second, no estoppel will attach.[64] Aside from any ambiguity in the findings, the difference in burden of proof

58. 540 F.2d at 716 n.2.

59. This finding was explicitly made by the Virginia Supreme Court on appeal, 215 Va. at 721, 214 S.E.2d at 136. *See* note 49 *supra*.

60. This term of art is generally considered to be an essential element of duress. *See* United States v. Huckabee, 83 U.S. (16 Wall.) 414 (1872). "Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." *Id.* at 432. The judge might well have concluded that to threaten a boycott is simply a good business tactic, which an ordinary businessman should be able to take in stride.

61. Duress usually requires the higher burden of "clear and convincing" evidence, rather than the ordinary civil burden of a "preponderance" of the evidence. Virginia state law appears to adhere to this requirement. "One who seeks to cancel a contract for fraud and duress must carry the burden of proof and furnish clear and full proof of such fraud and duress." Scott v. Scott, 142 Va. 31, 39, 128 S.E. 599, 601 (1925) (per curiam) (quoting the trial court). The judge's use of the word "convincing" indicates that this was the standard he was applying.

62. *See* Russell v. Place, 94 U.S. 606, 608 (1876).

63. 426 F.2d at 105.

64. 409 U.S. at 234. *One Lot Emerald Cut Stones* is distinguishable from *Azalea* in that in the former the party against whom the estoppel was asserted had failed to establish fraudulent intent on the part of its adversary, whereas in the latter Azalea had failed to establish that its own will had been overcome. Nevertheless, it should make no difference which party is looking into whose head; an element of proof in addition to the establishment of the objective act is required either way. To establish the antitrust claim, Azalea had only to show that a threat of a group boycott had been made, such a threat being a per se antitrust violation. *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) and cases cited *id.* at 212 n.5.

alone dictates that estoppel is inappropriate, according to *Helvering v. Mitchell* and the other cases discussed above.[65]

One consideration briefly addressed and summarily dismissed by the *Azalea* opinion is that of collateral estoppel compromising the right to jury trial under the antitrust claim. The court stated that "the rules foreclosing relitigation of factual issues between the same parties serve such important policies that relitigation should not be allowed though the fact finding processes in the first tribunal were unlike those which otherwise would be available in the second."[66] Although this declaration could be taken as direct disapproval of the ill-conceived rule of *Rachal v. Hill*,[67] it persuasiveness is diluted by the omission of any citation to that case, by the fact that the estoppel in *Azalea*, being mutual, is thus readily distinguishable, and by the failure to weigh the "important policies" of collateral estoppel against those of the right to jury trial in any sort of analytical discussion.

While *Lyons v. Westinghouse Electric Corp.*[68] is not directly apposite by virtue of the state court's refusal to hear the antitrust defense, the inference remains strong that if it had ruled on the merits of the defense and simply found against Azalea without clearly indicating that a threat of group boycott had not been made, a *Lyons* analysis would have dictated that the federal court not be bound.[69] Thus it seems anomalous that the federal court should be bound by a judgment based on a different major premise (duress), when it would not have been bound by a judgment based on the same major premise (antitrust).

Except for the jury trial issue, any one of the above considerations standing alone should have mandated that collateral estoppel be refused in the instant case. All are corollaries of the fundamental axiom that the issue in the first suit must be substantially identical to the issue in the second, and, taken together, weigh so heavily against the *Azalea* opinion that it must be said that the case was wrongly decided.[70] The

65. 303 U.S. at 397; *see* notes 26-28 and accompanying text *supra*.

66. 540 F.2d at 715.

67. *See* notes 35-39 and accompanying text *supra*.

68. *See* notes 45-54 and accompanying text *supra*.

69. This is not to say that if such a specific factual finding were made, the federal court should disregard it. Such a finding would be collateral estoppel in re the existence of the threat, and since the merits of the antitrust claim depend on this fact, it would require that the claim be dismissed. This would be an example of collateral estoppel by a "constituent" fact, as opposed to "congeries" of fact represented by a general finding on the claim. *See* notes 51-54 and accompanying text *supra*.

70. The doctrine of collateral estoppel is flexible in its allowance of extrinsic

glaring defect in the court's analysis is that it treats the state finding as one of a singular factual issue, rather than as an issue of fact so entangled with an overlay of legal issues that it is impossible to extract with confidence the one factual finding relevant to the second suit. The state court issue was decided as one of mixed fact and law; the federal court issue was one of fact alone. Therefore the issues were not the same in both suits. The issues being different, no estoppel should have attached.[71]

FRANK LANE WILLIAMSON

Civil Procedure—Kidd v. Early: Summary Judgment on Testimonial Evidence in North Carolina

In *Cutts v. Casey*[1] the North Carolina Supreme Court held that any testimonial evidence submitted in support of a motion for a directed verdict created an issue of credibility to be presented to the jury. This holding gave rise to dire predictions[2] that the North Carolina summary judgment procedure would be crippled. The North Carolina Supreme Court, however, has narrowed the scope of *Cutts* by setting guidelines for determining when an issue of credibility actually arises.

In *Kidd v. Early*[3] the court granted summary judgment[4] for the

evidence to show what was decided in the first suit. The holding in the instant case thus could possibly have been redeemed if the court had examined the trial record and, say, found the level of evidence against a threat having been made so overwhelming as to support a partial directed verdict in an antitrust trial. With such a demonstration, the ambiguity of the judge's findings could justifiably have been disregarded.

71. The instant case should at least remind us that the "lesson" preached by Professor Vestal has not been thoroughly learned: "One of the lessons which must be learned is that great exactness must be used in determining the issues decided in Suit I and to be decided in Suit II. . . . In the years ahead, it will be necessary to use more finesse in the area." Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 192 (1965). The basic value of *Azalea* is to point out that refinement of collateral estoppel technique is needed to insure that the "fit" between issues is a close one.

1. 278 N.C. 390, 180 S.E.2d 297 (1971).

2. Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. REV. 729 (1972); Note, *Civil Procedure—Cutts v. Casey Extended to Summary Judgment*, 54 N.C.L. REV. 940 (1976).

3. 289 N.C. 343, 222 S.E.2d 392 (1976).

4. Pursuant to N.C.R. CIV. P. 56. The North Carolina Rules of Civil Procedure were enacted in 1970. Rule 56 enables a court to grant final judgment for a