SUPREME COURT OF THE UNITED STATES

No. 96–653

KENNETH LEE BAKER AND STEVEN ROBERT BAKER, BY HIS NEXT FRIEND, MELISSA THOMAS, PETITIONERS *v.* GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 13, 1998]

JUSTICE KENNEDY, with whom JUSTICES O'CONNOR and THOMAS join, concurring in the judgment.

I concur in the judgment. In my view the case is controlled by well-settled full faith and credit principles which render the majority's extended analysis unnecessary and, with all due respect, problematic in some degree. This separate opinion explains my approach.

I

The majority, of course, is correct to hold that when a judgment is presented to the courts of a second State it may not be denied enforcement based upon some disagreement with the laws of the State of rendition. Full faith and credit forbids the second State from questioning a judgment on these grounds. There can be little doubt of this proposition. We have often recognized the second State's obligation to give effect to another State's judgments even when the law underlying those judgments contravenes the public policy of the second State. See, *e.g.*, *Estin* v. *Estin*, 334 U. S. 541, 544–546 (1948); *Sherrer* v. *Sherrer*, 334 U. S. 343, 354–355 (1948); *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 438 (1943); *Williams* v. *North*

Carolina, 317 U. S. 287, 294–295 (1942); *Fauntleroy* v. *Lum*, 210 U. S. 230, 237 (1908).

My concern is that the majority, having stated the principle, proceeds to disregard it by announcing two broad exceptions. First, the majority would allow courts outside the issuing State to decline to enforce those judgments "purport[ing] to accomplish an official act within the exclusive province of [a sister] State." *Ante*, at 11. Second, the basic rule of full faith and credit is said not to cover injunctions "interfer[ing] with litigation over which the ordering State had no authority." *Ante*, at 11–12. The exceptions the majority recognizes are neither consistent with its rejection of a public policy exception to full faith and credit nor in accord with established rules implementing the Full Faith and Credit Clause. As employed to resolve this case, furthermore, the exceptions to full faith and credit have a potential for disrupting judgments, and this ought to give us considerable pause.

Our decisions have been careful not to foreclose all effect for the types of injunctions the majority would place outside the ambit of full faith and credit. These authorities seem to be disregarded by today's holding. For example, the majority chooses to discuss the extent to which courts may compel the conveyance of property in other jurisdictions. That subject has proven to be quite difficult. Some of our cases uphold actions by state courts affecting land outside their territorial reach. *E.g.*, *Robertson* v. *Howard*, 229 U. S. 254, 261 (1913) ("[I]t may not be doubted that a court of equity in one State in a proper case could compel a defendant before it to convey property situated in another State"); see also *Carpenter* v. *Strange*, 141 U. S. 87, 105–106 (1891); *Muller* v. *Dows*, 94 U. S. 444, 449 (1877); *Massie* v. *Watts*, 6 Cranch 148 (1810). See generally 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2945, pp. 98–102 (2d ed. 1995); Restatement (Second) of Conflict of Laws §102, Comment *d* (1969); Reese, Full Faith and Credit to

Foreign Equity Decrees, 42 Iowa L. Rev. 183, 199–200 (1957). Nor have we undertaken before today to announce an exception which denies full faith and credit based on the principle that the prior judgment interferes with litigation pending in another jurisdiction. See, *e.g.*, *Cole* v. *Cunningham*, 133 U. S. 107, 116–117 (1890); *Simon* v. *Southern R. Co.*, 236 U. S. 115, 122 (1915); cf. *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 51–52 (1941); *Donovan* v. *Dallas*, 377 U. S. 408, 415–418 (1964) (Harlan, J., dissenting). See generally Reese, *supra*, at 198 ("the Supreme Court has not yet had occasion to determine whether [the practice of ignoring antisuit injunctions] is consistent with full faith and credit"). As a general matter, there is disagreement among the state courts as to their duty to recognize decrees enjoining proceedings in other courts. See Schopler, Extraterritorial recognition of, and propriety of counterinjunction against, injunction against actions in courts of other states, 74 A. L. R. 2d 831–834, §§3–4 (1960 and Supp. 1986).

Subjects which are at once so fundamental and so delicate as these ought to be addressed only in a case necessarily requiring their discussion, and even then with caution lest we announce rules which will not be sound in later application. See Restatement, *supra*, §102, Comment *c* ("The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act"); E. Scoles & P. Hay, Conflict of Laws §24.9, p. 964 (2d ed. 1992) (noting that interstate recognition of equity decrees other than divorce decrees and decrees ordering payment of money "has been a matter of some uncertainty"). We might be required to hold, if some future case raises the issue, that an otherwise valid judgment cannot intrude upon essential processes of courts outside the issuing State in certain narrow circumstances,

but we need not announce or define that principle here. Even if some qualification of full faith and credit were required where the judicial processes of a second State are sought to be controlled in their procedural and institutional aspects, the Court's discussion does not provide sufficient guidance on how this exception should be construed in light of our precedents. The majority's broad review of these matters does not articulate the rationale underlying its conclusions. In the absence of more elaboration, it is unclear what it is about the particular injunction here that renders it undeserving of full faith and credit. The Court's reliance upon unidentified principles to justify omitting certain types of injunctions from the doctrine's application leaves its decision in uneasy tension with its own rejection of a broad public policy exception to full faith and credit.

The following example illustrates the uncertainty surrounding the majority's approach. Suppose the Bakers had anticipated the need for Elwell's testimony in Missouri and had appeared in a Michigan court to litigate the privileged character of the testimony it sought to elicit. Assume further the law on privilege were the same in both jurisdictions. If Elwell, GM, and the Bakers were before the Michigan court and Michigan law gave its own injunction preclusive effect, the Bakers could not relitigate the point, if general principles of issue preclusion control. Perhaps the argument can be made, as the majority appears to say, that the integrity of Missouri's judicial processes demands a rule allowing relitigation of the issue; but, for the reasons given below, we need not confront this interesting question.

In any event, the rule would be an exception. Full faith and credit requires courts to do more than provide for direct enforcement of the judgments issued by other States. It also "requires federal courts to give the same preclusive effect to state court judgments that those judg-

ments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 466 (1982); accord, *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 525 (1986); *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373, 380–381, 384 (1985); *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U. S. 75, 81 (1984); *Haring* v. *Prosise*, 462 U. S. 306, 313 (1983); *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980). Through full faith and credit, "the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence . . . ." *Riley* v. *New York Trust Co.*, 315 U. S. 343, 349 (1942). And whether or not an injunction is enforceable in another State on its own terms, the courts of a second State are required to honor its issue preclusive effects. See *Parsons Steel, supra;* 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4467, p. 635 (1981).

II

In the case before us, of course, the Bakers were neither parties to the earlier litigation nor subject to the jurisdiction of the Michigan courts. The majority pays scant attention to this circumstance, which becomes critical. The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. In our most recent full faith and credit cases, we have said that determining the force and effect of a judgment should be the first step in our analysis. *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 375 (1996); *Marrese, supra,* at 381–382; *Haring, supra,* at 314; see also *Kremer, supra,* at 466–467. "If the state courts would not give preclusive effect to the prior judgment, the courts of the United States can accord it no greater efficacy' under §1738." *Haring, supra,* at 313, n. 6 (quoting *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 75 (1903)); accord, *Marrese,* 470 U. S., at 384. A con-

clusion that the issuing State would not give the prior judgment preclusive effect ends the inquiry, making it unnecessary to determine the existence of any exceptions to full faith and credit. *Id.*, at 383, 386. We cannot decline to inquire into these state-law questions when the inquiry will obviate new extensions or exceptions to full faith and credit. See *Haring, supra*, at 314, n. 8.

If we honor the undoubted principle that courts need give a prior judgment no more force or effect that the issuing State gives it, the case before us is resolved. Here the Court of Appeals and both parties in their arguments before our Court seemed to embrace the assumption that Michigan would apply the full force of its judgment to the Bakers. Michigan law does not appear to support the assumption.

The simple fact is that the Bakers were not parties to the Michigan proceedings, and nothing indicates Michigan would make the novel assertion that its earlier injunction binds the Bakers or any other party not then before it or subject to its jurisdiction. For collateral estoppel to apply under Michigan law, "'the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.'" *Nummer* v. *Treasury Dept.*, 448 Mich. 534, 542, 533 N. W. 2d 250, 253 (quoting *Storey* v. *Meijer, Inc.*, 431 Mich. 368, 373, n. 3, 429 N. W. 2d 169, 171, n. 3 (1988)), cert. denied, 516 U. S. 964 (1995). "Although there is a trend in modern law to abolish the requirement of mutuality, this Court reaffirmed its commitment to that doctrine in 1971 in [*Howell* v. *Vito's Trucking & Excavating Co.*, 386 Mich. 37, 191 N. W. 2d 313]. Mutuality of estoppel remains the law in this jurisdiction . . . ." *Lichon* v. *American Universal Ins. Co.*, 435 Mich. 408, 427–428, 459 N. W. 2d 288, 298 (1990) (footnote omitted). Since the Bakers were not parties to the Michigan proceedings and had no opportunity to litigate any of the issues presented, it appears that Michigan law would

not treat them as bound by the judgment. The majority cites no authority to the contrary.

It makes no difference that the judgment in question is an injunction. The Michigan Supreme Court has twice rejected arguments that injunctions have preclusive effect in later litigation, relying in no small part on the fact that the persons against whom preclusion is asserted were not parties to the earlier litigation. *Bacon* v. *Walden*, 186 Mich. 139, 144, 152 N. W. 1061, 1063 (1915) ("Defendant was not a party to [the prior injunctive] suit and was not as a matter of law affected or bound by the decree rendered in it"); *Detroit* v. *Detroit R. Co.*, 134 Mich. 11, 15, 95 N. W. 992, 993 (1903) ("[T]he fact that defendant was in no way a party to the record is sufficient answer to the contention that the holding of the circuit judge in that [prior injunctive] case is a controlling determination of the present").

The opinion of the Court of Appeals suggests the Michigan court which issued the injunction intended to bind third parties in litigation in other States. 86 F. 3d 811, 820 (CA8 1996). The question, however, is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State. Full faith and credit measures the effect of a judgment by all the laws of the rendering State, including authoritative rulings of that State's highest court on questions of issue preclusion and jurisdiction over third parties. See *Kremer*, *supra*, at 466; *Matsushita*, *supra*, at 375.

The fact that other Michigan trial courts refused to reconsider the injunction but instead required litigants to return to the trial court which issued it in the first place sheds little light on the substance of issue preclusion law in Michigan. In construing state law, we must determine how the highest court of the State would decide an issue. See *King* v. *Order of United Commercial Travelers of Amer-*

ica, 333 U. S. 153, 160–161 (1948); *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 464–465 (1967).

In this case, moreover, those Michigan trial courts which declined to modify the injunction did not appear to base their rulings on preclusion law. They relied instead on Michigan Court Rule 2.613(B), which directs parties wishing to modify an injunction to present their arguments to the court which entered it. See Brief for Respondent 10. Rule 2.613(B) is a procedural rule based on comity concerns, not a preclusion rule. It reflects Michigan's determination that, within the State of Michigan itself, respect for the issuing court and judicial resources are best preserved by allowing the issuing court to determine whether the injunction should apply to further proceedings. As a procedural rule, it is not binding on courts of another State by virtue of full faith and credit. See *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 722 (1988) ("[A] State may apply its own procedural rules to actions litigated in its courts"). The Bakers have never appeared in a Michigan court, and full faith and credit cannot be used to force them to subject themselves to Michigan's jurisdiction. See *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 403 (1917) ("And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory").

Under Michigan law, the burden of persuasion rests on the party raising preclusion as a defense. See *Detroit* v *Qualls*, 434 Mich. 340, 357–358, 454 N. W. 2d 374, 383 (1990); *E & G Finance Co.* v. *Simms*, 362 Mich. 592, 596, 107 N. W. 2d 911, 914 (1961). In light of these doctrines and the absence of contrary authority, one cannot conclude that GM has carried its burden of showing that Michigan courts would bind the Bakers to the terms of the earlier

injunction prohibiting Elwell from testifying. The result should come as no surprise. It is most unlikely that Michigan would give a judgment preclusive effect against a person who was not a party to the proceeding in which it was entered or who was not otherwise subject to the jurisdiction of the issuing court. See *Kremer,* 456 U. S., at 480–481 ("We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue").

Although inconsistent on this point, GM disavows its desire to issue preclude the Bakers, claiming "the only party being 'bound' to the injunction is Elwell." See Brief for Respondent 39. This is difficult to accept because in assessing the preclusive reach of a judgment we look to its practical effect. *E.g.*, *Martin* v. *Wilks,* 490 U. S. 755, 765, n. 6 (1989); cf., *e.g.*, *Donovan* v. *Dallas,* 377 U. S., at 413 ("[I]t does not matter that the prohibition here was addressed to the parties rather than to the federal court itself"); *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 309 U. S. 4, 9 (1940) ("That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial"). Despite its disclaimer, GM seeks to alter the course of the suit between it and the Bakers by preventing the Bakers from litigating the admissibility of Elwell's testimony. Furthermore, even were we to accept GM's argument that the Bakers are essentially irrelevant to this dispute, GM's argument is flawed on its own terms. Elwell, in the present litigation, does not seek to relitigate anything; he is a witness, not a party.

In all events, determining as a threshold matter the extent to which Michigan law gives preclusive effect to the injunction eliminates the need to decide whether full faith and credit applies to equitable decrees as a general matter or the extent to which the general rules of full faith and

credit are subject to exceptions. Michigan law would not seek to bind the Bakers to the injunction and that suffices to resolve the case. For these reasons, I concur in the judgment.