

# A “PROCEDURAL NIGHTMARE”: DUELING COURTS AND THE APPLICATION OF THE FIRST-FILED RULE

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## Abstract

Pretend that Party A sues Party B in Court 1. Instead of countersuing, however, B then sues A in Court 2. The problem this Note examines is whether Court 1 may enjoin B from continuing to litigate in Court 2 if Court 2 has already declined to stay the case or transfer it to Court 1.

This question has sharply divided the U.S. Circuit Courts of Appeal. How the issue is resolved will have serious consequences for high-stakes litigation in the United States. If one district court may overrule a court of coordinate rank, strategically sophisticated parties might file suits in multiple courts to coerce poorer adversaries into settlement. On the other hand, if a federal district court cannot enjoin litigation which is simultaneously proceeding before a peer, the litigation might continue in both districts. Forcing a poorer adversary to litigate one case in two places at the same time could be a dream come true for a wealthy litigant willing to partake in such strategic gamesmanship to bully poorer adversaries into settling their claims.

This Note proposes issue preclusion as a solution to this problem. Granting preclusive effect to the first decision of either court to address venue would not only prevent parties from being able to relitigate venue across districts but would also eliminate the incentive to file duplicative litigation in the first place.

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\* J.D. 2017, University of Florida Levin College of Law. B.A. 2011, Middlebury College. I would like to thank the following individuals for their support: Professor Elizabeth T. Lear, Professor William H. Page, my note advisors Rachel Wasserman and Anthony Sirven, Notes and Comments Executive Editor Miranda Moore, and the student editors and staff of the *Florida Law Review*.

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## INTRODUCTION

This Note analyzes the split between U.S. Circuit Courts of Appeal on what should occur when two federal district courts disagree about where a case should be litigated after parties have filed the same dispute in two courts. When more than one suit has been filed between the same parties in more than one forum, the first-filed rule establishes which action should proceed.<sup>1</sup> First-filed rule disputes can develop into notoriously complex affairs.<sup>2</sup> The U.S. Court of Appeals for the Third Circuit called one such dispute a “procedural nightmare.”<sup>3</sup> These disputes do not relate to the merits of the parties’ claims, but arise when parties disagree about where to litigate.<sup>4</sup> The rule is irrelevant where either a constitutional requirement or a federal statute prevent a case from proceeding in a particular court. The rule aims to prevent duplicative proceedings by preventing two cases, both related to the same controversy and parties, from continuing simultaneously in multiple forums.<sup>5</sup>

Because litigating the first-filed rule does not reach the merits of any claim, parties likely invest their time and resources into litigating the issue only when they have a substantial stake in the case proceeding in a preferred forum or before a particular judge.<sup>6</sup> Thus, forum and judge shopping are likely critical motivations for parties who refuse to accede

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1. 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854, Westlaw (database updated Apr. 2016) (“[W]hen two courts have concurrent jurisdiction over a dispute involving the same parties and issues, as a general proposition, the forum in which the first-filed action is lodged has priority.”); e.g., *N.Y. Marine & Gen. Ins. Co. v. LaFarge N. Am.*, 599 F.3d 102, 112 (2d Cir. 2010) (“The first-filed rule states that, in determining the proper venue, ‘[w]here there are two competing lawsuits, the first suit should have priority.’” (alteration in original) (quoting *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006))); *Cardoza v. T-Mobile USA, Inc.*, No. 08–5120 SC, 2009 WL 723843, at \*2 (N.D. Cal. Mar. 18, 2009) (“The first-to-file rule ‘allows a district court to transfer, stay, or dismiss an action when a similar complaint has already been filed in another federal court.’” (quoting *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 623 (9th Cir. 1991))).

2. The *Semmes Motors* case is a good example. See *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1200–01 (2d Cir. 1970).

3. *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1273 (3d Cir. 1991).

4. See *supra* note 1.

5. See *Freedom Mortg. Corp. v. Irwin Fin. Corp.*, No. 08–146 GMS, 2009 WL 763899, at \*4 (D. Del. Mar. 23, 2009) (“[The first filed rule’s] purpose is to avoid differing outcomes on the same issue by two sister courts, thereby minimizing duplicative litigation in different fora, and saving judicial resources.”).

6. See *Hershey Foods*, 945 F.2d at 1272 (describing the litigation over the first-filed rule as “a struggle for the perceived advantage of litigating rights in the HERSHEY’S trademark in their preferred federal district courts”).

to their adversary's choice of forum.<sup>7</sup> While the first-filed rule generally promotes efficiency and judicial comity by ensuring that two or more courts use the same yardstick to decide where a case should be litigated, disagreements between district courts on its application threaten judicial comity and the conservation of resources.

This Note examines a split between U.S. Circuit Courts of Appeal on whether, when a case is filed in two different federal courts which disagree about where the case should proceed pursuant to the first-filed rule, one district court may enjoin the litigation from proceeding before the other court after the other has already ruled that the case should proceed in its own forum.<sup>8</sup> The resolution to this circuit split may have serious ramifications. For example, equity and justice could suffer if Court 1 can enjoin a party from litigating a case in Court 2 which Court 2 had already decided to hear. Allowing parties to relitigate venue across the United States could result in unscrupulous parties filing parallel suits simply to create time-consuming and expensive court battles over venue.<sup>9</sup> Creating a venue dispute could delay a court from entering a judgment on the merits or coerce an opponent into settling by dramatically raising its litigation expenses.<sup>10</sup> On the other hand, if Court 1 could not enjoin Court 2, future plaintiffs might choose to file cases in both Courts 1 and 2 to force adversaries to spend resources litigating the same dispute in two forums.

The circuit courts disagree not only on the equitable risks of either allowing or prohibiting inter-district injunctions, but also on related questions involving intra-judicial branch comity, preserving judicial resources, avoiding conflicting rulings on the same questions of law or fact, and determining what constitutes an appeal under 28 U.S.C. § 1292,<sup>11</sup> a federal statute governing appeals. Part I of this Note addresses the first-filed rule. Part II addresses the circuit split. Part III proposes a solution: issue preclusion.

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7. *See id.*

8. *See* *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1005–07 (8th Cir. 1993); *Ellicott Mach. Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180–82 (4th Cir. 1974); *Nat'l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 45–46 (2d Cir. 1961).

9. *See* 15A WRIGHT ET AL., *supra* note 1, § 3907 (“Litigation often involves adversaries of unequal resources and conflicting interests in securing or avoiding prompt judgment. Frequent appeals can be used by a party with greater resources, or an interest in delay, either deliberately or with the effect of harassing an adversary into cheap settlement or outright surrender. Relatively impecunious litigants, indeed, may find the initial prospect of litigation entailing more than one trial and one appeal too forbidding to encounter.” (footnote omitted)).

10. *Id.*

11. *See* *Nw. Airlines*, 989 F.2d at 1005; *Ellicott*, 502 F.2d at 180–81; *Nat'l Equip. Rental*, 287 F.2d at 45.

## I. THE FIRST-FILED RULE

Under the first-filed rule, when two courts have jurisdiction over the same case, the court in which the case was first filed should be the court to hear it except under special circumstances.<sup>12</sup> Because the first-filed rule intends to prevent duplicative litigation, it applies only where the actions before both courts involve the same or substantially similar parties and issues.<sup>13</sup> By ensuring that parties to a single controversy handle their dispute in one forum, the rule prevents two courts of equal rank from issuing conflicting rulings and promotes judicial comity.<sup>14</sup>

Further, the first-filed rule prevents the wasteful preclusion consequences that may arise from courts exercising concurrent jurisdiction.<sup>15</sup> “Preclusion” is a term used to group a variety of doctrines<sup>16</sup> which are intended to prevent parties from relitigating claims or issues which a court has already adjudicated.<sup>17</sup> Perhaps in response to the

12. See sources cited *supra* note 1.

13. See *Oleg Cassini, Inc. v. Serta, Inc.*, No. 11 Civ. 8751(PAE), 2012 WL 844284, at \*3 (S.D.N.Y. Mar. 13, 2012) (“For the rule to apply, the ‘claims, parties, and available relief’ must not ‘significantly differ between the actions.’ However, the issues need not be identical, and the named parties need not be entirely the same provided that they represent the same interests.” (citation omitted) (quoting *Byron v. Genovese Drug Stores, Inc.*, No. 10–CV–03313, 2011 WL 4962499, at \*3 (E.D.N.Y. Oct. 14, 2011))); *Preci-Dip, SA v. Tri-Star Elecs. Int’l, Inc.*, No. 08 C 4192, 2008 WL 5142401, at \*2 (N.D. Ill. Dec. 4, 2008); *eNom, Inc. v. Philbrick*, No. C08–1288RSL, 2008 WL 4933976, at \*2 (W.D. Wash. Nov. 17, 2008) (“[T]he ‘sameness’ requirement does not mandate that the two actions be identical, but is satisfied if they are ‘substantially similar.’” (quoting *Inherent.com v. Martindale–Hubbell*, 420 F. Supp. 2d 1093, 1102 (N.D. Cal. 2006))); *Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 958–60 (N.D. Cal. 2008) (holding first-filed rule applied where parties and claims were sufficiently similar).

14. See *W. Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728–29 (5th Cir. 1985) (“The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other’s affairs.”).

15. See 18 WRIGHT ET AL., *supra* note 1, § 4404 (“[A]s between actions pending at the same time, *res judicata* attaches to the first judgment regardless of the sequence in which the actions were commenced.”); *Proctor & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 500 (5th Cir. 2004) (“When two suits proceed simultaneously, as in this case, *res judicata* effect is given to the first judgment rendered. Maintaining such a litigation strategy almost assures that at some point one of the cases will become barred by a judgment in the other; the successful party will find that all its claims and defenses have merged into the judgment, while the unsuccessful party will find that its have been extinguished.” (citations omitted)).

16. See 18 WRIGHT ET AL., *supra* note 1, § 4402 (“[T]he broad ‘*res judicata*’ phrase refers to the distinctive effects of a judgment separately characterized as ‘claim preclusion’ and ‘issue preclusion.’”).

17. See Stewart E. Sterk & Kimberly J. Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139, 1147–48 (2011) (“Preclusion doctrine rests on a combination of efficiency and fairness concerns. First, precluding relitigation of previously decided issues conserves judicial resources. . . . [Moreover], from a fairness

withering criticism of its preclusion cases, the U.S. Supreme Court attempted in *Taylor v. Sturgell*<sup>18</sup> to simplify preclusion theory by condensing it into two categories: (1) claim preclusion; and (2) issue preclusion, which traditionally consisted of collateral estoppel and direct estoppel.<sup>19</sup> If two courts exercised jurisdiction over the same case, claim or issue preclusion may grant the first judgment on any question by either court preclusive effect in the court which had not yet reached the matter.<sup>20</sup> The time and resources parties spent in litigating the question would be wasted in the second court to rule on the matter because the judgment in the first court would preclude the second court from making an alternative decision.<sup>21</sup>

The first-filed rule not only helps to protect litigants from the expensive consequences of preclusion, but also saves them the costs of litigating whether preclusion applies. Determining preclusion's relevance can be complicated. Over time, the law of preclusion has become rife with disagreements over terminology.<sup>22</sup> For example, critics have harshly described collateral estoppel as "anything but predictable and easy to apply,"<sup>23</sup> "marred by a vexing interplay between the various individual rules,"<sup>24</sup> "commonly phrase[d] . . . in ambiguous terms that mandate meaningless exercises in verbal categorization,"<sup>25</sup> clouded by "uncertainty and confusion,"<sup>26</sup> "extremely unpredictable,"<sup>27</sup> "vague,"<sup>28</sup> "clumsy and disorderly,"<sup>29</sup> and beset by "too many rules . . . [which]

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perspective, preclusion protects a successful litigant from having to expend time and resources defending against duplicative litigation.").

18. 553 U.S. 880 (2008).

19. *Id.* at 892. "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "Issue preclusion, in contrast, bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Id.* (quoting *New Hampshire*, 532 U.S. at 748–49).

20. See *Proctor & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 500 (5th Cir. 2004).

21. See *id.*

22. See 18 WRIGHT ET AL., *supra* note 1, § 4402.

23. Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 42 (1995).

24. *Id.*

25. *Id.* at 43 (footnote omitted).

26. *Id.*

27. Brian Levine, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435, 439.

28. *Id.*

29. Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 876 (1987).

compete with and undermine each other.”<sup>30</sup> The meaning of *res judicata* has been similarly unclear.<sup>31</sup> Some scholars describe *res judicata* as having constituted what has developed into claim preclusion,<sup>32</sup> while others believe *res judicata* constituted both claim and issue preclusion.<sup>33</sup> While the Court attempted to simplify preclusion theory in *Taylor v. Sturgell*,<sup>34</sup> many attorneys, academics, and jurists continue to use the old terminology.<sup>35</sup> Confusion persists.<sup>36</sup> By curbing the likelihood of concurrent litigation, the first-filed rule saves parties the burden of litigating preclusion’s relevancy.

#### A. Factors Which Permit a Second-Filed Case to Take Precedence Over a First-Filed Action

The first-filed rule is an equitable rule with notable exceptions. In *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*,<sup>37</sup> the Supreme Court counseled that district courts must exercise discretion in determining where a case should proceed after it is filed in more than one court:

Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.<sup>38</sup>

Thus, first-filed rule decisions are currently subject to review under an abuse of discretion standard.<sup>39</sup> Although all U.S. Circuit Courts of Appeal acknowledge that certain circumstances justify departing from the rule,<sup>40</sup>

30. Levine, *supra* note 27, at 449–50.

31. See 18 WRIGHT ET AL., *supra* note 1, § 4402.

32. See *id.* (“For some years, a number of courts continued to limit the *res judicata* phrase so as to exclude the doctrines of issue preclusion or collateral estoppel. This usage is potentially confusing, and it is better to use *res judicata* in its broader sense to encompass both sets of doctrine.” (footnote omitted)).

33. See *id.*

34. See 553 U.S. 880, 892 (2008).

35. See 18 WRIGHT ET AL., *supra* note 1, § 4402.

36. See *id.*

37. 342 U.S. 180 (1952).

38. *Id.* at 183–84.

39. *Id.*

40. See *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2000) (“[T]he first filed action is generally preferred in a choice-of-venue decision.” (emphasis added) (quoting *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987))); *Thomas v. Apple-Metro, Inc.*, No. 14–CV–4120 (VEC), 2015 WL 505384, at \*2–3 (S.D.N.Y. Feb. 5, 2015) (“The first-filed rule is a

two circuits differ slightly from the others on how strongly they rely upon the first-filed rule in deciding where a case should proceed.<sup>41</sup> In all circuits except for the U.S. Court of Appeals for the Seventh Circuit and the U.S. Court of Appeals for the District of Columbia Circuit, the rule operates for all practical purposes as a presumption that a case should proceed where it was first filed.<sup>42</sup> Parties may defeat the presumption by showing the case should proceed elsewhere due to the same two factors courts normally consider when deciding if a change of venue is appropriate<sup>43</sup>: the interest of justice and the convenience of parties and witnesses.<sup>44</sup>

The Seventh Circuit and the District of Columbia Circuit do not treat the rule as a presumption which can be defeated by the interest of justice and the convenience of parties and witnesses. The Seventh Circuit has held the first-filed rule is a factor of equal weight with those two interests.<sup>45</sup> Similarly, the District of Columbia Circuit has held the rule should be balanced equally with equitable considerations, broadly speaking.<sup>46</sup>

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well-established Second Circuit doctrine . . . [It is] a presumption, rather than a rigid rule . . .”); *EEOC v. Univ. of Pa.*, 850 F.2d 969, 972 (3d Cir. 1988); *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 180 (4th Cir. 1974); *W. Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728–29 (5th Cir. 1985); *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007); *Research Automation, Inc. v. Schrader–Bridgeport Int’l, Inc.*, 626 F.3d 973, 980 (7th Cir. 2010); *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006–07 (8th Cir. 1993); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1164 (10th Cir. 1982); *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005); *Handy v. Shaw, Bransford, Veilleux, & Roth*, 325 F.3d 346, 350 (D.C. Cir. 2003).

41. See *Research Automation*, 626 F.3d at 982 (“[T]he factors to be weighed in a first-to-file analysis are the same factors that apply to the decision of whether transfer is appropriate under section 1404(a). . . . We have upheld the use of the same factors in prior cases without giving the first-filed case any supplementary weight, and we decline to augment the weight it receives here.”); *Handy*, 325 F.3d at 350 (“Although some courts make this determination by using the so-called ‘first-to-file’ rule, we have emphasized that the district court must balance equitable considerations rather than using ‘a mechanical ‘rule of thumb.’” (citations omitted) (first quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999); then quoting *Columbia Plaza Corp. v. Sec. Nat’l Bank*, 525 F.2d 620, 628 (D.C. Cir. 1975))).

42. See cases cited *supra* note 40.

43. See cases cited *supra* note 40; see also 15 WRIGHT ET AL., *supra* note 1, § 3854 (“Exceptions to the first-filed rule apply when the [28 U.S.C.] Section 1404(a) factors weigh in favor of giving priority to the second action. Thus, courts have found exceptions to the first-filed rule based on forum shopping, anticipatory conduct, or when other special circumstances justify giving priority to the second action.”).

44. See 28 U.S.C. § 1404(a) (2012).

45. See *Research Automation*, 626 F.3d at 982.

46. See *Handy*, 325 F.3d at 350.

### B. *How First-Filed Disputes Commonly Arise*

First-filing disputes generally arise under one of two circumstances. Under the first scenario, a Plaintiff simply files a case against the same or similar parties in more than one court.<sup>47</sup> Under the second scenario, a Plaintiff files a case in one court, and then, instead of filing counterclaims in the original suit, the Defendant chooses to file those claims as a new suit in another court.<sup>48</sup> Because the original Plaintiff filed his suit first, the original Plaintiff's suit would have priority under the first-filed rule. Unless the exceptions to the rule were relevant, the rule would suggest that the case proceed in the court where it was first filed—the court in which the original Plaintiff filed.

The distinctions that may exist between the two scenarios are not relevant for the purposes of this Note because in both cases, the tools the parties have to end the duplication of proceedings are identical<sup>49</sup> and raise the same conflict from which the current circuit split arose. Under either scenario, a party may use a motion to stay,<sup>50</sup> to transfer,<sup>51</sup> or to enjoin proceedings in another court<sup>52</sup> in an attempt to end whichever of the cases it would prefer to end.<sup>53</sup> For example, a party who would prefer the case to proceed in the court of first filing may take action either there or in the

47. See *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1200 (2d Cir. 1970).

48. See *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 179–80 (4th Cir. 1974).

49. In each case, the parties used motions to stay, to transfer, and to enjoin an opposing party from continuing to litigate in a forum which the movant did not prefer. See *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1003 (8th Cir. 1993); *Ellicott*, 502 F.2d at 179–80; *Nat'l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 44 (2d Cir. 1961).

50. The power to stay a case is an inherent power of the federal courts. See *PBM Nutritionals, LLC v. Dornoch Ltd.*, 667 F. Supp. 2d 621, 631 (E.D. Va. 2009) (“A motion to stay, though not expressly provided for by the Federal Rules of Civil Procedure, is a power inherent in the courts ‘under their general equity powers and in the efficient management of their dockets.’” (quoting *Williford v. Armstrong World Indus.*, 715 F.2d 124, 127 (4th Cir. 1983))).

51. A motion to transfer under these circumstances would be pursuant to 28 U.S.C. § 1404(a), and not § 1406(a), because either forum would constitute a permissible venue. See § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”); 14D WRIGHT ET AL., *supra* note 1, § 3827 (noting that although confusion amongst courts exists regarding distinctions between § 1404(a) and § 1406, “[a] prerequisite to invoking Section 1406(a) is that the venue chosen by the plaintiff is improper”).

52. Courts may issue injunctions pursuant to their equitable powers. See 11A WRIGHT ET AL., *supra* note 1, § 2942; see also *Nw. Airlines*, 989 F.2d at 1004 (“The discretionary power of the federal court in which the first-filed action is pending to enjoin the parties from proceeding with a later-filed action in another federal court is firmly established.”).

53. See *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202 (2d Cir. 1970) (“[W]e can see no reason why the end result should be different when the party seeking to preserve the primacy of the first court moves the second court to stay its hand rather than asking the first court to enjoin prosecution of the second case.”).

court of second filing. In the court of first filing, the party may make a motion for that court to enforce the first-filed rule by enjoining its adversary from continuing to litigate in the second court.<sup>54</sup> In the court of second filing, the party may move for the court to stay the case or transfer it for consolidation with the first-filed action.<sup>55</sup>

A party who would prefer for the action to proceed only in the second court would likely make similar maneuvers. He may move for the court of first filing to stay or transfer the case to the second court.<sup>56</sup> The party could also move the second court to enjoin the first-filing plaintiff from continuing to litigate the case in the first court.<sup>57</sup> If a party prefers that the case proceed in the second court, he would need to show the interest of justice and convenience of parties and witnesses justify an exception to the first-filed rule.<sup>58</sup> However, if the litigant were proceeding in the Seventh Circuit or District of Columbia Circuit, the litigant would need to show an exception was justified pursuant to those circuits' slightly different understandings of the rule and its exceptions.<sup>59</sup>

A party moving one court to stay, to transfer, or to enjoin a parallel proceeding often faces its adversary engaging in the same strategic behavior.<sup>60</sup> Litigation involving the first-filed rule can quickly escalate into a very expensive exercise in forum and judge shopping. For example, in *Hershey Foods Corp. v. Hershey Creamery Co.*,<sup>61</sup> a dispute over rights to the HERSHEY'S trademark, two companies engaged in what the Third Circuit called a "struggle for the perceived advantage of litigating rights in the HERSHEY'S trademark in their preferred federal courts."<sup>62</sup> Hershey Foods filed first in the U.S. District Court for the Middle District of Pennsylvania.<sup>63</sup> Hershey Creamery responded, not by filing counterclaims, but by filing its own suit in another district entirely, the Southern District of New York.<sup>64</sup> Hershey Foods moved in Pennsylvania for the court to enjoin the New York case.<sup>65</sup> The Pennsylvania court, in the Third Circuit, granted the injunction and blocked its Second Circuit

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54. See *Nw. Airlines*, 989 F.2d at 1004; *Semmes Motors*, 429 F.2d at 1200.

55. See *Nw. Airlines*, 989 F.2d at 1004; *Semmes Motors*, 429 F.2d at 1201.

56. See *Ellicott Mach. Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 (4th Cir. 1974).

57. See *Semmes Motors*, 429 F.2d at 1200.

58. See cases cited *supra* note 40.

59. See cases cited *supra* note 41.

60. See *Nw. Airlines*, 989 F.2d at 1003-04; *Ellicott*, 502 F.2d at 179-80; *Nat'l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 44 (2d Cir. 1961).

61. 945 F.2d 1272 (3d Cir. 1991).

62. *Id.* at 1272.

63. *Id.* at 1273.

64. *Id.*

65. *Id.*

sister court in New York from being able to hear the case.<sup>66</sup> Hershey Creamery sought interlocutory review from the Third Circuit of the Pennsylvania court's injunction.<sup>67</sup> A seemingly exasperated Third Circuit called the case a "procedural nightmare"<sup>68</sup> and sidestepped the question dividing the circuit courts by holding it lacked appellate jurisdiction to review the injunction in the first place.<sup>69</sup>

## II. THE CIRCUIT SPLIT

U.S. Circuit Courts of Appeal disagree on whether a court of first filing may enjoin a party from continuing to litigate a claim in another court if the other court has already held that venue is proper in its forum in light of the interest of justice and the convenience of parties and witnesses, the exceptions to the first-filed rule.<sup>70</sup> The U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Eighth Circuit have held courts of first filing may enjoin a party from litigating in a court of second filing, even after the second court previously declined to stay the case or transfer it to the first court.<sup>71</sup> The U.S. Court of Appeals for the Fourth Circuit, however, has held that district courts abuse their discretion by enjoining a case from a proceeding before a coordinate federal court which had already ruled that a case was properly before it.<sup>72</sup>

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66. *Id.*

67. *Id.*

68. *Id.*

69. Whether an injunction a court grants to enforce the first-filed rule constitutes an appealable injunction under 28 U.S.C. § 1292(a)(1) is another question on which there is a circuit split. While the Third Circuit has held it lacks appellate jurisdiction to review these injunctions, the Second, Fourth, Seventh, and Eighth Circuits have held they do have jurisdiction. *Compare id.* at 1276–79 (“At this juncture, we intimate no view of the propriety of the district court’s order enjoining Hershey Creamery from proceeding in the Southern District of New York. . . . Because the Middle District of Pennsylvania’s order does not grant part of the relief requested by Hershey Foods, it does not qualify as an appealable ‘injunction’ . . .”), with *Research Automation, Inc. v. Schrader–Bridgeport Int’l*, 626 F.3d 973, 976 (7th Cir. 2010) (“Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over the appeal of the district court’s order denying Research Automation’s motion for an injunction.”), *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1003 (8th Cir. 1993) (exercising jurisdiction over an appeal of an injunction issued to enforce the first-filed rule), and *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 180 n.1 (4th Cir. 1974) (“Jurisdiction of the present appeal is afforded under 28 U.S.C. § 1292(a) (1).”).

70. *See supra* note 43.

71. *See Nw. Airlines*, 989 F.2d at 1003–04, 1007; *Nat’l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 44–46 (2d Cir. 1961).

72. *See Ellicott*, 502 F.2d at 181–82.

### A. *The Second Circuit*

In *National Equipment Rental, Ltd. v. Fowler*,<sup>73</sup> the Second Circuit upheld a district court's ability to enjoin a case in a peer court which had already held the case should proceed before it.<sup>74</sup> National Equipment sued A.L. Fowler and other defendants in the U.S. District Court for the Eastern District of New York after the defendants allegedly defaulted on a contract.<sup>75</sup> After answering the complaint and filing counterclaims in New York, the Defendants sued National Equipment in the U.S. District Court for the Northern District of Alabama.<sup>76</sup> They alleged National Equipment breached the same contract which was the subject of National Equipment's case in New York.<sup>77</sup> National moved for the Alabama court to stay or transfer the case to New York, the forum of first filing.<sup>78</sup> The Alabama court denied the motion.<sup>79</sup> National then moved the New York court to enjoin the defendants in that court (the plaintiffs in Alabama) from continuing to litigate in Alabama.<sup>80</sup> National also asked the New York court to transfer the Alabama action to New York.<sup>81</sup> The court granted the motion and the defendants appealed.<sup>82</sup>

The Second Circuit held the New York court lacked the ability to transfer another court's case to itself.<sup>83</sup> It also held the injunction was a proper enforcement of the first-filed rule.<sup>84</sup> Chief Judge Joseph Lumbard dissented in part.<sup>85</sup> He agreed the transfer was improper<sup>86</sup> but argued the injunction was inappropriate as well:

We are all agreed that a district court may protect its own jurisdiction by enjoining parties from subsequently litigating the same controversy before another district court. . . .

In this case, however, the issue . . . had first been tested by National in the Alabama district court. . . .

. . .

The technical rules controlling the application of the

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73. 287 F.2d 43 (2d Cir. 1961).

74. *Id.* at 45–46.

75. *Id.* at 44.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 46.

84. *Id.* at 45–47.

85. *Id.* at 47–49 (Lumbard, C.J., concurring in part and dissenting in part).

86. *Id.* at 49.

doctrine of *res judicata* may indeed prevent it from applying here since the Alabama order was merely interlocutory, but the principles supporting the rule are surely applicable . . . . National chose to present to the Alabama court its contention that the entire action be concluded in the Eastern District of New York. It then had the opportunity to urge that court to stay its own proceeding because of the priority-of-action rule and other considerations. There is no basis in the record for presuming that the court in Alabama did not weigh all these elements . . . . What the majority affirms, therefore, is a procedure which grants the plaintiff two federal forums in which to present the very same contentions addressed to the court's discretion. If he prevails in either of the two, he is given the relief he desires.

Not only is such double litigation unfair to the party forced to rebut the same arguments in two proceedings before different courts, but it presents an opportunity for unseemly conflict between coordinate federal courts and causes wasteful delay in judicial administration. . . . It was improper for the New York court to consider the same issue and decide that the balance of convenience favored the New York proceeding.<sup>87</sup>

### B. *The Fourth Circuit*

The Fourth Circuit confronted the question in *Ellicott Machine Corp. v. Modern Welding Co.*<sup>88</sup> The case is another example of how these disputes can evolve into extraordinarily complex affairs. Ellicott sued

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87. *Id.* *Res judicata* does not apply to judgments which are not final and on the merits of a party's claims. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("There is little to be added to the doctrine of *res judicata* as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). Chief Judge Lumbard is likely suggesting that the district court's ruling on National's 28 U.S.C. § 1404(a) transfer motion was not a final judgment on the merits of a claim in the underlying case. A judgment on venue, while important to the case's outcome, is not a final judgment on a claim's merits. National's motion did not speak to the law or facts of the contract dispute actually at issue in the case. *See Am. Can Co. v. Mansukhani*, 814 F.2d 421, 424 (7th Cir. 1987) ("Res judicata has no bearing . . . because an element required to invoke *res judicata* is lacking—there is no final judgment on the merits of the case. . . . Res judicata has no application to interlocutory rulings rendered during the course of the same lawsuit."); *see also Hoffman v. Blaski*, 363 U.S. 335, 340 n.9 (1960) ("Several reasons why principles of *res judicata* do not apply may be stated in a few sentences. The orders of the Texas and Illinois District Courts on the respective motions to transfer and to remand . . . were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction.").

88. 502 F.2d 178 (4th Cir. 1974).

Modern in the U.S. District Court for the District of Maryland.<sup>89</sup> Modern responded by filing claims against Ellicott in a Kentucky state court.<sup>90</sup> Modern's claims in Kentucky and Ellicott's Maryland claims involved the same case or controversy.<sup>91</sup> Ellicott removed Modern's second-filed Kentucky state suit to the U.S. District Court for the Western District of Kentucky and moved for the Western District either to quash service of process or transfer the case to the first-filed court, the U.S. District Court for the District of Maryland.<sup>92</sup> The court denied Ellicott's motion.<sup>93</sup> Modern then moved for the Maryland court of first filing to dismiss the action, quash service of process, or transfer the case to the Western District of Kentucky.<sup>94</sup> Ellicott moved for the Maryland court to enjoin Modern from continuing to litigate its second-filed action in Kentucky.<sup>95</sup> The Maryland court denied Modern's motions and granted Ellicott's motion to enjoin Modern.<sup>96</sup> Modern appealed the injunction.<sup>97</sup>

The Fourth Circuit split with the Second Circuit.<sup>98</sup> Citing Chief Judge Lumbard's dissent in *National Equipment Rental*, the court held the injunction was an abuse of discretion in light of the interests of finality, judicial comity, and fairness towards litigants.<sup>99</sup> A party seeking a court to stay or transfer a case is bound by that court's determination that venue under the first-filed rule is appropriate in its forum.<sup>100</sup> The Fourth Circuit said it was disrespectful for a court to enjoin a party from litigating a case in a coordinate court which had already ruled the case should be litigated before it.<sup>101</sup> Thus, because the Kentucky court previously denied the motion to transfer the case to Maryland, "respect for the judgment of coordinate federal courts" required the Maryland court to allow Modern to litigate in Kentucky.<sup>102</sup>

The court also held that issuing an injunction in these circumstances would waste judicial and litigant resources.<sup>103</sup> If a party were able to litigate where it wished by raising the question of venue in multiple

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89. *Id.* at 179.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 180.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 181–82.

99. *Id.*

100. *Id.* at 182.

101. *Id.* at 181–82.

102. *Id.*

103. *Id.*

courts, opposing parties would be dragged into spending time and money relitigating the question.<sup>104</sup> In addition, a federal court would have to duplicate the work of a coordinate federal court by reevaluating how the first-filed rule, justice, and the convenience of parties and witnesses apply to the controversy before both courts.<sup>105</sup>

Importantly, the Fourth Circuit also felt 28 U.S.C. § 1291, a federal statute governing appeals, prevents district courts from issuing injunctions under these circumstances.<sup>106</sup> While the court held it may exercise jurisdiction over an appeal from the granting of the injunction,<sup>107</sup> it recognized that 28 U.S.C. § 1291 prohibits parties from appealing the granting or denying of a motion to stay or transfer under 28 U.S.C. § 1404(a).<sup>108</sup> The court felt Ellicott had violated 28 U.S.C. § 1291 by effectively conducting an inter-district appeal:

Ellicott asked the district judge in Kentucky to exercise his discretion in granting or denying a motion for change of venue under 28 U.S.C. § 1404(a). It is well settled that the decision of a district judge on a motion for change of venue under section 1404(a) is not appealable as a final judgment.

. . .

What Ellicott has effectively done is appeal from one district judge to another. Worse, because relief was obtained by injunction, an otherwise unappealable decision on venue has now been brought up on appeal. In ruling against Modern's motion for transfer to the Western District of Kentucky, Judge Miller in effect reassessed the convenience factors which had already been considered, albeit impliedly, by Judge Gordon in his November 12 order denying Ellicott's motion to transfer to Maryland. The first-to-file principle relied upon by Judge Miller is a rule of sound judicial administration, but it must yield in the face of the historic policy of the federal courts, expressed in 28 U.S.C. § 1291, that appeal will lie only from "final decisions of the district courts" and then only in the courts of appeal.<sup>109</sup>

Thus, the Fourth Circuit agreed with the dissent in *National Equipment Rental* that a party which has sought a ruling from a court on

104. *Id.*

105. *Id.*

106. *See id.* at 181–82.

107. *Id.* at 180 n.1 ("Jurisdiction of the present appeal is afforded under 28 U.S.C. § 1292(a)(1).").

108. *Id.* at 180–81.

109. *Id.*

a motion to stay or transfer must abide by that court's decision regarding whether the case should remain active in its forum.<sup>110</sup> The court, however, expanded upon Chief Judge Lumbard's Second Circuit dissent by holding that granting the injunction would violate a federal statute.<sup>111</sup>

### C. *The Eighth Circuit*

In *Northwest Airlines, Inc. v. American Airlines, Inc.*,<sup>112</sup> the Eighth Circuit criticized the Fourth Circuit's reasoning in *Ellicott* and sided with the Second Circuit.<sup>113</sup> In *Northwest Airlines*, American Airlines' general counsel wrote a letter to the general counsel of Northwest Airlines complaining of Northwest's recent poaching of American's employees.<sup>114</sup> American requested Northwest cease hiring American Airlines workers and said American had strong grounds to sue Northwest for its behavior.<sup>115</sup> After sending a reply by mail, Northwest filed suit against American in the U.S. District Court for the District of Minnesota.<sup>116</sup> Northwest sought a declaratory judgment that its hiring of the employees was legal.<sup>117</sup> American then sought injunctive relief from Northwest's hiring practices and damages in the U.S. District Court for the Northern District of Texas.<sup>118</sup> American moved in the Minnesota court, the court of first filing, for the case to be dismissed or transferred to Texas.<sup>119</sup> The Minnesota court rejected the motion.<sup>120</sup> Northwest moved for the Texas court to stay the case or transfer it to Minnesota.<sup>121</sup> The Texas court rejected the motion.<sup>122</sup> Northwest then filed a motion in Minnesota to enjoin American from continuing to litigate American's second-filed case in Texas.<sup>123</sup> The Minnesota court granted the injunction and American appealed.<sup>124</sup>

The Eighth Circuit upheld the injunction.<sup>125</sup> Like the Second Circuit in *National Equipment Rental*, the court concluded it was proper for the

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110. *Id.*

111. *Id.* at 180–82.

112. 989 F.2d 1002 (8th Cir. 1993).

113. *Id.* at 1005–07.

114. *Id.* at 1003.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1003–04.

119. *Id.* at 1004.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1007.

Minnesota court, the court of first filing, to issue the injunction enforcing the first-filed rule.<sup>126</sup> In justifying its strict adherence to the rule, the court discussed the waste of resources which duplicative litigation would entail if allowed to continue.<sup>127</sup>

American had argued Northwest's motion for the injunction circumvented 28 U.S.C. § 1291 by constituting an inter-district appeal<sup>128</sup> and cited the Fourth Circuit's opinion in *Ellicott* for support.<sup>129</sup> Further, American claimed Northwest's appeal was before the wrong court.<sup>130</sup> By appealing, for all practical purposes, the Texas court's denial of the stay or transfer motion to the Minnesota district court, Northwest managed to get the Texas opinion before the Eighth Circuit instead of the U.S. Court of Appeals for the Fifth Circuit, the U.S. circuit court which takes appeals from federal district courts in Texas.<sup>131</sup>

The Eighth Circuit aligned itself with the Second Circuit. The court rejected the Fourth Circuit's view in *Ellicott* that an injunction in these circumstances constitutes a violation of 28 U.S.C. § 1291.<sup>132</sup> The court took a literal approach to what constitutes an appeal and concluded the Texas court's ruling on the propriety of venue was never appealed.<sup>133</sup> Although Northwest asked the Minnesota court to enjoin the Texas case after having asked the Texas court to stay the case or transfer it to Minnesota,<sup>134</sup> Northwest's injunction motion did not constitute an appeal because the Minnesota judge never actually reviewed the Texas court's earlier opinion.<sup>135</sup> Further, the Eighth Circuit suggested the Fourth Circuit inadequately valued the first-filed rule and that its approach would undermine judicial economy and waste litigant resources.<sup>136</sup>

Thus, while the Second and Eighth Circuits upheld district court decisions to enjoin the continued litigation of a case in a peer court which had itself previously held venue before it was proper, the Fourth Circuit has overturned such decisions as an abuse of discretion.

### III. THE SOLUTION: PRECLUSION

The ideal solution to these inter-district disagreements would not only frustrate efforts to relitigate the first-filed rule, but prevent merits-related

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126. *Id.*

127. *Id.* at 1006–07.

128. *Id.* at 1005.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1006.

133. *See id.* at 1005–06.

134. *Id.* at 1004.

135. *Id.* at 1005–06.

136. *Id.* at 1006–07.

litigation from proceeding before multiple courts simultaneously. Granting preclusive effect to the first decision applying the first-filed rule would achieve both these aims. Future circuits to rule on this question should give this proposal serious consideration. The Second, Fourth, and Eighth Circuits have embraced solutions that only achieve one of these objectives or the other.

The Second Circuit and Eighth Circuit believe they are preventing duplicative litigation by allowing a district court to enjoin a party from continuing to litigate in another court, even if that other court has already ruled the case was appropriately before it.<sup>137</sup> In a limited sense, these circuits are correct. Such an injunction ensures that only one of the forums would decide the case's merits. These circuits are misguided in a broader sense, however. By upholding district court decisions that grant such injunctions, the circuits permit parties to relitigate the first-filed rule in federal district courts across the country.<sup>138</sup> Thus, the opinions in *National Equipment Rental* and *Northwest Airlines* do not solve the fundamental duplication problem. To the contrary, they foster disputes over the first-filed rule and waste judicial resources by allowing a party which has obtained a decision not to its liking to seek an alternative decision from another judge in another forum.<sup>139</sup> The decisions permit the relitigation of a single question of law: which of two disputes, related to the same common nucleus of operative facts, should take priority under the first-filed rule? From this perspective, permitting the relitigation of the first-filed rule constitutes acceptance of duplicative litigation.

On the other hand, the risk of embracing the Fourth Circuit's approach is that allowing two cases to go forward simultaneously creates the type of duplicative litigation the Second and Eighth Circuits feared.<sup>140</sup> Arguably, allowing two cases to proceed simultaneously creates an even greater risk of wasting judicial and litigant resources than allowing the first-filed rule to be relitigated. At least when parties relitigate the first-filed rule, they are relitigating only one question of law and not the entire array of questions which may arise in a dispute.

Granting preclusive effect to the first decision of a court regarding which of two concurrent cases should proceed would best prevent duplicative litigation.<sup>141</sup> If the dilemma confronting federal courts is how

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137. *Id.*

138. *See* *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178, 180–81 (4th Cir. 1974).

139. *See Nw. Airlines*, 989 F.2d at 1006–07; *Nat'l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 46–47 (2d Cir. 1961).

140. *See Nw. Airlines*, 989 F.2d at 1006.

141. *See Buckley*, *supra* note 29, at 875 (“To guard against needless duplicative litigation, courts have developed certain finality doctrines. *Res judicata* prevents interested parties from relitigating claims or causes of action that previously had resulted in a final judgment. Collateral estoppel prevents those parties from relitigating issues, decided in a first suit, even though the second suit may differ from the first.”).

to prevent relitigation of the first-filed rule without allowing duplicative litigation of the same case in multiple fora, then preclusion doctrine is the most effective answer. Courts should grant preclusive effect to the decision of the first court to rule on where a case should proceed under the first-filed rule. If a ruling applying the first-filed rule had preclusive effect, the second court to rule on where a case should proceed under it would have to honor the prior court's decision. Because the second court to rule would be bound by the decision of the first court, the second court would need to stay or transfer the action to the first court if the first court had ruled that the case should proceed in its forum. A party would be able to appeal a judge's failure to stay or transfer the case after another court had previously ruled on where the case should proceed.<sup>142</sup> Such a party would also be able to seek a writ of mandamus from the appropriate U.S. Court of Appeals.<sup>143</sup>

Resolving the dilemma facing federal courts by using the preclusion doctrine requires identifying which theory of preclusion should apply. While Chief Judge Lumbard, in his *National Equipment Rental* dissent, recognized the appeal of claim preclusion,<sup>144</sup> he also understood it could

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142. While the granting or denial of an injunction may be appealed pursuant to 28 U.S.C. § 1292(a)(1), the granting or the denial of a motion to stay or transfer constitutes an interlocutory order which is usually unappealable. However, § 1292(b) does allow such an interlocutory appeal with the permission of the U.S. District Court and the appropriate U.S. Circuit Court of Appeals. See 28 U.S.C. § 1292(b) (2012); 16 WRIGHT ET AL., *supra* note 1, § 3920 (“Most of the opportunities for interlocutory review respond to concerns going beyond the danger of consequences outside the conduct of the litigation itself, although such consequences may be considered as well. Immediately, these concerns reflect the danger that an erroneous ruling may harm the continuing conduct of the suit. An erroneous ruling may mean . . . that subsequent trial-court proceedings must be duplicated later . . .”). U.S. Circuit Courts of Appeal generally review *de novo* the failure to grant preclusive effect to a ruling entitled to issue preclusion. See *Robinette v. Jones*, 476 F.3d 585, 588–89 (8th Cir. 2007) (“The application of collateral estoppel is a question of law that we also review *de novo*. The term ‘collateral estoppel’ comprehends a variety of more specific doctrines including issue preclusion, the estoppel applicable here.” (citation omitted)); *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999) (“Whether collateral estoppel, which is more accurately designated ‘issue preclusion,’ is available to a litigant is a question of law that we review *de novo*.”). Ideally, U.S. Circuit Courts of Appeal would authorize interlocutory appeals under § 1292(b) or grant a writ of mandamus under these circumstances.

143. See 28 U.S.C. § 1651; 16 WRIGHT ET AL., *supra* note 1, § 3932 (“Interlocutory review of district court orders is at times accomplished by the courts of appeals—or perhaps even a single circuit judge—through the extraordinary writ procedure authorized by 28 U.S.C.[] § 1651(a), the ‘All Writs Act.’ . . . Ordinarily courts resort to the writs of mandamus or prohibition, or to writs or acts in the nature of those writs, but in rare circumstances some other form may be employed. . . . The most common traditional statement is that the extraordinary writs are available to a court of appeals to prevent a district court from acting beyond its jurisdiction, or to compel it to take action that it lacks power to withhold.” (footnote omitted)).

144. Chief Judge Lumbard used the term *res judicata*. See *Nat'l Equip. Rental*, 287 F.2d at 48 (Lumbard, C.J., concurring in part and dissenting in part).

not technically apply.<sup>145</sup> Claim preclusion grants preclusive effect only to a final judgment on the merits.<sup>146</sup> A ruling on where a case should proceed under the first-filed rule does not involve a question of merit regarding the underlying grievances of the parties to a case.<sup>147</sup> Thus, such a ruling would constitute an interlocutory ruling to which claim preclusion could not apply.<sup>148</sup>

In recent decades, however, federal courts have eagerly embraced and expanded<sup>149</sup> the doctrine of issue preclusion.<sup>150</sup> Like the first-filed rule, issue preclusion prevents duplicative work for courts and litigants and promotes efficiency in the judicial process.<sup>151</sup> Courts have expanded the

145. *See id.* at 48 (“The technical rules controlling the application of the doctrine of *res judicata* may indeed prevent it from applying here since the Alabama order was merely interlocutory, but the principles supporting the rule are surely applicable . . .”).

146. *See* 18A WRIGHT ET AL., *supra* note 1, § 4427.

147. *See supra* note 87.

148. *See supra* note 87.

149. Issue preclusion constitutes what previously consisted of collateral and direct estoppel. Under the old formulations, only direct estoppel would apply to the first-filed rule because both the first and second filed cases involve the same controversy. Collateral estoppel applies when a party seeks to relitigate an issue resolved in a prior action. When an issue is resolved in a case and a party estops another party from relitigating that same issue in the exact same case, direct estoppel is the correct way to describe the estoppel. *See In re Duncan*, 713 F.2d 538, 541 (9th Cir. 1983) (“The doctrine of issue preclusion forecloses relitigation of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment in a prior action between the parties. The doctrine encompasses both the principles of collateral and direct estoppel. Issue preclusion in a second action on the same claim is designated direct estoppel, while issue preclusion in a second action brought on a different claim is termed collateral estoppel.” (citation omitted)); 18 WRIGHT ET AL., *supra* note 1, § 4416 (“Issue preclusion, moreover, is available whether or not the second action involves a new claim or cause of action. If the second action involves the same claim or cause of action as the first, issue preclusion may be called direct estoppel. If a new claim or cause of action is involved, issue preclusion is commonly called collateral estoppel.” (footnote omitted)).

150. *Levine*, *supra* note 27, at 440–41 (“The courts have gradually expanded the doctrine of collateral estoppel, however, to reach beyond court room litigation; for example, courts have examined the collateral estoppel effect of findings made in administrative hearings, arbitration proceedings, criminal sentencing hearings, partial summary judgment rulings, and default judgments.” (footnotes omitted)); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (abandoning the prohibition on the offensive use of collateral estoppel).

151. *See Freedom Mortg. Corp. v. Irwin Fin. Corp.*, No. 08–146 GMS, 2009 WL 763899, at \*4 (D. Del. Mar. 23, 2009) (“[The first-filed rule’s] purpose is to avoid differing outcomes on the same issue by two sister courts, thereby minimizing duplicative litigation in different fora, and saving judicial resources.”); *Buckley*, *supra* note 29, at 880 (“Numerous policy interests have grown up around collateral estoppel. Its present purposes include relieving parties of multiple and vexatious litigation, conserving judicial resources, and preventing inconsistent decisions. Further contributing to the doctrine’s outline is the recent concern with federal litigation for the public benefit.” (footnotes omitted)); *Richardson*, *supra* note 23, at 45–46 (“The established common-law doctrine of collateral estoppel serves several purposes. Specifically, collateral estoppel is intended to accomplish the following: conserve judicial resources, preserve the ‘integrity of the

availability of issue preclusion<sup>152</sup> because it is an effective tool to prevent duplicative litigation in a litigious culture and an era of expanding dockets.<sup>153</sup>

Issue preclusion should apply to a federal court's decision, under the first-filed rule, to deny a motion to stay or transfer a case. Courts deciding how to rule on this question should depart from the views of the Second, Eighth, and Fourth Circuits and stake out new ground by holding that issue preclusion applies. All the requirements of issue preclusion are satisfied here. A ruling applying the first-filed rule constitutes a resolution of "an issue of fact or law actually litigated": which of two suits regarding the same controversy should be litigated.<sup>154</sup> Further, a ruling on its application constitutes "a valid court determination essential to the . . . judgment."<sup>155</sup> Is it not essential to a judgment that a case is properly before the court to have entered judgment in the first place?<sup>156</sup> Importantly, while claim preclusion requires a final adjudication on the merits of a question,<sup>157</sup> issue preclusion can apply to the resolution of purely interlocutory matters.<sup>158</sup> For example, the Second Circuit has

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court' by preventing inconsistent resolution of issues, promote 'finality of judgments,' protect defendants from repetitive litigation, ensure that a winning 'party should not have to fight anew a battle it has already won,' and promote 'conclusive resolution of disputes.'" (footnotes omitted)).

152. See sources cited *supra* note 150.

153. See sources cited *supra* note 151; see also Levine, *supra* note 27, at 441 ("Several factors have driven the expansion of collateral estoppel beyond traditional judicial determinations. First, the adjudicative authority, acceptance, and use of administrative hearings, arbitration, and other less formal litigation processes have all expanded. Second, the procedural regularity of less formal adjudicative processes has increased. Finally, in light of increasingly crowded dockets, judicial efficiency has become a higher priority than it was in the past." (footnotes omitted)).

154. See Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001)).

155. *Id.*

156. Courts regularly grant res judicata effect to decisions on a court's jurisdiction. See 18A WRIGHT ET AL., *supra* note 1, § 4430 ("If a defendant appears to challenge personal jurisdiction, disposition of the challenge is directly binding as a matter of res judicata. A defendant who appears to litigate the merits without properly preserving an objection to personal jurisdiction forfeits the right to raise the objection in the initial proceeding and is bound by the resulting judgment."). While decisions on the first-filed rule do not technically resolve questions surrounding a court's jurisdiction, they do similarly speak to the legitimacy of the proceeding and thus are directly analogous.

157. See *id.* § 4434 ("However far traditional views of finality may be relaxed in dealing with issue preclusion, the question remains whether any comparable developments will occur with respect to claim preclusion. It is often assumed that traditional views will persist as to claim preclusion.").

158. See *id.* ("Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings . . . . There may be settings short of trial on the merits in which preclusion is warranted as to fully contested matters that have been decided beyond apparent reconsideration, notwithstanding the fact that appellate review will be available only at some time in the future.").

granted preclusive effect to interlocutory decisions.<sup>159</sup> Thus, issue preclusion should apply to the interlocutory denial of a motion to stay or transfer under the first-filed rule.

While a court may feasibly apply the law of the case theory to resolve this question, issue preclusion constitutes a better solution because it is not discretionary. Law of the case theory suggests that courts abstain from overturning prior decisions reached during the same case.<sup>160</sup> It is a theory which aims to promote judicial consistency.<sup>161</sup> The discretionary nature of the law of the case theory<sup>162</sup> makes it a poor candidate for a workable solution. These inter-district conflicts arise precisely because there is too much judicial discretion.<sup>163</sup> If judges exercising their discretion to overrule or outright ignore the decisions of their peers constitutes the

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159. See *Lummas Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (“Whether a judgment, not ‘final’ in the sense of 28 U.S.C. § 1291, ought nevertheless be considered ‘final’ in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. ‘Finality’ in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.” (citations omitted)).

160. See 18B WRIGHT ET AL., *supra* note 1, § 4478; Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 342 (2011) (“[T]he law-of-the-case doctrine, intended to foster judicial economy, provides that a court (and any coordinate or lower courts as well) will normally adhere to a ruling it has declared in a particular action when a party later raises the point again in the same action. But this doctrine applies very flexibly, so that the rendering court and coordinate courts can revisit the ruling if convinced it was wrong or some other reason counsels reconsideration.”).

161. 18B WRIGHT ET AL., *supra* note 1, § 4478 (“Law-of-the-case doctrine seems to have exploded during the closing decades of the Twentieth Century. The seeming explosion, however, is more an effusion of applications than a dramatic development of theory. The basically simple principle of disciplined self-consistency that underlies the doctrine continues to establish a firm core. The courts are understandably reluctant to reopen a ruling once made. This general reluctance is augmented by comity concerns when one judge or court is asked to reconsider the ruling of a different judge or court. Reluctance, however, does not equal lack of authority. The constraint is a matter of discretion. So long as the same case remains alive, there is power to alter or revoke earlier rulings. . . . Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” (footnote omitted)).

162. See Clermont, *supra* note 160, at 342 (“[The law of the case theory’s] constraint, however, is never really confining. Accordingly, it will not always apply.”).

163. See *Nat’l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 48 (2d Cir. 1961) (Lumbard, C.J., concurring in part and dissenting in part) (“There is no basis in the record for presuming that the court in Alabama did not weigh all these elements in passing on the motions, which called for an exercise of the court’s discretion. Nor is there any showing made in this court or below that such discretion was abused, even assuming *arguendo* that it would be proper for this court to consider such a claim. What the majority affirms, therefore, is a procedure which grants the plaintiff two federal forums in which to present the very same contentions addressed to the court’s discretion. If he prevails in either of the two, he is given the relief he desires.”).

problem, a doctrine emphasizing judicial discretion is not the answer.

Issue preclusion is preferable because it would not permit a U.S. District Court judge to overturn or ignore the decision of a peer judge in a court of coordinate rank. Unlike Chief Judge Lumbard in his dissenting opinion in *National Equipment Rental*,<sup>164</sup> the Fourth Circuit in *Ellicott* did not explicitly discuss claim preclusion, issue preclusion, or any other possible means of resolving the problems which inter-district disagreements over the application of the first-filed rule raise.<sup>165</sup> The court appeared very troubled by whether these cases violate federal law by constituting inter-district appeals in violation of 28 U.S.C. § 1292<sup>166</sup> and did not clarify the theoretical grounds for its decision. While the court noted that “a party seeking the exercise of a district court’s discretion is ordinarily bound by that court’s determination,”<sup>167</sup> it nevertheless reviewed the lower court decision on an abuse of discretion standard that would be inapplicable if issue preclusion applied.<sup>168</sup>

The most serious flaw in the Fourth Circuit’s *Ellicott* opinion is that it reviews the appeal on an abuse of discretion standard.<sup>169</sup> This assumes the judge had discretion. Future courts which consider this question should take the Fourth Circuit’s analysis a step further and hold that decisions regarding whether preclusion applies to a prior court’s application of the first-filed rule is entitled to de novo review.<sup>170</sup> With a major exception which is not relevant here,<sup>171</sup> issue preclusion is reviewed de novo<sup>172</sup> and not under an abuse of discretion standard. Thus, if judgments applying the first-filed rule are entitled to preclusive effect, judges would lack the discretion which has led to the lack of inter-judicial comity at the heart of this split among the U.S. Circuit Courts of Appeal.

Granting preclusive effect to a judgment applying the first-filed rule would not contradict Supreme Court precedent. When the *Kerotest*

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164. See *supra* note 163.

165. See *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178 (4th Cir. 1974).

166. See *id.* at 181.

167. *Id.* at 182.

168. See *id.* at 181 n.4.

169. See *id.*

170. WRIGHT ET AL., *supra* note 1, § 4416 (“It should be clear, however, that ordinarily the rules of issue preclusion have not turned on any open-ended discretion, and that any movement toward rules of discretion should depend on the specific dilemmas of specific preclusion problems. The need for clear and reliable preclusion rules must defeat any significant element of discretion outside the distinctively risky use of nonmutual preclusion.” (footnote omitted)).

171. See *Resolution Tr. Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999) (“With regard to the use of offensive non-mutual collateral estoppel in the federal courts, the Supreme Court has indicated that it is not precluded, but that trial courts should have broad discretion to determine when it should be applied.”).

172. See cases cited *supra* note 40.

*Manufacturing Co. v. C-O-Two Fire Equipment Co.*<sup>173</sup> Court held decisions applying the first-filed rule required “an ample degree of discretion,” the Court was discussing the appropriate standard for ruling on a motion to stay or transfer under the rule.<sup>174</sup> *Kerotest* involved a single district court entering a temporary ninety-day stay order and then entering an injunction after the ninety days had elapsed.<sup>175</sup> The case did not involve one district court overturning a peer court’s holding that a case should continue before the peer court. The Court neither decided whether a court should be bound by a peer court’s ruling on venue nor articulated the appropriate standard of review with which a U.S. Circuit Court of Appeals would evaluate the second judge’s refusal to honor the first judge’s decision.<sup>176</sup> The Supreme Court has yet to resolve this circuit split or decide whether issue preclusion applies after a court has entered a judgment of this nature.

#### CONCLUSION

All levels of the federal court system should embrace issue preclusion as the best way to resolve district court disagreements about venue. Unlike the Second and Eighth Circuits’ approach of simply allowing the injunctions, issue preclusion would prohibit district courts from overturning each other and stop litigants from using venue disputes to force adversaries to relitigate the same question across the country. Unlike the Fourth Circuit’s approach of calling the injunctions an abuse of discretion and allowing the case to proceed in two courts, the preclusion solution would ensure that the case proceeds in one forum. Because the preclusion solution best combats the threat of duplicative litigation, courts should embrace it.

If district court disagreements over venue continue to reach the U.S. Circuit Courts of Appeal, the circuits should reverse district courts which issue the injunction and hold they should have granted preclusive effect to their peers’ earlier decisions. However, even if those U.S. Circuit Courts of Appeal which have yet to confront this question embrace the preclusion solution, a circuit split will remain unless the Second, Fourth, and Eighth Circuits overturn their opinions in *National Equipment Rental*, *Ellicott*, and *Northwest Airlines*, respectively. If this question should arise in litigation before the Supreme Court, the Court should prevent duplicative litigation from becoming a tool which wealthy litigants use to bludgeon less wealthy adversaries into settlement. The preclusion solution would best achieve that objective.

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173. 342 U.S. 180 (1952).

174. *Id.* at 182–83.

175. *Id.* at 181–83.

176. *Id.* at 182–83.

