CIVIL PROCEDURE—RES JUDICATA—NEW JERSEY SUPREME COURT, OVER STRONG DISSENT, HOLDS THAT FEDERAL COURT DISMISSAL BASED ON DEFENDANT'S LACK OF CAPACITY IS DECISION ON MERITS AND CANNOT BE RELITIGATED IN STATE COURT—*Velasquez v. Franz*, 123 N.J. 498, 589 A.2d 143 (1991).

Res judicata,[1] pervasive in every area of the law,[2] is an inte-

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[1] Literally, res judicata means "the thing adjudged." ALLAN D. VESTAL, RES JUDICATA/PRECLUSION V-6 (1969). In contemporary usage, res judicata refers to the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). A detailed examination of the components of this definition, encompassing the concepts of merger, privity and the effect of splitting a cause of action, is beyond the scope of this Note. For a comprehensive exposition of the doctrine and its concomitant complexities see generally VESTAL, *supra*; Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1928); *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818 (1952).

The doctrine of res judicata originated in Roman law. Robert W. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 44 (1940). Under Roman principles, which focused on the sanctity of the judicial proclamation, preclusion attached by virtue of the fact of a judgment. W. W. BUCKLAND, TEXT-BOOK OF ROMAN LAW 690-91 (1921). The Roman doctrine was adopted by English law, from which emerged the oft-cited pronouncement in the Duchess of Kingston's Case:

> [T]hese two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court: secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose.

Duchess of Kingston's Case, 20 How. St. Tr. 355, 538; 3 Smith, L. C. (9th Am. ed.) 1998, 1999 (1776). *Duchess of Kingston's Case* is frequently referred to as the first to definitively adopt res judicata. *See, e.g.*, Wilson's Ex'r v. Deen, 121 U.S. 525, 533-34 (1887) (adhering to the concept of res judicata as set forth in the "celebrated case of the Duchess of Kingston"); Cromwell v. County of Sac, 94 U.S. 351, 354 (1876) (noting the "rule laid down in the celebrated opinion in the case of the Duchess of Kingston").

Res judicata was similarly adopted in American jurisprudence. *See, e.g.*, Williams v. Armroyd, 11 U.S. (7 Cranch) 423, 432 (1813) (the judgment of a competent court cannot be assailed by another tribunal); *see also* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940) (reciting the "well-settled principle" of res judicata); *Wilson's Ex'r*, 121 U.S. at 534 (approving the "settled" law of res judicata); United States v. Throckmorton, 98 U.S. 61, 65 (1878) (stressing the solemnity of res judicata and the interests advanced by its application); *Cromwell*, 94 U.S. at 358 (enunciating the scope and rule of res judicata); Cornett v. Williams, 87

gral part of the doctrine of former adjudication.[3] Founded on principles of fairness and judicial efficiency,[4] res judicata gener-

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U.S. (20 Wall.) 226, 250 (1873) (absent fraud, the settled law is that a judgment of a court of competent jurisdiction cannot be collaterally attacked).

[2] *See Developments in the Law*, *supra* note 1, at 865-86 (examining res judicata as applied to administrative law, criminal law, declaratory judgments, patent law and bankruptcy).

[3] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1 (1985). The doctrine of former adjudication "govern[s] the binding effect of a judgment entered in one action on a subsequent proceeding." *Id.* at 606-07. The doctrine is comprised of two separate but interrelated concepts—res judicata and collateral estoppel. *Id.* at 607. The United States Supreme Court succinctly distinguished res judicata from collateral estoppel in the seminal case of Cromwell v. County of Sac:

> [T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received . . . but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Cromwell, 94 U.S. at 352-53. *Accord* 1B JAMES W. MOORE ET AL., Moore's Federal Practice ¶ 0.405[3] (2d ed. 1991); Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326 (1955); Kram v. Kram, 94 N.J. Super. 539, 551, 229 A.2d 285, 291-92 (Ch. Div.), *rev'd on other grounds*, 98 N.J. Super 274, 237 A.2d 271 (App. Div. 1967), *aff'd*, 52 N.J. 545, 247 A.2d 316 (1968). Thus, res judicata focuses on a *judgment* rendered in a prior proceeding, while collateral estoppel focuses on the *record* or the *actions of the parties prior* to the judgment. Millar, *supra* note 1, at 52-54.

[4] VESTAL, *supra* note 1, at V-7 to -12. Professor Vestal, in one of the few thorough dissertations on the topic, delineated the purposes furthered by res judicata. *See id.* According to Professor Vestal, the doctrine promoted finality and obviated the possibility of inconsistent decisions in successive lawsuits. *Id.* at V-8 to -9. "[R]ights and duties have meaning only if they are certain." *Id.* at V-8. Professor Vestal hypothesized that the doctrine also shielded litigants from the harassment of repetitive litigation by precluding multiple suits on the same cause of action. *Id.* at V-9 to -10. Further, Professor Vestal posited that res judicata fostered judicial integrity by requiring courts to defer to the judgments rendered by the courts of sister states. *Id.* at V-12. Finally, Professor Vestal commented that the doctrine promoted efficiency in the administration of the court system. *Id.* at V-9 to -10. The last rationale, that of judicial efficiency, should be cautiously employed. Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 348 (1948). As Professor Cleary warned:

> Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government. If

ally precludes relitigation of a claim if a court of competent jurisdiction rendered a valid, final judgment on the merits of that claim in a previous lawsuit.[5] The firmness with which res judicata is embedded in our legal tradition reflects the sanctity of the policies it was developed to promote.[6] On occasion, however, strict adherence to the rule elicits severe results.[7]

A recent case, *Velasquez v. Franz*,[8] exemplifies the continuing controversy over what courts and commentators have at times termed the "harsh" consequences of res judicata.[9] In *Velasquez*,

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> the judges are too few and able to decide cases fairly and on the merits, the public probably can afford to have more judges.

Id. (footnote omitted).

5 FRIEDENTHAL et al., *supra* note 3, § 14.1, at 607. For a comprehensive discussion of res judicata and the doctrine of former adjudication, see MOORE et al., *supra* note 3, ¶ 0.405[1] and von Moschzisker, *supra* note 1, at 299.

6 VESTAL, *supra* note 1, at V-7. Professor Vestal, discussing the virtues of res judicata, referred to the doctrine as "the heart of the system of law and adjudication which we know today." *Id.*

7 *See, e.g.*, Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 400-01 (1981) (res judicata barred one plaintiff from appealing a final unappealed judgment even though other appealing plaintiffs in the same case benefitted from a change in the law and proceeded with the suit). Professor Cleary commented: "When courts pretty consistently feel called upon to apologize to a litigant while administering the kiss of death to his cause, perhaps some basic reconsideration of the reasons is overdue." Cleary, *supra* note 4, at 339. Professor Cleary referenced cases where disparities resulted from the application of res judicata. *Id.* (citing Jacobson v. Mutual Benefit Health & Accident Ass'n, 11 N.W.2d 442, 446 (N.D. 1943) (widow precluded from recovering the remainder of a life insurance payment even though the insurance carrier would have been forced to pay the full amount had the widow been aware of a contract provision); Hahl v. Sugo, 62 N.E. 135, 136-37 (N.Y. 1901) (plaintiff cannot recover his land, even though he has a judgment declaring that defendant is wrongfully in possession, because plaintiff's original complaint failed to seek equitable relief)). *See also* Kline v. Stein, 90 P. 1041, 1041 (Wash. 1907) (land owners cannot recover land previously adjudged to be wrongfully taken). Professor Cleary concludes: "Small wonder that apologies are in order." Cleary, *supra* note 4, at 339.

8 123 N.J. 498, 589 A.2d 143 (1991).

9 *See, e.g.*, Moch v. East Baton Rouge Parish Sch. Bd., 548 F.2d 594, 598 (5th Cir.) (on occasion, too rigid an application of preclusion rules can work a "manifest injustice"), *cert. denied*, 434 U.S. 859 (1977); La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1276 (2d Cir. 1974) (noting the "unwarranted hardship" ensuing from too inflexible an application of res judicata); Desrosiers v. American Cyanamid Co., 377 F.2d 864, 871 (2d Cir. 1967) (same); Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting) ("The defense of res judicata is universally respected, but actually not very well liked."); Castillo Morales v. Best Fin. Corp., 682 F. Supp. 3, 5 (D.P.R. 1988) (noting the harshness of res judicata, but adding that adverse consequences could have been avoided through compliance with the liberal amendment provisions of the Federal Rules of Civil Procedure), *aff'd*, 867 F.2d 606 (1st Cir. 1988); Chang v. Northwestern Memorial Hosp., 549 F. Supp. 90, 95-96 (N.D. Ill. 1982) (mem.) (despite the harshness of the result, application of res judicata warranted); *see also* MOORE et al.,

the New Jersey Supreme Court confronted the issue of whether a federal court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6),[10] in which the court focused on the defendant's lack of capacity to be sued, should bar a plaintiff from later bringing the same action in the New Jersey state courts.[11] While the dissent persuasively endorsed a flexible interpretation of res judicata,[12] the majority determined that the federal dismissal was rendered on the merits and held that res judicata barred the plaintiff from attempting to bring the suit anew at the state level.[13]

Jose Velasquez, a New York resident, was a machine operator for Certech, Inc. in Westwood, New Jersey.[14] On November 6, 1984, Velasquez sustained severe injuries to his right hand while operating a molding machine that suddenly cycled as he inserted his hand in a dye opening.[15] Leyden Hydraulics, Inc. (Leyden), the Illinois corporation that manufactured the machine, was dissolved under Illinois law on October 25, 1984, thirteen days prior to the accident.[16] Upon dissolution, Leyden's

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supra note 3, ¶ 0.405[12], at 259-60 (discussing equitable aspects of res judicata formulated to ameliorate the potential harshness of the doctrine); *id.* at ¶ 0.405[1] (commenting that "res judicata is a triumphal rule—and in application can produce results arguably too harsh at times"); Dean Braverman & Richard Goldsmith, *Rules of Preclusion and Challenges to Official Action: An Essay on Finality, Fairness, and Federalism All Gone Awry*, 39 SYRACUSE L. REV. 599, 599-601 (1988) (suggesting that blind adherence to rules of preclusion may lead to oppression); *Developments in the Law*, *supra* note 1, at 820 (warning of the potential for increased litigation and perpetuation of judicial error).

10 Federal Rule of Civil Procedure 12 provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted.

FED. R. CIV. P. 12(b)(6).

11 *Velasquez*, 123 N.J. at 500, 589 A.2d at 144.

12 *Id.* at 516, 589 A.2d at 152 (Stein, J., dissenting).

13 *Id.* at 515, 589 A.2d at 152.

14 Velasquez v. Franz, No. 86-2413, slip op. at 3 (D.N.J. Mar. 23, 1987).

15 *Id.* The molding machine crushed Mr. Velasquez's hand, resulting in the amputation of his thumb and index finger. *Id.* He also suffered hand and wrist fractures, multiple bone and soft-tissue loss and nerve damage. *Id.* Velasquez alleged that the cause of the accident was defective mechanical controls. *Id. See also infra* note 20 (outlining the allegations in the complaint).

16 *Velasquez*, No. 86-2413, slip op. at 3. The Illinois Business Corporations Act of 1983 permitted suit against a dissolved corporation *only* if the cause of action arose *prior* to dissolution; thus, this date is significant because it demonstrates that the accident occurred *after* the corporation dissolved. *See* ILL. ANN. STAT. ch. 32, ¶

assets were distributed to the wife of Leyden's principal shareholder, Illinois resident Vera Franz (Franz).[17]

On June 20, 1986, Velasquez instituted suit against Leyden and Franz[18] in the United States District Court for the District of New Jersey.[19] The complaint alleged that Leyden had defectively manufactured the machine[20] and that Franz was derivatively liable as the recipient of the corporate assets.[21] Jurisdiction was invoked on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332.[22]

Leyden moved to dismiss the claim under Federal Rule of Civil Procedure 12(b)(6).[23] Relying on the language of the Illinois Business Corporations Act of 1983,[24] Leyden argued that it

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12.80 (Smith-Hurd 1988); *see also infra* note 24 (for the relevant portions of the Illinois Business Corporations Act).

17 *Velasquez*, No. 86-2413, slip op. at 7; *Velasquez*, 123 N.J. at 501, 589 A.2d at 145.

18 Velasquez sued Franz individually and as a trustee for Leyden. *Velasquez*, No. 86-2413, slip op. at 7. Velasquez alleged that Franz became a trustee of Leyden upon its dissolution because Franz received Leyden's assets through trusts at that time. *Id.* Velasquez's allegations were founded on the trust fund doctrine. *Id.* Essentially, this doctrine holds that corporate property distributed to shareholders upon dissolution is held in trust and made available to satisfy corporate debts. *Id.* (citing Blankenship v. Demmler Mfg. Co., 411 N.E.2d 1153, 1155 (Ill. App. 3d 1980)). The doctrine was promulgated to protect creditors upon corporate dissolution. *Id.*

19 *Id.* at 3. Velasquez also named Cridge, Inc., the company that manufactured the machine dye, as well as New Jersey Manufacturers Insurance Company, the worker's compensation carrier for Certech. *Velasquez*, 123 N.J. at 519, 589 A.2d at 154. Velasquez claimed that New Jersey Manufacturers was liable because it negligently inspected the molding machine that caused his injuries. *Id.* The claims against these defendants were not at issue before the New Jersey Supreme Court. *Id.* at 501, 589 A.2d at 145.

20 *Velasquez*, No. 86-2413, slip op. at 3. The complaint contained nine counts and enumerated theories of strict liability in tort for the manufacture of a defective product, breach of implied warranty and negligence. *Id.*

21 *Id.* at 7.

22 *Id.* at 2 (citing 28 U.S.C. § 1332 (1988)).

23 *Id.* at 2-3. *See supra* note 10 (setting forth the relevant text of Rule 12).

24 The material provisions of the Illinois Business Corporations Act provided:

> Survival of remedy after dissolution. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a judgment of dissolution by a circuit court of this State, or (3) by expiration of its period of duration, shall not take away nor impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, *prior to such dissolution* if action or other proceeding thereon is commenced within five years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

lacked the capacity to be sued because the Act foreclosed suit on claims accruing subsequent to corporate dissolution.[25] Franz, also relying on the statute, claimed that she too lacked the capacity to be sued under Illinois law.[26] Franz reasoned that because Leyden could not lawfully be sued, and because she was liable only if the corporation could be held accountable, the complaint against her should likewise be dismissed.[27]

The district court referred to Federal Rule of Civil Procedure 17(b) to determine the applicable law.[28] Rule 17(b) indicated that the law of the state of incorporation should govern corporate capacity to sue or be sued.[29] Because Leyden was organized pursuant to Illinois law, Judge Ackerman, writing for the court, found that the law of that state controlled the capacity dispute.[30] After interpreting the Illinois Business Corporations

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ILL. ANN. STAT. ch. 32, ¶ 12.80 (Smith-Hurd 1984) (emphasis added). Subsection (3) of the statute was amended, effective August 31, 1988, and currently states in pertinent part: "by expiration of its period of duration, shall not take away nor impair any *civil* remedy. . . ." ILL. ANN. STAT. ch. 32, ¶ 12.80 (Smith-Hurd 1988) (emphasis added).

25 *Velasquez*, No. 86-2413, slip op. at 4.

26 *Id.* at 7.

27 *Id.* Franz advanced three arguments in support of her motion to dismiss. *Id.* First, Franz charged that Illinois did not recognize the trust-fund doctrine. *Id.* Second, Franz maintained that the Illinois survival statute precluded Velasquez from instituting suit against her. *Id.* Franz reasoned that a finding of liability pursuant to the Illinois survival statute would contravene the *Blankenship* rule. *Id.* at 8 (citing Blankenship v. Demmler Mfg. Co., 411 N.E.2d 1153, 1156-57 (Ill. App. 3d 1980) (the trust fund doctrine could not be applied to render a shareholder liable if the corporation could escape liability on claims accruing subsequent to dissolution)). Finally, Franz contended that Velasquez could not justify piercing the corporate veil and, therefore, could not hold her liable in her individual capacity. *Id.*

28 *Id.* at 4.

29 Federal Rule of Civil Procedure 17 provides in pertinent part:

> (b) The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

FED. R. CIV. P. 17(b).

30 *Velasquez*, No. 86-2413, slip op. at 4. The parties disagreed on the law that should govern the dispute. *Id.* at 2. Hence, in a preliminary hearing, Judge Ackerman ordered the parties to submit briefs on the issue, but resolved the conflict by

Act[31] and case law construing its terms,[32] the district court concluded that Illinois law barred claims that accrued against a corporation subsequent to its dissolution.[33] Judge Ackerman therefore granted Leyden's 12(b)(6) motion to dismiss.[34] The district court similarly dismissed plaintiff's claims against Franz.[35]

Velasquez chose not to appeal the district court's decision,

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reference to Federal Rule of Civil Procedure 17(b). *Velasquez*, No. 86-2413, slip op. at 2, 4.

[31] *See supra* note 24 (relevant text of Act). Judge Ackerman noted that the statute had been "uniformly interpreted" to allow suits only on "those causes of action which accrued *prior to the dissolution of the corporation*." *Velasquez*, No. 86-2413, slip op. at 5 (emphasis added).

[32] *Id.* at 5-6. Judge Ackerman examined *Blankenship*, in which the plaintiff in a strict liability action appealed the dismissal of the offending machine manufacturer and its president from the suit. *Velasquez*, No. 86-2413, slip op. at 5-6; *see also Blankenship*, 411 N.E.2d at 1154-55. In *Blankenship*, an Illinois appellate court affirmed the dismissals because the plaintiff's claim arose after the corporation dissolved. *Id.* at 1157. In so doing, the *Blankenship* court observed that the legislative intent in promulgating the Business Corporations Act was "to establish a definite point in time when a corporation ceases to exist." *Id.* at 1156. Judge Ackerman also discussed *In re* Johns-Manville Asbestosis Cases, in which the court, relying on the *Blankenship* ruling, held that a co-defendant's cross claim for indemnity against a dissolved corporate defendant should be dismissed under the Act because the action for indemnification did not arise until the indemnitee had been adjudicated liable. *See Velasquez*, No. 86-2413, slip op. at 6 (citation omitted); *In re* Johns-Manville Asbestosis Cases, 516 F. Supp. 375, 377-78 (N.D. Ill. 1981). Because the indemnitee was not held liable *before* the indemnitor's dissolution, the court dismissed the complaint. *Id.* at 378. *Accord* Cornick v. Hi Grade Cleaners, Inc., 595 F. Supp. 718, 720 (N.D. Ill. 1984) (holding that pursuant to the Illinois Business Corporations Act, plaintiff's claims against a dissolved corporation for delinquent contributions to a pension fund should be dismissed because the cause of action accrued after the corporation dissolved).

[33] *Velasquez*, No. 86-2413, slip op. at 7. Judge Ackerman rejected Velasquez's argument that the Illinois legislature, in enacting the Business Corporations Act, could not possibly have intended to allow an Illinois corporation to avoid liability merely by dissolving and distributing the corporate assets. *Id.* at 6. Judge Ackerman posited: "While such a result may seem unjust to an injured plaintiff, this is precisely what the unambiguous language of the statute provides." *Id.*

[34] *Id.* at 7.

[35] *Id.* at 9. As to Franz's contention that Illinois did not recognize the trust fund doctrine, Judge Ackerman, without deciding the issue, opined that Illinois law seemed to recognize such trusts. *Id.* at 7. *See Blankenship*, 411 N.E.2d at 1155-56 (acknowledging the trust fund doctrine as applied by the Illinois courts but holding the doctrine inapplicable). Judge Ackerman observed, however, that even if Illinois recognized the trust fund doctrine, Franz could not be held accountable because "such liability would be inconsistent with Illinois law providing for the end of a corporate existence" and, as such, "would mean that the corporation could never completely dissolve but would live on indefinitely through its shareholders." *Velasquez*, No. 86-2413, slip op. at 8 (quoting *Blankenship*, 411 N.E.2d at 1156). Judge Ackerman thus found it unnecessary to decide Franz's remaining argument that Velasquez could not pierce the corporate veil. *Id.* at 8-9.

but rather brought an action in the New Jersey Superior Court, Law Division four days after the district court rendered its decision.[36] The complaint was virtually indistinguishable from the complaint previously filed in the district court.[37] In response, Leyden and Franz again moved for a dismissal, relying on their lack of capacity to be sued, the same argument asserted in federal court.[38] Leyden and Franz further stipulated that Velasquez was barred by res judicata from maintaining an identical action in the New Jersey state courts.[39]

The law division asserted that the action was not barred by res judicata.[40] The judge interpreted New Jersey's choice-of-law provisions to require that the law of Illinois, Leyden's state of incorporation, govern the corporation's capacity to be sued.[41] Accordingly, the law division agreed with the conclusion of the federal court, that the Illinois Business Corporations Act barred the suit, and dismissed the complaint against both Leyden and Franz.[42]

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36 Velasquez v. Franz, 123 N.J. 498, 503-04, 589 A.2d 143, 146 (1991).

37 *Id.* at 504, 589 A.2d at 146. The only differences between the two complaints were the *ad damnum* clause and the caption style mandated for New Jersey courts. *Id.* An *ad damnum* clause is the "technical name of that clause of the . . . complaint [] which contains a statement of the plaintiff's money loss, or the damages which he claims." BLACK'S LAW DICTIONARY 37 (6th ed. 1990).

38 *Velasquez*, 123 N.J. at 504, 589 A.2d. at 146. *See supra* text accompanying notes 23-27.

39 *Velasquez*, 123 N.J. at 504, 589 A.2d at 146.

40 Velasquez v. Franz, No. L-33035-87, slip op. at 2-3 (N.J. Super. Ct. Law Div. Feb. 9, 1988). Judge Minuskin of the law division stated that res judicata was inapplicable because the federal disposition rested on the "procedural aspects" of Rule 17(b). *Id.* at 3.

41 *Id.* at 3-4. The law division relied on the precedent set in Harris-Woodbury Lumber Co. v. Coffin, 179 F. 257, 261 (C.C.N.C. 1910), *aff'd*, 187 F. 1005 (4th Cir. 1911), where the law of the state where the corporation was organized determined corporate powers. *Velasquez*, No. L-33035-87, slip op. at 34.

42 *Velasquez*, No. L-33035-87, slip op. at 4. The law division recognized that its decision effectively deprived Velasquez of a remedy against the manufacturer of an allegedly defective machine. *Id.* Judge Minuskin acknowledged a strong policy in New Jersey precluding this result. *Id.* (citing Nieves v. Bruno Sherman Corp., 86 N.J. 361, 365, 431 A.2d 826, 828 (1981) (imposing liability on both the intermediate and present corporate successors for defective machine manufactured by original selling corporation); Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 348-49, 431 A.2d 811, 819-20 (1981) (imposing liability on a successor corporation for the tort liabilities of the selling corporation under a product line theory)). Judge Minuskin distinguished *Ramirez* and *Nieves*, however, because the successor corporations involved in those cases not only purchased corporate assets and goodwill, but also continued to manufacture and sell the product line acquired from the selling corporations. *Id.* at 6. The court concluded that the rationale of those decisions did not extend to persons, such as Franz, who received assets from a dissolved corporation but did not continue exploiting the dissolved corporation's goodwill. *Id.* at 6-8.

The New Jersey Superior Court, Appellate Division, granted plaintiff's motion for leave to appeal[43] as well as defendant's motion to cross-appeal on the issue of res judicata.[44] The appellate

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[43] Velasquez v. Franz, No. A-3284-87T5, slip op. at 4 (N.J. Super. Ct. App. Div. July 7, 1989). Velasquez averred that the law division erred in applying Illinois law to determine Leyden's capacity to be sued because New Jersey's choice-of-law principles for tort cases were applicable. *Id.* at 4-5. Velasquez advocated that the law division should have applied a two-step governmental interest analysis to determine the applicable law. *Id.* at 5 (citing Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 649, 475 A.2d 648, 650 (App. Div. 1984) (court should ascertain the competing policies of the respective states and then measure the litigants' contacts in each jurisdiction to determine the applicable law)). *See also infra* notes 171-75 and accompanying text for an examination of the two-step choice-of-law analysis.

Velasquez conceded that res judicata foreclosed a subsequent action in the federal courts, but insisted that the doctrine did not forestall an opportunity to seek redress in the New Jersey state courts. *Velasquez*, No. A-3284-87T5, slip op. at 6. He reasoned that the federal dismissal rested solely on the determination, pursuant to FED. R. CIV. P. 17(b), that Leyden lacked the capacity to be sued. *Velasquez*, No. A-3284-87T5, slip op. at 6. Velasquez argued that because Rule 17(b) was a procedural rule and because the New Jersey Court Rules did not contain a provision analogous to Rule 17(b), the federal dismissal was not rendered on the merits of his claim and thus should not be accorded preclusive effect. *Id.* at 7-8. Velasquez relied on New Jersey case law to support his contentions. *Id.* at 7 (citing Zaccardi v. Becker, 88 N.J. 245, 253-55, 440 A.2d 1329, 1332-34 (1982) ("equitable considerations" may militate against barring an action when a prior dismissal did not explicitly state that it was with prejudice); Roberts v. Goldner, 79 N.J. 82, 85, 397 A.2d 1090, 1091 (1979) (a cause of action *decided on the merits* precludes relitigation of the claim); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 150, 215 A.2d 345, 351-52 (1965) ("While the appellants may have pursued the wrong procedural avenue, they should not now be deprived of a just determination in the proper forum."); Central R.R. Co. v. Neeld, 26 N.J. 172, 177, 139 A.2d 110, 113 (res judicata usually not applicable absent an "adjudication on the ultimate merits"), *cert. denied*, 357 U.S. 928 (1958)). Velasquez also argued that the federal dismissal resembled a dismissal for lack of subject matter jurisdiction and was thus not an adjudication on the merits. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) (1982) (a valid, final personal judgment for defendant does not bar plaintiff from bringing another action on the same claim if the claim was dismissed "for lack of jurisdiction, for improper venue or for nonjoinder or misjoinder of parties")). According to Velasquez, the law division should have determined whether shareholders could inherit the distributed assets of a dissolved corporation without incurring tort liability for defective products, or whether such shareholders must instead take the corporate assets subject to tort liabilities. *Id.* at 5.

[44] *Id.* at 4. Leyden and Franz, in addition to relying on res judicata, maintained that New Jersey tort principles were irrelevant. *Id.* at 5. Rather, Leyden and Franz framed the relevant issue as one of corporate existence and asserted that the law division properly invoked Illinois law, the law of the state in which Leyden was organized. *Id.* In support of their res judicata defense, Leyden and Franz cited to the RESTATEMENT (SECOND) OF JUDGMENTS § 19 at 161. *Velasquez*, No. A-3284-87T5, slip op. at 8. The Restatement provides: "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." RESTATEMENT, *supra* note 43, § 19 at 161. The defendants further directed the court's attention to comment a of § 19:

division affirmed, but, finding that the district court's dismissal was "on the merits,"[45] based its decision on principles of res judicata and rejected the choice-of-law rationale proffered by the law division.[46]

> The prototype case continues to be one in which the merits of the claim are in fact adjudicated against the plaintiff after trial of the substantive issues. Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar.

Velasquez, No. A-3284-87T5, slip op. at 8 (quoting RESTATEMENT, *supra* note 43, § 19 cmt. a).

Finally, Leyden and Franz posited that the federal judgment was entitled to full faith and credit. *Id.* at 6. Although the appellate division did not address this last contention, *see id*, neither the Full Faith and Credit Clause of the United States Constitution nor the Full Faith and Credit statute, 28 U.S.C. § 1738, explicitly deal with the effect a state must accord a previous federal judgment. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1988); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 743-44 (1976). State courts nonetheless generally do give full faith and credit to federal judgments. *Id.* at 744. *See also* Watkins v. Resorts Int'l. Hotel & Casino, 124 N.J. 398, 408, 591 A.2d 592, 597 (1991) ("[P]ositive law does not expressly mandate that state courts give preclusive effect to the judgments of federal courts. . . . [But generally] state courts have accepted federal court judgments as binding.").

[45] *Velasquez*, No. A-3284-87T5, slip op. at 9. A dismissal with prejudice (on the merits) precludes further litigation in regard to the same claim. *Developments in the Law*, *supra* note 1, at 838. In contrast, a dismissal without prejudice (one that is *not* on the merits) will not bar a subsequent suit. *Id.* *See* Gissen v. Tackman, 401 F. Supp. 310, 311 (D.N.J. 1975) ("[A] judgment is 'on the merits' where the substance of the claim, as distinguished from matters of practice, procedure, jurisdiction or form, has been determined."), *vacated*, 537 F.2d 784 (3d Cir. 1976); FRIEDENTHAL et al., *supra* note 3, § 14.7 at 650 ("judgment is considered to be on the merits if it is a disposition based on the validity of plaintiff's claim, rather than on a technical procedural ground"); 9 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2373 (1971) (comparing dismissals rendered with and without prejudice). *But see* RESTATEMENT, *supra* note 43, § 19 cmt. a (discarding the language "on the merits" because the phrase was often misleading).

[46] *Velasquez*, No. A-3284-87T5, slip op. at 10-11. The appellate division held that the doctrine of res judicata barred Velasquez from pursuing his claim in New Jersey because the 12(b)(6) dismissal for failure to state a claim for relief was an adjudication on the merits. *Id.* at 11. In so doing, the appellate division noted that federal law precluded Velasquez from pursuing his claim in the state courts. *Id.* at 9 (citing RESTATEMENT *supra* note 43, § 87 ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court.")). The court referred to Federal Rule of Civil Procedure 41(b) which generally provides that unless the order of dismissal evinces a contrary intention, dismissed cases (other than cases dismissed for lack of jurisdiction, lack of venue or failure to join a party under Rule 19) should be construed as adjudications on the merits. *Velasquez*, No. A-3284-87T5, slip op. at 9. The appellate division concluded that the federal dismissal was rendered on the merits because Judge Ackerman failed to specify that the dismissal was without prejudice, and because the Rule 41(b) exceptions were inapplicable. *Id.* at 9-10. *See* Cemer v. Marathon Oil Co., 583 F.2d 830, 832 (6th Cir. 1978) (in the absence of language indicating that the judgment was without prejudice, Rule 41(b) prescribes that the judgment was on the merits when the dismissal was pursuant to

The New Jersey Supreme Court granted Velasquez's motion for leave to appeal.[47] In affirming the decision of the appellate division, the court reiterated that the federal dismissal, pursuant to 12(b)(6) of the Federal Rules of Civil Procedure, was on the merits and that res judicata barred Velasquez from maintaining an action in the New Jersey courts.[48]

The significance of res judicata will be best understood by appreciating the policies long invoked in its support.[49] In 1878, the United States Supreme Court declared that, in the interest of the state, litigation must eventually come to a conclusion and no person should have to defend twice against the same claim.[50]

Rule 12(b)(6)); MOORE et al., *supra* note 3, ¶ 0.409 [1.-2] (dismissal pursuant to Federal Rule 12(b)(6) barred later actions under both federal and state law).

The court unequivocally rejected Velasquez's contention that Rule 17(b) was a mere procedural rule. *Velasquez*, No. A-3284-87T5, slip op. at 10. Rather, the court determined that Rule 17(b) was a rule of substantive law that was entitled to full res judicata effect. *Id.* at 10-11 (citing Pendleton v. Russell, 144 U.S. 640, 645 (1892) (because the state of incorporation determined corporate existence, a judgment of a sister state awarding recovery against a dissolved corporation was a nullity and "no more valid against a non-existing corporation than it would have been if rendered . . . against a dead man")). *See* Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927) (corporate dissolution analogous to the death of a human being; once corporation dissolved, litigation must cease); RESTATEMENT (SECOND) CONFLICT OF LAWS § 299(1) (1971) (law of the state of incorporation governs corporate existence). The *Velasquez* court, holding that the claim was barred by res judicata, never reached the issue of applicability of New Jersey choice-of-law principles as applied to tort claims. *Velasquez*, No. A-3284-87T5, slip op. at 11-12.

47 Velasquez v. Franz, 122 N.J. 343, 585 A.2d 357 (1990).

48 Velasquez v. Franz, 123 N.J. 498, 511, 589 A.2d 142, 150 (1991).

49 Factors frequently asserted as justifications for res judicata include judicial efficiency, respect for and desirability of stable judicial decisions, prevention of double recovery and economy of court time. *See* Cleary, *supra* note 4, at 344-49; *Developments in the Law*, *supra* note 1, at 826-28.

50 United States v. Throckmorton, 98 U.S. 61, 65 (1878). Justice Miller announced: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy." *Id.* These two principles—that the interest of the state requires there be an end to litigation and that no one should be twice vexed by the same claim—have been adopted by numerous courts for well over a century. *See, e.g.*, Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (denouncing the Ninth Circuit's attempt to recognize an exception to res judicata because interests of finality and freedom from repeated litigation would be thwarted); Heiser v. Woodruff, 327 U.S. 726, 733 (1946) (there are no legal or equitable justifications for disregarding the sanctimonious rule of res judicata); Reed v. Allen, 286 U.S. 191, 198-99 (1932) ("*res judicata* [was] conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy"); Baldwin v. Traveling Men's Ass'n., 283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."); Hart Steel

Keeping these valued policies in mind, federal and state courts have almost always approached the res judicata question with strict adherence to its underlying precepts.[51] Especially relevant to the *Velasquez* decision is the manner in which courts have traditionally determined whether a prior adjudication is a decision on the merits, thereby barring under principles of res judicata a subsequent suit on the same claim.[52]

The Supreme Court spoke decisively on the issue of what constitutes a decision "on the merits" in the early case of *Bell v. Hood*.[53] The petitioners, invoking federal question jurisdiction, instituted suit in the United States District Court for the Southern District of California alleging that Federal Bureau of Investi-

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Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (res judicata is a rule " 'of public policy and of private peace,' which should be cordially regarded and enforced"); United States v. C.C. Clark, Inc., 159 F.2d 489, 490 (5th Cir.) (res judicata is a rule of public policy designed to "avoid useless litigation"), *cert. denied*, 331 U.S. 818 (1947); Mitchell v. National Broadcasting Co., 553 F.2d 265, 276-77 (2d Cir. 1977) (res judicata promotes "judicial husbandry," federal-state comity, and "the equity of protecting opposing parties . . . from vexatious duplicative litigation"); Spilker v. Hankin, 188 F.2d 35, 38 (D.C. Cir. 1951) (recognizing that, in the interest of finality, a matter once litigated should normally be conclusive); Putnam v. Clark, 34 N.J. Eq. 532, 535 (1881) (party admonished for bringing successive claims because "it [was] gross oppression to vex another with a double suit for the same cause of action").

[51] This is amply demonstrated by a myriad of cases that have accorded a prior judgment full res judicata implications even if it later became apparent that the dismissal was erroneously granted. *See, e.g.*, *Federated*, 452 U.S. at 398 (a final adverse judgment, unappealed, is unassailable regardless of whether the prior judgment was wrong or rested on a principle of law that was subsequently overruled); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375 (1940) (bondholders, having failed to attack the validity of a statute in prior litigation, were bound by the outcome of that litigation despite the statute later being declared unconstitutional); Reed v. Allen, 286 U.S. 191, 199 (1932) (res judicata imposed regardless of whether the prior adjudication was wrong); Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause."); Wilson's Ex'r v. Deen, 121 U.S. 525, 534 (1887) (the binding effect of a judgment does not depend on whether the judgment was right or wrong); United States v. Throckmorton, 98 U.S. 61, 65 (1878) (erroneous decision should be corrected on appeal).

[52] *See supra* note 45.

[53] 327 U.S. 678 (1946). Although an application of res judicata was not at issue, the Court's explication of the effect of a dismissal for failure to state a claim for relief as opposed to a dismissal for lack of jurisdiction is illustrative. *Id.* at 682. The distinction is especially relevant in light of Velasquez's claim that the 12(b)(6) dismissal at issue, for failure to state a claim, was more akin to a dismissal for lack of jurisdiction because it was rendered pursuant to Rule 17(b). *See* Velasquez v. Franz, 123 N.J. 498, 504, 510, 589 A.2d 143, 146, 149 (1991).

gation (FBI) agents violated their constitutional rights.[54] The agents moved to dismiss for failure to state a claim for relief.[55] The district court dismissed the action *sua sponte* for lack of subject matter jurisdiction[56] and the Ninth Circuit affirmed.[57]

The Supreme Court granted certiorari[58] and reversed.[59] The Court held that to decide whether petitioner's claim stated a valid federal cause of action, the district court must have first assumed jurisdiction over the controversy.[60] The Court explained the distinction between a dismissal for failure to state a claim and a dismissal for lack of jurisdiction, concluding that the former was a question of law to be decided *after* the court assumed jurisdiction over the matter.[61] The Court clarified further that if jurisdiction had attached and the court had then determined that the complaint failed to state a claim for relief, the dismissal would

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54 Bell v. Hood, 150 F.2d 96, 97 (9th Cir. 1945), *rev'd*, 327 U.S. 678 (1946). The petitioners sought damages for violations of their Fourth and Fifth Amendment rights. *Id.* Petitioners claimed that the FBI agents conspired to deprive them of their liberty without due process of law and to subject them and their property to an unlawful search and seizure. *Id.* at 97-98. Each of the petitioners sought "compensatory damages for alleged illegal arrest, false imprisonment, the forcible removal of his person from one place to another, the searching of his premises illegally and unreasonably, the seizing of property belonging to him and others, and the questioning without affording him the aid or advice of an attorney." *Id.* at 98.

55 *Bell*, 327 U.S. at 680. The agents averred that the arrests were within the authority conferred upon them as officers of the United States. *Id.* The agents contended that the searches and seizures were therefore valid as pursuant to a lawful arrest. *Id.*

56 *Id.* The district court concluded that the causes of action alleged did not arise under the Constitution or laws of the United States and were thus insufficient to confer federal question jurisdiction. *Id.* Accordingly, the district court judge did not rule on petitioner's substantive allegations. *Id.*

57 *Bell*, 150 F.2d at 100. The Ninth Circuit affirmed for the reason proffered by the district court and further denied petitioner's motion for leave to amend the complaint to clarify the allegations in the complaint. *Id.*

58 Bell v. Hood, 326 U.S. 706 (1945).

59 Bell v. Hood, 327 U.S. 678, 685 (1946).

60 *Id.* at 682. The agents argued that the district court could not have assumed jurisdiction for two reasons. *Id.* at 680-81. The agents first asserted that the complaint alleged only a state law cause of action for trespass. *Id.* Further, the agents stipulated that neither the Constitution nor statute authorized a recovery of money damages for Fourth and Fifth Amendment violations. *Id.* at 681.

61 *Id.* at 682. The Court stated: "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Id.* at 681. The Court refuted the agents' contention that the complaint alleged only a state law cause of action and charged that "[a] mere reading of the complaint" demonstrated that the suit was predicated on constitutional violations. *Id.* Similarly, the Court stressed that the unresolved question of a right to monetary relief was not dispositive of the existence of federal jurisdiction. *Id.*

have been on the merits, and not for lack of jurisdiction.[62] Noting that the district court could entertain jurisdiction, the Supreme Court remanded the case for a determination of whether the complaint set forth a valid claim for relief.[63]

The United States Supreme Court, in 1947, again expounded on the meaning of the phrase "on the merits" in *Angel v. Bullington*.[64] Bullington sued Angel in North Carolina state court to enforce a deficiency judgment.[65] Angel demurred,[66] claiming that a North Carolina statute precluded Bullington from recovering the deficiency.[67] The court overruled the demurrer and entered judgment for Bullington.[68] In reversing the lower court's opinion, the state supreme court held that the statute did

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62 *Id.* at 682. The Court indicated that petitioner's right to recover damages was dependent on an interpretation of federal and constitutional law. *Id.* at 685. The Court concluded that the district court had jurisdiction to interpret the law; if the district court then determined that monetary relief was not available, the dismissal would be on the merits for failure to state a claim. *Id. Cf.* Bacon v. Best Foods, Div. of C.P.C. Int'l, Inc., 412 F. Supp. 15, 16 (D. Mass. 1976) (a dismissal pursuant to Rule 12(b)(6), for failure to state a claim for relief, is a dismissal on the merits).

63 *Bell*, 327 U.S. at 685.

64 330 U.S. 183 (1947).

65 *Bullington v. Angel*, 16 S.E.2d 411, 412 (N.C. 1941), *rev'd*, 56 F. Supp. 372 (W.D.N.C. 1944), *aff'd*, 150 F.2d 679 (4th Cir. 1945), *rev'd sub nom.* Angel v. Bullington, 330 U.S. 183 (1947). Bullington, a Virginia citizen, sold land located in Virginia to Angel, a North Carolina citizen. *Id.* at 412. Angel paid a portion of the purchase price and executed notes for the remainder secured by a deed of trust on the land. *Id.* Thereafter, Angel defaulted on one of the notes. *Id.* Bullington called all of the notes due pursuant to an acceleration clause in the deed and sold the land. *Id.* Because the sale proceeds did not satisfy the full amount due on the notes, Bullington sued to collect the deficiency. *Id.*

66 *Id.* Federal Rule of Civil Procedure 7(c) abolished the term demurrer. *See* FED. R. CIV. P. 7(c) ("Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."). A demurrer is "[a]n assertion that [a] complaint does not set forth a cause of action upon which relief can be granted. . . ." BLACK'S LAW DICTIONARY 433 (6th ed. 1990). The contemporary equivalent of a demurrer in the federal courts is the 12(b)(6) motion to dismiss. *Id. See supra* note 10 (quoting Rule 12(b)(6)). Thus, Angel claimed that Bullington failed to state a claim for relief. *Bullington*, 16 S.E.2d at 412.

67 *Id.* The statute provided in relevant part:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this act to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed or trust or obligation secured by the same.

N.C. GEN. STAT. § 2593(f) (1939).

68 *Bullington*, 16 S.E.2d at 412.

not allow Bullington the recovery sought.[69]

Bullington did not appeal to the United States Supreme Court.[70] Instead, he instituted suit in the United States District Court for the Western District of North Carolina.[71] Angel asserted that the federal court was bound to follow the policy expressed by the North Carolina Legislature through its statute and should affirm the state supreme court's holding.[72] The district court reversed, and held that Bullington could collect the deficiency.[73] The Fourth Circuit affirmed the district court's holding[74] and the Supreme Court granted Angel's petition for

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69 *Id.* In dismissing Bullington's action, the North Carolina Supreme Court interpreted the statute as a jurisdictional limit on the North Carolina state courts. *Id.* The court continued:

> The legislature, within Constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this state. The legislature has exercised its prerogative to so limit the jurisdiction of the courts of this state that holders of notes given for purchase price of real estate are not entitled to a deficiency judgment thereon in such courts.

Id.

70 Angel v. Bullington, 330 U.S. 183, 185 (1946).

71 Bullington v. Angel, 56 F. Supp. 372, 372 (W.D.N.C. 1944), *aff'd*, 150 F.2d 679 (4th Cir. 1945), *rev'd sub nom.* Angel v. Bullington, 330 U.S. 183 (1947). Angel essentially contended that, pursuant to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937), the district court sitting in North Carolina was required to apply North Carolina law and to dismiss Bullington's complaint. *Bullington*, 56 F. Supp. at 373. *See infra* note 164 (discussing *Erie*, which mandates that federal courts exercising diversity jurisdiction apply state substantive law).

72 *Bullington*, 56 F. Supp. at 373.

73 *Id.* at 373-74. Judge Webb, writing for the district court, declared:

> During my nearly twenty-five years on the federal bench, I have scrupulously respected and guarded the rights of the states, but I cannot now go so far as to hold that the Legislature of North Carolina can deprive a non-resident of the right to come into this Court and sue a local defendant to recover an amount in excess of three thousand dollars which is admittedly due the plaintiff.

Bullington, 56 F. Supp. at 372-73. In holding that Bullington could invoke federal diversity jurisdiction, despite the contrary provisions of the North Carolina statute, Judge Webb interpreted *Erie* as applying only to matters of substantive law and not to matters of jurisdiction. *Id.* at 373 (citing Stephenson v. Grand Trunk W. R.R. Co., 110 F.2d 401, 405 (7th Cir. 1940)). The district court reasoned that if state legislation could restrict federal jurisdiction, it could also fully abrogate federal jurisdiction. *Id.* (citing *Stephenson*, 110 F.2d at 405). Thus, the district court concluded that although a state could limit the jurisdiction of state courts within its boundaries, state courts could not dictate the jurisdiction of the federal courts "under the theory that the latter is required to follow the public policy of the former." *Id.* (citing *Stephenson*, 110 F.2d at 406). *See generally* L.W. Farinholt, Jr., *Angel v. Bullington: Twilight of Diversity Jurisdiction*, 26 N.C. L. REV. 29 (1947) (discussing the admixture of the *Erie* doctrine and res judicata upon which the *Bullington* decision was based).

74 Bullington v. Angel, 150 F.2d 679, 681 (4th Cir. 1945), *rev'd sub nom.* Angel v. Bullington, 330 U.S. 183 (1947). The Fourth Circuit articulated that because Bull-

certiorari.[75]

Before the Supreme Court, Angel asserted that the district court erred in allowing Bullington to recover the deficiency because the North Carolina Supreme Court judgment barred a renewed action in federal court.[76] Bullington retorted that because the state court judgment was not rendered on the merits, res judicata did not bar his action.[77] Justice Frankfurter, however, writing for a divided Court, posited that Bullington misconceived the doctrine.[78] The Justice explained that a determination not to reach the ultimate substantive issues of a claim could itself operate as an adjudication of the merits, and concluded that such a determination had been made by the North Carolina Supreme Court.[79] Because the North Carolina Supreme Court declined to enforce Bullington's claim, and no appeal was taken, the majority held that the merits of Bullington's case were adjudicated and he could not wage a collateral attack in federal court.[80]

Since the promulgation of the Federal Rules of Civil Procedure, courts have concluded that a judgment is final by reference

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ington met the jurisdictional qualifications prescribed by the Constitution and laws of the United States, the federal courts could properly entertain jurisdiction that could not be circumscribed in any manner by state statutes. *Id.* at 680.

75 Angel v. Bullington, 326 U.S. 713 (1945) (mem.). The United States Supreme Court posited that the case "presented an important question in the administration of justice." Angel v. Bullington, 330 U.S. 183, 186 (1947).

76 *Angel*, 330 U.S. at 186-87.

77 *Id.* at 190. Bullington argued that because the state court did not reach the substantive merits of his claim, as mandated by the North Carolina statute, he was therefore free to litigate his cause in federal court. *Id.*

78 *Id.* Noting that the state and federal complaints were virtually identical, the Court postulated that had the present action been brought in another North Carolina state court it would undoubtedly have been barred. *Id.* at 186. The Court stated that the possibility that the North Carolina Supreme Court's decision was erroneous was irrelevant for purposes of res judicata. *Id.* at 187. According to the Court, Bullington could have sought direct review of the state supreme court's interpretation of the statute, but failed to do so. *Id.* at 189.

79 *Id.* at 190. The Court reiterated that the sole dispute before the state supreme court, whether North Carolina could lawfully close its doors to particular litigation, was raised and decided at the state level. *Id.* Accordingly, the Court declared that Bullington was not at liberty to relitigate the issue in federal court. *Id.*

80 *Id.* at 190-91. Justice Frankfurter critically observed:

> The merits of this controversy were adjudicated by the North Carolina Supreme Court since that court, or this Court on appeal, might have decided that the North Carolina statute did not bar Bullington's first action. The North Carolina statute might have been found unconstitutional. . . . Bullington knew that there were federal issues in the State suit because he raised them. He was then content to drop them and let the intermediate adjudication stand. Now he wants an encore.

Angel, 330 U.S. at 191.

to Rule 41(b), which defines the scope of decisions that will be considered "on the merits."[81] For example, in *Bartsch v. Chamberlain Co. of America, Inc.*,[82] plaintiff Bartsch brought suit in the United States District Court for the Northern District of Ohio for breach of contract.[83] The court dismissed the action, without explicitly stating that the dismissal was without prejudice, for failure to state a claim for relief.[84] Bartsch did not appeal, but instead brought another action in the district court upon the same claim.[85] The district court dismissed the action, finding that by the plain language of Rule 41(b), the original action was dismissed with prejudice.[86] On appeal, the Sixth Circuit observed that Bartsch neither sought leave to amend his complaint, nor requested that the initial order of dismissal reflect that it was rendered without prejudice.[87] The court of appeals determined that, unless stated otherwise, a judicial decision pursuant to Rule 41(b) is *with prejudice*.[88] The Sixth Circuit thus ruled that given the clear import of Rule 41(b), the dismissal was an adjudication on the merits and operated as a bar to a renewed action.[89]

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81 Federal Rule of Civil Procedure 41(b), which delineates the binding effect of an involuntary dismissal, provides in relevant part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FED. R. CIV. P. 41(b).

82 266 F.2d 357 (6th Cir. 1959) (per curiam).

83 *Id.* at 358. The *Bartsch* court interpreted Rule 41(b) literally by looking at the language of the rule and, finding that the facts did not fit within any exception, declared that the ruling was on the merits. *Id.*

84 *Id.* The order of dismissal stated that the complaint was dismissed at plaintiff's costs. *Id.*

85 *Id.* In response, Chamberlain moved for summary judgment on the grounds that Bartsch was precluded from bringing the action because the prior dismissal served as an absolute bar to an identical suit. *Id.*

86 *Id.* The order of dismissal in this proceeding granted the motion for summary judgment pursuant to Rule 41(b). *Id.*

87 *Id.*

88 *Id.* The court added that the dismissal did not fall within any of the exceptions enumerated in Rule 41(b). *Id.* *Accord* NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990) (unless stated otherwise, a dismissal for failure to state a claim for relief under Rule 12(b)(6) is with prejudice under Rule 41(b)); Gissen v. Tackman, 401 F. Supp. 310, 312 (D.N.J. 1975) (if a 12(b)(6) dismissal did not state that it was without prejudice, it barred a renewed action), *vacated on other grounds*, 537 F.2d 784 (3d Cir. 1976).

89 *Bartsch*, 266 F.2d at 358. *See, e.g.*, Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970) (the unambiguous language of Rule 41(b) clearly requires that if an order of dismissal fails to specify its preclusive effect, it is with prejudice); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) ("[I]n view of the unequivocal lan-

Two years later, in *Costello v. United States*,[90] the Supreme Court interpreted Rule 41(b) in a different manner.[91] The government had failed to file a timely affidavit of good cause in a denaturalization proceeding against Costello.[92] The United

guage of Rule 41(b), and the absence of the words 'without prejudice,' we must and do decide that the dismissal was on the merits and that it was intended to be on the merits."); *see also Rule 41(b), Federal Rules of Civil Procedure—Is A Specifying Dismissal Order Unimpeachable?*, 31 MD. L. REV. 85 (1971) (examining the ramifications of a prior dismissal with and without prejudice).

90 365 U.S. 265 (1961). Frank Costello, originally a citizen of Italy, became a naturalized American citizen in May of 1925. United States v. Costello (Costello II), 171 F. Supp. 10, 14 (S.D.N.Y. 1959) (holding that first dismissal was not on the merits), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). In 1952, the U.S. Government instituted denaturalization proceedings against Costello based on allegations that he procured his U.S. citizenship "by the concealment of material facts and by willful misrepresentation." *Id.* at 13, 14. Specifically, the government asserted that to obtain citizenship, Costello represented that he was in the real estate business when in fact his occupation was bootlegging in violation of the prohibition laws of the United States. *Id.* at 16.

91 *See Costello*, 365 U.S. at 286-87 (a dismissal will only be construed as an adjudication without prejudice under Rule 41(b) if the policy of the Rule's stated exceptions is furthered).

92 United States v. Costello (Costello I), 142 F. Supp. 290, 290-91 (S.D.N.Y. 1956) (motion to dismiss denied), *and*, 145 F. Supp. 892 (S.D.N.Y. 1956) (motion to dismiss granted), *rev'd*, 247 F.2d 384 (2d Cir. 1957), *rev'd sub nom.* Matles v. United States, 356 U.S. 256 (1958) (per curiam), *on remand sub nom.* United States v. Costello (Costello II), 171 F. Supp. 10 (S.D.N.Y. 1959) (holding that first dismissal was not on the merits), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). At that time, the government was required to submit an affidavit of good cause as a prerequisite for bringing a denaturalization proceeding. *Id.* at 291. Although the government filed the required affidavit, the affidavit was not served simultaneously with the complaint. *Id.* On a motion to dismiss the government's complaint, Costello contended that because the affidavit was a prerequisite to the district court's obtaining jurisdiction over the case, the government's late filing could not establish jurisdiction because jurisdiction never attached in the first instance. *Id.* at 291. The district court nonetheless held that the government was permitted to file the affidavit separately from the complaint and therefore refused to dismiss the action. *Id.* At trial, however, the district court dismissed the government's action because portions of the affidavit were derived from wiretapping. United States v. Costello, 145 F. Supp. 892, 894 (S.D.N.Y. 1956), (motion to dismiss granted), *rev'd*, 247 F.2d 384 (2d Cir. 1957), *rev'd sub nom.* Matles v. United States, 356 U.S. 256 (1958) (per curiam), *on remand sub nom.* United States v. Costello (Costello II), 171 F. Supp. 10 (S.D.N.Y. 1959) (holding that first dismissal was not on the merits), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). Because the district court deemed it too difficult and timely for the government to segregate the tainted from the lawful sources of information contained in the affidavit, it dismissed the action without prejudice upon Costello's stipulation that he would not object to the government bringing the action anew. *Id.* at 895-96. The government appealed this dismissal and the United States Court of Appeals for the Second Circuit reversed. United States v. Costello, 247 F.2d 384, 387 (2d Cir. 1957), *rev'd sub nom.* Matles v. United States, 356 U.S. 256 (1958) (per curiam), *on remand sub nom.* United States v. Costello (Costello II), 171 F. Supp. 10 (S.D.N.Y. 1959) (holding that first dismissal was not on

States District Court for the Southern District of New York ultimately dismissed the action but, as the court in *Bartsch*, did not specify whether the dismissal was with or without prejudice.[93] The government then brought the action anew in the district court, this time accompanied in a timely manner by the required affidavit.[94] In response, Costello argued that under Rule 41(b)[95] the government was barred from bringing a second action because the prior dismissal did not state that it was without prejudice and because the dismissal did not fall within exceptions stated in the Rule.[96] The district court held that its previous dismissal, entered at the direction of the United States Supreme Court, was jurisdictional in nature and therefore was not rendered on the merits.[97] The Second Circuit affirmed[98] and the

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the merits), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). Recognizing that the required affidavit may have contained unlawfully procured information, the Second Circuit nonetheless concluded that the government should have been granted leave to file a new affidavit. *Id.* at 387. The Supreme Court granted certiorari and reversed. *See* Matles v. United States, 356 U.S. 256 (1958) (per curiam), *on remand sub nom.* United States v. Costello (Costello II), 171 F. Supp. 10 (S.D.N.Y. 1959) (holding that first dismissal was not on the merits), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). The Supreme Court noted that an affidavit of good cause must be filed in a denaturalization proceeding, but added that the affidavit must also be filed simultaneously with the complaint. *Id.* at 257. Accordingly, the Court directed the district court on remand to dismiss the government's action. *Id.*

93 *See* United States v. Costello, 275 F.2d 355, 361 (2d Cir. 1960) (acknowledging that the district court's order, entered at the direction of the Supreme Court, failed to specify the preclusive effect of the judgment of dismissal), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961).

94 *Costello II*, 171 F. Supp. at 14. The government filed the affidavit in compliance with § 340(a) of the Immigration and Nationality Act of 1952 and submitted it simultaneously with the complaint. *Id.*

95 In 1961, Federal Rule of Civil Procedure 41(b) did not refer to Rule 19, because Rule 19 was not yet promulgated; otherwise Rule 41(b) was substantially the same then as it is now. *See supra* note 81 for the text of Rule 41(b).

96 *Costello II*, 171 F. Supp. at 22. Interestingly, among the grounds Costello asserted for dismissal of the denaturalization proceedings was that the government was barred by res judicata from bringing the action. *Id.* Costello argued that the order of naturalization, granted some thirty-five years earlier, was a valid judgment and binding on the government. *Id.* The court, however, dismissed this contention, reminding that the government was not bound by res judicata from revoking a certificate of citizenship procured by fraud. *Id.*

97 *Id.* The district court ultimately revoked Costello's citizenship, stating: "An application to become a United States citizen is a serious matter and is entitled to be treated with more respect than an application to join the corner pinochle club." *Id.* at 19.

98 United States v. Costello, 275 F.2d 355, 361 (2d Cir. 1960), *aff'd sub nom.* Costello v. United States, 365 U.S. 265 (1961). The appellate court recognized that the district court's failure to indicate that its dismissal was without prejudice "may

United States Supreme Court granted certiorari.[99]

In holding that the prior dismissal was not on the merits, the Supreme Court advocated against a literal reading of Rule 41(b).[100] The Court reasoned that the prior dismissal resembled a dismissal for lack of jurisdiction, a ground specifically enumerated in the Rule as a dismissal without prejudice.[101] The Court reminded, however, that if a claimant failed to demonstrate a right to relief, either on the facts or the law, it would be justifiable to grant a dismissal with prejudice.[102]

The United States Court of Appeals for the Eighth Circuit, in *Glick v. Ballentine Produce, Inc.*,[103] similarly commented on the directive of Rule 41(b) in the context of a wrongful death action.[104] The suit below was dismissed with prejudice because the com-

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have been an error." *Id.* The court further posited that any confusion generated by that failure could have been corrected if the government had appealed the order of dismissal. *Id.* Although holding that Rule 41(b) did not bar the government's action, the court warned that it was not construing "jurisdiction" as used in the Rule in its technical sense. *Id.* Rather, the court reasoned that the Supreme Court, in directing the district court to dismiss the action, did not intend that the government be forever barred from stripping Costello of his citizenship. *Id.* at 361-62.

99 Costello v. United States, 362 U.S. 973 (1960) (mem.).

100 Costello v. United States, 365 U.S. 265, 285 (1961). The Court opined:

> It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

Id.

101 *Id.* at 286. The Court perceived that a Rule 41(b) dismissal that operated as an adjudication on the merits typically "involve[d] situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them." *Id.* The Court opined that a dismissal pursuant to Rule 41(b), other than one for lack of jurisdiction, should only be construed as an adjudication on the merits when the policy of the Rule would be served. *Id.*

102 *Id.*

103 397 F.2d 590 (8th Cir. 1968).

104 *Id.* at 591. A widow and her minor son sued Ballentine for the wrongful death of Wallace Glick. *See* Glick v. Ballentine Produce, Inc., 343 F.2d 839, 840 (8th Cir.), *cert. denied*, 382 U.S. 891 (1965), *and*, 397 F.2d 590 (8th Cir. 1968). The complaint alleged that a negligently driven Ballentine vehicle collided with a vehicle operated by Wallace Glick causing Glick's death. *Id.* The widow and her son jointly sought damages totalling $162,000. *Id.* at 840-41. The claimants instituted suit in the United States District Court for the Western District of Arkansas. *Id.* at 840. Jurisdiction was predicated on diversity of citizenship; the Glicks were Missouri residents and Ballentine was an Arkansas corporation with its principal place of business in Arkansas. *Id.* The accident occurred on a public highway in Missouri.

plaint failed to assert a claim upon which relief could be granted.[105] The Eighth Circuit affirmed[106] and the Supreme Court denied certiorari.[107] The claimants subsequently instituted a second action in federal court, drafting the complaint so as to plead a cognizable cause of action.[108] The district court dismissed the complaint as barred by the statute of limitations.[109]

In their appeal to the Eighth Circuit, the claimants attempted to differentiate a dismissal on the pleadings from a dismissal on the merits, maintaining that only the latter barred a second suit on the same cause of action.[110] The court held that under 41(b) it was irrelevant whether the dismissal was on the pleadings or on the merits.[111] In either scenario, the court postulated, a dismissal for failure to state a claim was an adjudication on the merits under Rule 41(b).[112] The court explained as well that such a dismissal clearly sufficed to bar the suit through the application of res judicata.[113]

It was against this backdrop of procedural complexity that

Id. The action was transferred to the United States District Court for the Western District of Missouri upon motion by Ballentine. *Id.* at 841.

105 *Id.* The claimants contended that Arkansas law governed the dispute and drafted their complaint accordingly. *Id.* The district court, however, determined that Missouri law governed the dispute and concluded that the complaint failed to state a cognizable cause of action under Missouri law. *Id.* Hence, the district court granted an order to permit the claimants to amend their complaint. *Id.* Instead of re-drafting the complaint to comply with Missouri law, the claimants "filed a 'motion to modify order' " contending that Arkansas law should govern. *Id.* The district court denied the motion and dismissed the suit. *Id.*

106 *Id.* at 844.

107 Glick v. Ballentine Produce Inc., 343 F.2d 839 (8th Cir.), *cert. denied*, 382 U.S. 891 (1965).

108 *See* Glick v. Ballentine Produce Inc., 397 F.2d 590, 591 (8th Cir. 1968). The claimants drafted their complaint to comply with the Missouri wrongful death statute. *Id.*

109 *Id.*

110 *Id.* at 592-93. The claimant's primary contention on appeal concerned the date on which the statute of limitations accrued. *Id.* at 591. In addition, the claimants urged that their original suit was dismissed only because their complaint failed to state a cause of action, and not because their claim was invalid. *Id.* The claimants therefore argued that the dismissal was not on the merits, despite the order of dismissal stating that it was with prejudice. *Id.* at 592.

111 *Id.* The court emphasized that the original complaint did not state a cause of action and was specifically dismissed with prejudice. *Id.*

112 *Id.* at 592-93.

113 *Id.* at 593. The court repeated that a dismissal for failure to state a claim for relief was a final adjudication with prejudice and binding on the claimants in a subsequent action between the same parties. *Id.* (citations omitted). *Accord* Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987); Cemer v. Marathon Oil Co., 583 F.2d 830, 832 (6th Cir. 1978) (per curiam); Mitchell v. National Broadcasting Co., 553 F.2d 265, 271 (2d Cir. 1977).

the New Jersey Supreme Court approached *Velasquez v. Franz*.[114] The court addressed the preclusive effect of a federal 12(b)(6) dismissal grounded on the defendant's immunity from suit.[115] Justice Garibaldi, writing for the majority, commenced with a discussion of res judicata,[116] which, the justice maintained, unequivocally defeated Velasquez's claim.[117] Noting the common law origins of the doctrine,[118] the justice delineated the interests that res judicata was designed to accommodate.[119] Buttressed by

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114 123 N.J. 498, 589 A.2d 143 (1991). The opinion canvassed pertinent provisions of the Federal Rules of Civil Procedure in conjunction with principles of res judicata under both federal and state law. *See id.* at 505-10, 589 A.2d at 147-50.

115 *Id.* at 500, 589 A.2d at 144.

116 *Id.* at 505, 589 A.2d at 147. The justice stated: "[T]he doctrine of *res judicata* provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Id.* (citing Roberts v. Goldner, 79 N.J. 82, 85, 397 A.2d 1090, 1091 (1979)). *See, e.g.*, Constant v. Pacific. Nat'l Ins. Co., 84 N.J. Super. 211, 216, 201 A.2d 405, 408 (Law Div. 1964) (the application of res judicata requires "(1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action, and (4) identity of the quality in the persons for or against whom the claim is made.").

117 *Velasquez*, 123 N.J. at 505, 589 A.2d at 147. Velasquez advocated that the New Jersey Supreme Court was confronted with a choice "between two diametrically opposed approaches in applying the doctrine of *res judicata*." Brief for Appellant at 3, Velasquez v. Franz, 123 N.J. 498, 589 A.2d 143 (1991) (No. 30-882). Velasquez proffered that one approach was designed to bar only those claims adjudicated on the " 'ultimate merits' " *Id. Accord* Donnelly v. United Fruit Co., 75 N.J. Super. 383, 391, 183 A.2d 415, 419 (App. Div. 1962) (res judicata barred a subsequent suit between the same parties upon the same claim only where there was a prior adjudication on the ultimate merits), *aff'd*, 40 N.J. 61, 190 A.2d 825 (1963); Central R.R. Co. v. Neeld, 26 N.J. 172, 177, 139 A.2d 110, 113 ("The doctrine of *res judicata* is well designed to preclude the relitigation of issues which have been fairly and finally determined, but it ordinarily does not come into play where the parties have not had an adjudication on the ultimate merits."), *cert. denied*, 357 U.S. 928 (1958); Longo v. Reilly, 35 N.J. Super. 405, 410, 114 A.2d 302, 304 (App. Div. 1955) ("[W]hen a prior action is dismissed on grounds not going to the merits of a grievance asserted, it will not constitute *res adjudicata*."), *certif. denied*, 25 N.J. 45, 134 A.2d 540 (1957). The other approach, according to Velasquez, "elevate[d] techniques to improve dispositional statistics over the importance of reaching a just result in the individual case." Brief for Appellant at 4, *Velasquez* (No. 30-882). *Accord* RESTATEMENT, *supra* note 43, § 19 cmt. a ("Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar.").

118 *Velasquez*, 123 N.J. at 505, 589 A.2d at 147. *See In re* Coruzzi, 95 N.J. 557, 568, 472 A.2d 546, 551 (observing that courts are not required to apply the related doctrine of collateral estoppel because it is not constitutionally or statutorily based), *appeal dismissed*, 469 U.S. 802 (1984).

119 *Velasquez*, 123 N.J. at 505, 589 A.2d at 147. The majority commented:

> The rationale underlying *res judicata* recognizes that fairness to the defendant and sound judicial administration require a definite end to litigation. The doctrine evolved in response to the specific policy concerns of providing finality and repose for the litigating parties; avoid-

these policy considerations, Justice Garibaldi rebuffed Velasquez's attempt to relitigate his claim in a New Jersey forum.[120]

Principally, the majority disputed Velasquez's assertion that the federal dismissal was not an adjudication on the merits and therefore should not be given preclusive effect.[121] The justice recognized that, typically, the merits of a claim are reached after a plenary proceeding.[122] The majority added, however, that preclusive effect could attach to a judgment even in the absence of a full trial on the substantive merits.[123]

> ing the burdens of relitigation for the parties and the court[] and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter.

Id. (citations omitted).

120 *Id.* at 515, 589 A.2d at 152. The Justice forcefully indicated that "well-established principles of *res judicata* . . . squarely answer[ed]" Velasquez's contentions. *Id.* at 505, 589 A.2d at 147.

121 *Id.* at 507, 589 A.2d at 148.

122 *Id.* at 506, 589 A.2d at 147.

123 *Id.* at 506, 589 A.2d at 147. The majority noted that claims disposed of before trial may also be entitled to preclusive effect. *Id.* *See* MOORE et al., *supra* note 3, ¶ 0.409[1.-2] ("A 'judgment on the merits,' as that phrase is used in the conventional statement of the res judicata doctrine, is not necessarily a judgment based upon a trial of contested facts.") (footnotes omitted); 46 AM. JUR. 2D *Judgments* § 477 (1969) ("[I]t is not essential to the operation of the doctrine of res judicata that the court shall have passed on the ultimate substantive [merits].") (footnote omitted); *see also* Angel v. Bullington, 330 U.S. 183, 190 (1947) (a determination not to reach the ultimate substantive issues of a claim could itself operate as an adjudication of the merits); Gambocz v. Yelencsics, 468 F.2d 837, 840 (3d Cir. 1972) (a dismissal with prejudice, even if entered before trial, bars a subsequent action on the same claim); Blazer Corp. v. N.J. Sports and Exposition Auth., 199 N.J. Super. 107, 113, 488 A.2d 1025, 1028 (App. Div. 1985) (a judgment of dismissal, even if entered before trial, can constitute a judgment on the merits). The majority therefore cited with approval § 27 of the RESTATEMENT, *supra* note 43, which reads in relevant portion:

> When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment, . . . a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict.

RESTATEMENT, *supra* note 43, § 27 cmt. d; *Velasquez*, 123 N.J. at 506, 589 A.2d at 147. Although the *Velasquez* majority cited the above provision as relating to res judicata, the language of § 27 pertains to *issues* and more appropriately governs the effects of collateral estoppel or issue preclusion. *See id.*; *see also supra* note 3 for an explanation of the distinction between res judicata and collateral estoppel; Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (noting that, as used in the Restatement, res judicata loosely refers to doctrines of "merger, bar, collateral estoppel, and direct estoppel"); 18 WRIGHT et al., *supra* note 45, § 4419 (discussing the requirement of "actual litigation" as used in § 27 of the Restatement (Second) of Judgments, in the context of *issue* preclusion).

Despite suggestions to the contrary, Justice Garibaldi emphasized that the federal dismissal for Leyden's lack of capacity to be sued could not be equated with a dismissal for lack of jurisdiction, a ground that concededly would not have foreclosed a subsequent action.[124] The justice, interpreting Federal Rule of Civil Procedure 41(b)[125] and its state counterpart, Rule 4:37-2(d),[126] concluded that under both provisions, a dismissal for failure to state a claim was an adjudication on the merits.[127] The majority further noted that the federal dismissal was devoid of any language indicating that the judgment was rendered without

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[124] *Velasquez*, 123 N.J. at 507, 589 A.2d at 148. Velasquez urged that the federal dismissal should be treated as a dismissal for lack of subject matter jurisdiction because, in essence, his claim was dismissed for lack of capacity to be sued and not pursuant to Rule 12(b)(6). *Id.* Thus, Velasquez argued that the federal court did not pass on the merits of the case. *Id.* Justice Garibaldi acknowledged that a dismissal for lack of jurisdiction would not bar relitigation of a claim dismissed on that ground. *Id.* *See* RESTATEMENT, *supra* note 43, § 20(1)(a) (a valid, final and personal judgment does not bar a plaintiff from instituting another action on the same claim if the judgment is one of dismissal for lack of jurisdiction, improper venue or the improper joinder of parties). The justice, however, firmly stated that Velasquez's federal action was dismissed pursuant to Rule 12(b)(6) for failure to state a claim for relief and not because the federal court lacked jurisdiction over the matter. *Velasquez*, 123 N.J. at 507, 589 A.2d at 148. *Cf.* Summers v. Interstate Tractor and Equip. Co., 466 F.2d 42, 50 (9th Cir. 1972) (capacity to sue or be sued in federal court has no bearing on the court's jurisdiction); Brown v. Keller, 274 F.2d 779, 780 (6th Cir.) (intimating that there was a distinction between lack of jurisdiction and lack of capacity under Rule 17), *cert. denied*, 363 U.S. 828 (1960).

[125] *See supra* note 81 (text of Rule).

[126] New Jersey Court Rule 4:37-2 provided in pertinent part: "Unless the order of dismissal otherwise specifies, a dismissal under R. 4:37-2(b) or (c) and any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits." N.J. CT. R. 4:37-2(d).

[127] *Velasquez*, 123 N.J. at 508, 589 A.2d at 148. Rule 4:37-2 "is in the main Federal Civil Rule 41(b) as amended." New Jersey Supreme Court, *Tentative Draft of the Rules Governing the Courts of New Jersey* 180 (1948). Having demonstrated that Rule 41(b) and New Jersey Rule 4:37-2 were virtually identical in effect, the majority concluded that under New Jersey Court Rule 4:6-2(e), New Jersey's analogue to FED R. CIV. P. 12(b)(6), a dismissal for failure to state a claim was "an adjudication on the merits for *res judicata* purposes." *Velasquez*, 123 N.J. at 508, 589 A.2d at 148. Rule 4:6-2 provides in pertinent part:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader be made by motion, with briefs: . . . . (e) failure to state a claim upon which relief can be granted.

N.J. CT. R. 4:6-2(e). *See* 9 WRIGHT et al., *supra* note 45, § 2373 at 229 ("A dismissal under Rule 41(b) or any other dismissal not provided for in Rule 41 will operate as an adjudication on the merits unless the court otherwise specifies or the dismissal is for lack of jurisdiction, improper venue, or failure to join a party under Rule 19.").

prejudice.[128] In the absence of such language, Justice Garibaldi announced that she was constrained to deny Velasquez's requested relief.[129]

The majority next refuted Velasquez's contention that res judicata did not bar his state suit because the judgment did not issue from a substantive rule, but rather resulted from the directive of Federal Rule of Civil Procedure 17(b), a rule of federal procedure.[130] Justice Garibaldi retorted that the prior federal action was dismissed pursuant to Rule 12(b)(6), and not Rule 17(b).[131] Even assuming, however, that the federal dismissal followed from 17(b), the majority concluded that the Rule could not accurately be characterized as one of mere procedure.[132] The justice reasoned that the law of the state of incorporation governed corporate capacity to be sued under decisional law even before the promulgation of the Rule 17(b) capacity provision.[133]

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128 *Velasquez*, 123 N.J. at 509, 589 A.2d at 149. *See* Mason v. Nabisco Brands, Inc., 233 N.J. Super. 263, 267, 558 A.2d 851, 853 (App. Div. 1989) (when there has been no prior adjudication of the merits of a particular claim, any dismissal of that prior claim will be without prejudice and will not preclude a litigant from bringing another action to recover upon the same claim); Malhame v. Borough of Demarest, 174 N.J. Super. 28, 30-31, 415 A.2d 358, 359 (App. Div. 1980) (per curiam) (a dismissal without prejudice "adjudicates nothing").

129 *Velasquez*, 123 N.J. at 509, 589 A.2d at 149. *Accord* WRIGHT et al., *supra* note 45, § 2373 (it is within the discretion of the court to specify on the order of dismissal that the judgment is without prejudice, but if the court fails to do so the dismissal is construed as if it were with prejudice). Justice Garibaldi observed that because the dismissal sub judice failed to specify that it was without prejudice, the 12(b)(6) dismissal in the federal court was on the merits. *Velasquez*, 123 N.J. at 509, 589 A.2d at 149. *See* Dyer v. Intera Corp., 870 F.2d 1063, 1066 (6th Cir. 1989) (12(b)(6) dismissal is on the merits and entitled to preclusive effect); Cemer v. Marathon Oil Co., 583 F.2d 830, 832 (6th Cir. 1978) (a dismissal for failure to state a claim for relief is an adjudication on the merits pursuant to Rule 41(b)). *But see* MOORE et al., *supra* note 3, ¶ 0.409[1.-2] nn. 10, 14 (several jurisdictions do not accord preclusive effect to a dismissal for failure to state a claim).

130 *Velasquez*, 123 N.J. at 510, 589 A.2d at 149. Velasquez charged that his original federal suit was dismissed because Rule 17(b) "forced" the district court to apply Illinois law (the law of Leyden's state of incorporation) to determine Leyden's capacity to be sued. Brief for Appellant at 1, Velasquez v. Franz, 123 N.J. 498, 589 A.2d 143 (1991) (No. 30-882). Velasquez averred that although the district judge "made passing reference to FED. R. CIV. P. 12(b)(6) in his oral opinion, his real focus was on Fed. R. Civ. P. 17(b) and in substance, the dismissal was based upon Fed. R. Civ. P. 17(b), not 12(b)(6)." *Id.* at 5. Thus, Velasquez maintained that because 17(b) was a procedural rule and his complaint was dismissed pursuant to its terms, res judicata should not apply. *Velasquez*, 123 N.J. at 510, 589 A.2d at 149. *Cf.* Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 (2d Cir. 1977) (a dismissal rendered solely on procedural grounds was not on the merits).

131 *Velasquez*, 123 N.J. at 510, 589 A.2d at 149. Justice Garibaldi pointed out that Velasquez, as well as the dissent, failed to recognize this critical fact. *Id.*

132 *Id.* at 510, 589 A.2d at 149-50.

133 *Id.*, 589 A.2d at 149. According to the majority, this was amply demonstrated

Thus, according to the majority, Rule 17(b) was substantive and should have been accorded full res judicata effect.[134]

Moreover, the majority questioned Velasquez's failure to appeal the adverse federal decision.[135] According to Justice Garibaldi, any attempt to contravene the established course of appellate review was futile.[136] Velasquez's effort to begin anew in the state courts after a dismissal in federal court was contrary, in the court's view, to principles of comity,[137] and the majority stressed that it would not allow Velasquez to pursue that route.[138]

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by Pendleton v. Russell, in which a judgment obtained in Tennessee against a corporation dissolved in New York was held invalid. *Id.* (citing Pendleton v. Russell, 144 U.S. 640, 645 (1892)). The *Pendleton* Court stated that because the corporation had expired, "the suit . . . ceased to be a pending suit." *Pendleton*, 144 U.S. at 645. Justice Garibaldi posited that the fact that the United States Supreme Court referred to the law of the state of incorporation demonstrated that the choice of law provisions of Rule 17(b) were indeed a matter of substantive law. *Velasquez*, 123 N.J. at 510-11, 589 A.2d at 149-50.

134 *Velasquez*, 123 N.J. at 510, 589 A.2d at 149. *But see* 6A WRIGHT et al., *supra* note 45, § 1559 at 441; *id.* § 1569 at 490 ("[c]apacity traditionally has been viewed as a procedural matter that does not infringe upon the substantive right to recover.").

135 *Velasquez*, 123 N.J. at 511, 589 A.2d at 150. The majority emphasized that even if the federal court erred in following the directive of Rule 17(b), plaintiff's redress lies in an appeal to the Third Circuit, not in a subsequent state court action. *Id.* Justice Garibaldi added that, in her view, the dissent failed to adequately address this issue. *Id.* at 512, 589 A.2d at 150. *See* RESTATEMENT, *supra* note 43, § 71 cmt. f ("[R]elief on the basis of mistake is not a substitute for an appeal."); *id.* § 71 cmt. e ("errors by the court in reaching decision, for example in misinterpreting the legal rule that should be applied," cannot be avoided by bringing another suit but must be corrected on appeal); RESTATEMENT (SECOND) CONFLICT OF LAWS § 106 (1971) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment."); *see also supra* note 51 for cases where the court refused to deny preclusive effect simply because a prior decision may have been erroneous.

136 *Velasquez*, 123 N.J. at 511, 512, 589 A.2d at 150, 151. The justice announced: "We would not approve a federal court's decision to ignore a judgment of our trial court. We will not embrace the opposite course here." *Id.* at 512, 589 A.2d at 151.

137 *Id.*, 589 A.2d at 151. Judicial comity is the notion that courts will respect judgments of courts from different jurisdictions, even if not obliged to do so, "out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990). *See generally* Robert H. Jackson, *Full Faith And Credit—The Lawyer's Clause Of The Constitution*, 45 COLUM. L. REV. 1 (1945) (discussing the development and requirements of the Full Faith and Credit Clause of the U.S. Constitution).

138 *Velasquez*, 123 N.J. at 513, 589 A.2d at 151. The majority explained that because Velasquez initiated his action in federal court and received an adverse decision, the court would not entertain his attempt to undertake a state proceeding. *Id.* Any other conclusion, the court deemed, would endorse forum sampling. *Id. Accord* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419 (1964) (when a party makes a deliberate choice to litigate federal claims in state court, that party has elected to forego his right to return to a federal forum); Schum v. Bailey, 578 F.2d 493, 505 (3d Cir. 1978) (Gibbons, J., concurring) (if forum shopping were

Finally, the majority spurned the suggestion that, due to attendant circumstances, res judicata should not be applied.[139] Such a conclusion, the justice articulated, would frustrate rather than promote the goals of res judicata. [140] Although the majority acknowledged that in rare cases principles of res judicata must fall to competing considerations,[141] it concluded that the case at bar did not justify such a departure.[142] Justice Garibaldi emphatically refused to countenance Velasquez's suggestion that res judicata should yield, in the interest of justice, to afford a more equitable result.[143] Accordingly, the majority held that the federal dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) was a decision on the merits and that res judicata barred

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allowed "we would witness the ludicrous spectacle of litigants scurrying around in search of the state that provides the best avenue of attack on the federal judgment").

139 *Velasquez*, 123 N.J. at 513-14, 589 A.2d at 151.

140 *Id.* at 514, 589 A.2d at 151-52. Justice Garibaldi reiterated that the federal and state actions were identical in all relevant aspects. *Id.* According to the justice, to endorse plaintiff's attempt to refile a losing claim in state court would "undermine public policies favoring stability, limitation on the duration of litigation of a claim, and conservation of judicial resources." *Id.* As such, the justice deferred to the chastising language of the United States Supreme Court in a decision rendered some 60 years ago:

> The predicament in which respondent finds himself is of his own making. . . . [W]e cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.

Id. at 514, 589 A.2d at 151 (quoting Reed v. Allen, 286 U.S. 191, 198-99 (1932)).

141 *Id.* at 513-14, 589 A.2d at 151. The majority suggested that res judicata should yield only where a substantial public interest was at stake and where the prior judgment would " 'frustrate totally the essential purpose of a statute' and result in an 'inequitable administration of the law.' " *Id.* (quoting City of Plainfield v. Public Serv. Elec. & Gas Co., 82 N.J. 245, 258-59, 412 A.2d 759, 760 (1980) (relitigation of the interpretation of an 1898 contract allowed despite the fact that the contract was the subject of a prior adjudication in 1916)).

142 *Id.* at 514, 589 A.2d at 151.

143 *Id.*, 589 A.2d at 151-52. The majority stressed that res judicata "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* at 513, 589 A.2d at 151 (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981)). *See* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) ("no principle of law or equity" approves the rejection of res judicata). The majority therefore declined to decide whether New Jersey choice-of-law rules would have favored the application of New Jersey or Illinois law. *Velasquez*, 123 N.J. at 514, 589 A.2d at 151.

Velasquez from relitigating his claim in the New Jersey courts.[144]

Justice Stein,[145] noting the peculiarity of the case, filed a thorough dissent.[146] The justice not only advocated a view contrary to that of the majority, but posited that the decision of the court failed to sufficiently address the issues involved.[147] Instead of embracing the questions of whether the federal disposition was rendered on the merits or pursuant to Federal Rule 12(b)(6) or 17(b) as the majority had done, the dissent characterized the issue in markedly different terms.[148]

According to the dissent, the majority failed to consider the possibility that equitable relief could be granted notwithstanding the technical mandate of res judicata.[149] In undertaking this analysis, Justice Stein emphasized that the issue could only be settled by addressing the doctrine in the context of the specific factual circumstances that prompted the district court to dismiss Velasquez's claim.[150]

Justice Stein first reviewed several axiomatic principles of res judicata.[151] The justice noted that litigants have never been permitted to circumvent prior adverse decisions solely on the grounds that they were wrong.[152] In such cases, the dissent suggested, res judicata should properly bar a second suit.[153] In cer-

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144 *Id.* at 515, 589 A.2d at 152.

145 Justice Stein was joined in dissent by Justice O'Hern. Justice Clifford did not participate. *Velasquez*, 123 N.J. 542, 589 A.2d 168 (Stein, J., dissenting).

146 *Id.* at 515, 589 A.2d at 152 (Stein, J., dissenting).

147 *Id.*

148 *Id.* The justice stated that the majority's analysis was founded on a "make-weight issue." *Id.* The dissent observed that it was readily apparent that the federal court relied on Rule 17(b) in resolving the choice-of-law issue and that the case was dismissed pursuant to Rule 12(b)(6). *Id.* at 515-16, 589 A.2d at 152 (Stein, J., dissenting). Hence, Justice Stein framed the issue as "the extent to which principles of *res judicata* permit a court to grant relief from an otherwise final judgment because of significant equitable considerations." *Id.* at 515, 589 A.2d at 152 (Stein, J., dissenting).

149 *Id.* Justice Stein questioned the majority's adherence to "hornbook legal principles" that fail to explain the majority's hesitance to adopt a more equitable view of res judicata. *Id.* at 516, 589 A.2d at 152 (Stein, J. dissenting).

150 *Id.*

151 *Id.* at 516-17, 589 A.2d at 152-53 (Stein, J., dissenting). *See* Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) ("*[R]es judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace.' ").

152 *Velasquez*, 123 N.J. at 516, 589 A.2d at 152-53 (Stein, J., dissenting). *See* Mitchell v. National Broadcasting Co., 553 F.2d 265, 272 (2d Cir. 1977) ("The doctrine of res judicata does not depend on whether the prior judgment was free from error. . . . Otherwise, judgments would have no finality and the core rationale of the rule of res judicata—repose—would cease to exist.") (citations omitted).

153 *Id. See, e.g.*, Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)

tain circumstances, however, the dissent indicated that principles of res judicata should not be inflexibly applied.[154] Justice Stein

(erroneous judgments cannot be collaterally attacked but must instead be corrected on appeal).

[154] *Velasquez*, 123 N.J. at 517, 589 A.2d at 153 (Stein, J., dissenting). Justice Stein referenced several cases that adopted a more sympathetic view of res judicata. *Id.* *See In re* Coruzzi, 95 N.J. 557, 568, 472 A.2d 546, 551 ("sufficient countervailing interests" may justify a departure from collateral estoppel if the rule's application would not further its purposes), *appeal dismissed*, 469 U.S. 802 (1984); City of Plainfield v. Public Serv. Elec. and Gas Co., 82 N.J. 245, 258, 412 A.2d 759, 766 (1980) (courts, compelled by "broader considerations," may disregard rules of preclusion "to avoid inequitable administration of the law"). Indeed, Justice Rutledge called for the exercise of discretion in applying res judicata in his dissent in Angel v. Bullington:

> It is not every case in which a litigant has had "one bite at the cherry" that the law forbids another. In other words, it is not every such case in which the policy of stopping litigation outweighs that of showing the truth. . . . Upon the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the showing of the truth. That balance has never been so one-sided in favor of the former that the matter is ended simply by showing that a party has had some chance, however slight, in a previous litigation to secure a favorable decision.

Angel v. Bullington, 330 U.S. 183, 203-04 (1947) (Rutledge, J., dissenting) (footnote omitted). *See Federated*, 452 U.S. at 403 (Blackmun, J., concurring) (approving the application of res judicata but recognizing that it need not be applied immutably); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964) (refusing to bar an action where the claimant reasonably proceeded in reliance on an erroneous view of the law); Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1939) (Congress may, through legislation, create exceptions to usual rules of preclusion); Schum v. Bailey, 578 F.2d 493, 506 (3d Cir. 1978) (Gibbons, J., concurring) (relaxing the rule of finality to afford relief in unique circumstances, but warning: "our holding is not intended to be a precedent for any large inroads upon the finality principle"); Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594, 598 (5th Cir.) (an occasional exception to res judicata that comports with public policy will not hamper the rule's effectiveness), *cert. denied*, 434 U.S. 859 (1977); La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1276 (2d Cir. 1974) (res judicata "is intended to serve the aims of fairness and efficient judicial administration . . . [and] need not be applied mechanically where those ends would not be served"); Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 874 (3d Cir. 1972) ("While the doctrine of res judicata is meant to foster judicial efficiency and protect defendants from the oppression of repeated litigation, it should not be applied inflexibly to deny justice."); Desroisers v. American Cyanamid Co., 377 F.2d 864, 871 (2d Cir. 1967) (refusing to apply res judicata inflexibly to impose unwarranted hardship); Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951) (on occasion, public policy dictates against strict adherence to res judicata); Chang v. Northwestern Memorial Hosp., 549 F.Supp 90, 95 (N.D. Ill. 1982) (mem.) (courts can use some discretion in applying res judicata); Adams v. Pearson, 104 N.E.2d 267, 271-72 (Ill. 1952) (res judicata, although applicable, would not be applied because either or both litigants would be denied redress because of a technicality or legal mistake); Hodgson v. Applegate, 31 N.J. 29, 43, 155 A.2d 97, 105 (1959) (in applying res judicata "justice should be done in every case"); Taha v. DePalma, 214 N.J. Super. 397, 400, 519 A.2d 905, 906-07 (App. Div. 1986) (approving exceptions to res judicata when necessary to serve the public interest);

argued that the federal disposition of the matter fell short of adjudicating the ultimate issues and should not preclude Velasquez from relitigating his claim in the New Jersey courts.[155]

The dissent offered several rationales for its conclusion.[156] Initially, Justice Stein recognized that the federal court, relying on Rule 17(b), applied Illinois law in dismissing Velasquez's action.[157] The dissent maintained, however, that reliance on Rule 17(b), both by the court and counsel, was misplaced in light of an array of federal decisions holding the Rule inapplicable in diversity cases.[158] Thus, according to Justice Stein, the issue of controlling law was never actually litigated in the federal court.[159]

Blazer Corp. v. N.J. Sports and Exposition Auth., 199 N.J. Super. 107, 111, 488 A.2d 1025, 1027 (App. Div. 1985) (the entire controversy doctrine is predicated on judicial fairness and will be applied to invoke fair results); Kozlowski v. Smith, 193 N.J. Super. 672, 675, 475 A.2d 663, 665 (App. Div. 1984) ("Collateral estoppel is an equitable doctrine and therefore will not be applied when it is not fair to do so."); Kugler v. Romain, 110 N.J. Super. 470, 484, 485, 266 A.2d 144, 151, 152 (Ch. Div. 1970) (courts are empowered to grant relief from a judgment to achieve justice), *modified on other grounds*, 58 N.J. 522, 279 A.2d 640 (1971). *But see Federated*, 452 U.S. at 401 (there is no recognized exception to res judicata grounded in simple justice; "[s]imple justice is achieved when a complex body of law developed over a period of years is even handedly applied").

155 *Velasquez*, 123 N.J. at 517, 589 A.2d at 153 (Stein, J., dissenting). Justice Stein posited that the merits of the choice-of-law question were never actually litigated in federal court. *Id.* According to the justice, the federal court's application of Rule 17(b) was based on an assumption, albeit erroneous, that 17(b) *mandated* dismissal. *Id.* at 518, 589 A.2d at 153 (Stein, J., dissenting). The dissent endorsed the language of the RESTATEMENT, *supra* note 43, § 12, and based his subsequent analysis on its provisions. *Velasquez*, 123 N.J. at 517, 589 A.2d at 153 (Stein, J., dissenting). That section provided in pertinent part:

> The central problem in finality of judgments is how far the principle of finality is to be qualified. The law of res judicata grapples with this central problem. Its specifications endeavor to state the conditions under which the possibility of failure of civil justice is so substantial as to justify remedial action in the form of relitigation. On the one hand, judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. On the other hand, a judgment in a particular case must be subject to reexamination in the name of substantial justice *if the initial engagement of the merits was inadequate.*

RESTATEMENT, *supra* note 43, § 12 (emphasis added). Justice Stein would have excused Velasquez's failure to appeal the adverse decision to the Third Circuit. *Velasquez*, 123 N.J. at 518, 589 A.2d at 153 (Stein, J., dissenting). The justice accepted Velasquez's argument that the application of Rule 17(b) appeared to be "virtually incontrovertible" and afforded Velasquez no grounds for an appeal. *Id.*

156 *Id.* at 517-19, 589 A.2d at 153-54 (Stein, J., dissenting).

157 *Id.* at 517, 589 A.2d at 153 (Stein, J., dissenting).

158 *Id.* at 518, 589 A.2d at 153-54 (Stein, J., dissenting). *See infra* note 166 (cases holding Rule 17(b) inapplicable to diversity litigation).

159 *Velasquez*, 123 N.J. at 518-19, 589 A.2d at 154 (Stein, J., dissenting). Justice Stein observed that New Jersey's choice-of-law rules were never examined to deter-

Justice Stein termed the district court's reliance on Rule 17(b) "understandable."[160] The dissenting justice acknowledged that the Rule's directive, that the law of the state of incorporation governed corporate capacity to sue or be sued,[161] was established law for some time.[162] The justice explained, however, that since the landmark case of *Erie Railroad Co. v. Tompkins*,[163] various federal decisions declared that Rule 17(b) could not be applied consistently with the *Erie* doctrine in diversity cases.[164] Justice Stein

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mine whether they would have favored New Jersey or Illinois law. *Id.* The justice averred that if New Jersey choice-of-law principles favored the application of New Jersey law, then Velasquez should have had his day in state court to litigate the issue of whether New Jersey would permit suit against a dissolved foreign corporation. *Id.* The dissent concluded: "Hence, we must determine if 'the initial engagement of the merits was inadequate' to such an extent that the district court's judgment should not be accorded preclusive effect in this action." *Id.* (citation omitted).

160 *Id.* at 515, 589 A.2d at 152 (Stein, J., dissenting).

161 *See supra* note 29 (text of Rule).

162 *Velasquez*, 123 N.J. at 521, 589 A.2d at 155 (Stein, J., dissenting). *See* David Lupton's Sons Co. v. Auto. Club of Am., 225 U.S. 489 (1912). Lupton, a Pennsylvania corporation, contracted with the Automobile Club of America to perform work for the latter in New York. *Id.* at 493. Subsequently, Lupton sued Automobile Club on the contract in New York federal court. *Id.* at 494. Automobile Club moved to dismiss, relying on a New York statute that provided that foreign corporations operating in New York without a certificate of authority could not maintain suit in New York courts. *Id.* Because Lupton did not have a certificate of authority to conduct business in New York, its suit was dismissed. *Id.* Ultimately, the United States Supreme Court reversed and held that although the New York door-closing statute foreclosed suit in New York state courts, it did not preclude a federal court from hearing the case. *Id.* at 499-500. Because Lupton was empowered to sue on the contract in Pennsylvania, it's state of incorporation, the Court held Lupton could also maintain suit in federal court. *Id.* at 500. Lupton was therefore able to sue in a New York federal court even though it could not have obtained relief in the state courts of New York. *Id.*

The rule that corporate capacity to sue or be sued depended solely on the law of the state of incorporation, as set forth in *David Lupton's Sons*, was codified by Rule 17(b) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 17 advisory committee's note. *See* Baron & Co., Inc. v. Bank of N.J., 504 F. Supp. 1199, 1202-03 (D.N.J. 1981) (the rule that corporate capacity to sue or be sued in federal court is governed by the law of the state of incorporation "has been memorialized in Rule 17(b) of the Federal Rules of Civil Procedure").

Justice Stein added, however, that *David Lupton's Sons* was decided prior to the Supreme Court decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *Velasquez*, 123 N.J. at 521-22, 589 A.2d at 155 (Stein, J., dissenting).

163 304 U.S. 64 (1938). The *Erie* decision militated against vertical forum shopping by requiring a federal court, in adjudicating a state law cause of action, to apply state substantive law. *Erie*, 304 U.S. at 78.

164 *Velasquez*, 123 N.J. at 518, 589 A.2d at 153-54 (Stein, J., dissenting). A general understanding of the *Erie* doctrine begins with an exposition of the Rules of Decision Act, § 34 of the Judiciary Act of 1789, which provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in

therefore examined these decisions and similarly concluded that,

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trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 92. Until 1842, there was a disparity among the federal courts concerning the interpretation of the Act when federal courts exercised diversity jurisdiction. *See* FRIEDENTHAL, et al., *supra* note 3, § 4.1. Specifically, federal courts differed as to whether the Act required them to apply state common law in addition to state statutes and constitutions. *Id.* Therefore, in an attempt to resolve the problem, Justice Story, writing for the United States Supreme Court, declared that federal courts sitting in diversity were bound to follow as rules of decision: state constitutions, state statutes, decisions of the highest state courts interpreting state laws and decisions of the highest state courts concerning purely "local" matters. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842). The Court, however, held that federal courts were not bound by state common law on matters of purely "general" concern. *Id.* at 16. As to these matters, Justice Story ruled that the federal courts were free to formulate a national general federal common law. *Id.*

For a variety of reasons, the *Swift* decision failed to unify the federal courts, and until the advent of *Erie* and the Federal Rules of Civil Procedure in 1938, federal judgments in diversity cases remained in a state of disarray. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 10.2 (3d ed. 1986). In 1938, Justice Brandeis pronounced the *Swift* concept of general federal common law unconstitutional. *Erie*, 304 U.S. at 78. The Justice noted that two bodies of law developed under *Swift*, one applied to litigants in state court and the other to litigants in federal court by virtue of diversity of citizenship. *Id.* at 74-76. To promote vertical uniformity and prevent forum shopping, which flourished under the *Swift* ruling, Justice Brandeis declared: "There is no federal general common law." *Id.* at 78. Thus, after *Erie*, federal courts exercising diversity jurisdiction were bound to apply state substantive law. FRIEDENTHAL, et al., *supra* note 3, § 4.2.

Erie, however, created a need to distinguish state substantive law, which federal courts were bound to apply, from state procedural law, which federal courts were free to disregard. WEINTRAUB, *supra*, § 10.2. In three subsequent decisions, the Supreme Court refined the *Erie* substance/procedure distinction. *Id.* §§ 10.2 -.3. In the first refinement, the United States Supreme Court held that where a state law, if applied, would substantially affect the outcome of litigation, it was a substantive law and a federal court sitting in diversity was bound to apply it. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). The next clarification of the *Erie* doctrine resulted in a tripartite balancing test. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535-40 (1958). *Byrd* essentially required that a federal court, in deciding whether to apply a proffered state law, must determine the extent to which the state law was "bound up" with the rights and obligations of the litigants, then weigh the importance of the implicated federal interest versus the need for vertical uniformity and finally determine whether, at a minimum, there was a strong possibility that the state law would substantially affect the outcome of the litigation. *Id.* In its final refinement of *Erie*, the Supreme Court added two more variables to the substance/procedure test—"the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468 (1965). More importantly, however, the *Hanna* Court declared that the refined outcome determinative test was inapplicable when a Federal Rule of Civil Procedure conflicted with a counterpart state law. *Id.* at 469-71. In such cases, the Court announced that so long as the conflicting Federal Rule was constitutionally authorized and in compliance with the Rules Enabling Act, 28 U.S.C. § 2072 (1958), it could be applied to the total exclusion of the state law. *Hanna*, 380 U.S. at 470-71. The Court clarified that a Federal Rule was constitutionally authorized if it was procedural and in cases where the distinction was not clear, the Fed-

notwithstanding the fact that Rule 17(b) had not been altered to reflect the apparent changes in the law,[165] the Rule could not be applied to a case, such as *Velasquez*, where jurisdiction was predicated on diversity of citizenship.[166]

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eral Rule would be presumed constitutional. *Id.* at 472. Finally, the Court explained that a Federal Rule complied with the Rules Enabling Act if the Rule did not materially alter any existing substantive right. *Id.* at 473-74.

165 *See* FED. R. CIV. P. 17 advisory committee's note (indicating codification of David Lupton's Sons Co. v. Auto. Club of Am., 225 U.S. 489 (1912)); *see also supra* note 162 (describing the *Lupton* case). The *Erie* doctrine, however, mandated that federal courts apply state substantive law in cases invoking diversity jurisdiction. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The *Erie* doctrine was designed to prevent a *Lupton*-type result, i.e., to prevent a federal court in New York from applying different law than a New York state court would apply. *See id.* According to Justice Stein, the *Lupton* case, as codified in FED. R. CIV. P. 17(b), apparently conflicted with the *Erie* doctrine. *Velasquez*, 123 N.J. at 518, 589 A.2d at 153-54 (Stein, J., dissenting).

166 *Velasquez*, 123 N.J. at 522, 589 A.2d at 155 (Stein, J., dissenting). The dissent observed that the first case to question the application of Rule 17(b) in diversity litigation was Angel v. Bullington, 330 U.S. 183 (1947). *Velasquez*, 123 N.J. at 522, 589 A.2d at 155 (Stein, J., dissenting). The *Angel* Court announced:

> Cases like *Lupton's Sons Co. v. Automobile Club* are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad v. Tompkins*. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts.

Angel, 330 U.S. at 192 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); David Lupton's Sons Co. v. Auto. Club of Am., 225 U.S. 489 (1912)). The *Angel* Court concluded: "[a] federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld." *Id.* *See supra* notes 64-80 and accompanying text for further discussion of the *Angel* case.

Justice Stein pointed out that a subsequent Supreme Court case had definitively rejected the *Lupton* case. *Velasquez*, 123 N.J. at 522-23, 589 A.2d at 156 (Stein, J., dissenting). *See* Woods v. Interstate Realty Co., 337 U.S. 535 (1949). In *Woods*, a Tennessee company sued a Mississippi resident in a Mississippi federal court to recover a brokerage commission. *Id.* at 535-36. The company was not registered to conduct business in Mississippi. *Id.* The federal court dismissed the suit because a Mississippi statute provided: "Any foreign corporation failing to . . . [designate an agent for service of process] shall not be permitted to bring or maintain any action or suit in any of the courts of this state." *Id.* at 536 n.1 (quoting MISS. CODE § 5319 (1942)). The court of appeals, relying on *Lupton's Sons*, reversed. *Id.* at 536. The circuit court held that although the Mississippi statute precluded the company from suing in Mississippi state courts, a federal court in Mississippi was not bound by the statute. *Id.* The Supreme Court reversed and determined that where "one is barred from recovery in the state court, he should likewise be barred in the federal court." *Id.* at 538. In so doing, the Court reaffirmed that by its decision in *Erie*, "the case of *Lupton's Sons* had become 'obsolete.' " *Id.* at 537.

Justice Stein also cited several federal cases that addressed conflicts between Rule 17(b) and parallel state statutes, all of which concluded that 17(b) should not apply. *Velasquez*, 123 N.J. at 524, 589 A.2d at 157 (Stein, J., dissenting). *See* Baron & Co. Inc. v. Bank of N.J., 504 F. Supp. 1199, 1204 (D.N.J. 1981) (Rule 17(b), which would have led to the application of Pennsylvania law, the law of corporate plain-

The dissenting justice recognized that the majority of such cases dealt with conflicts between capacity to sue as determined by the state of incorporation under 17(b) and state statutes restricting access to state courts.[167] The justice acknowledged that the instant case presented the opposite scenario; 17(b) restricted Leyden's capacity *to be sued* in federal court while the New Jersey rule, in all likelihood, would have allowed Velasquez to proceed.[168] Nonetheless, Justice Stein postulated that in both instances, Rule 17(b) was tantamount to a uniform federal choice of law rule.[169] In this capacity, Justice Stein observed that Rule

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tiff's state of incorporation, *not* applied in diversity case); Farris v. Sambo's Restaurants, Inc., 498 F. Supp. 143, 145 (N.D. Tex. 1980) ("Although the language of Rule 17(b) has not been altered to reflect the demise of the *Lupton's Sons* doctrine, *Erie* and *Woods* leave no doubt that Rule 17(b) now applies only to the capacity of a corporation to sue or be sued in federal court in cases where subject matter jurisdiction is pitched on grounds other than diversity of citizenship."); McCollum Aviation, Inc. v. CIM Associates, Inc., 438 F. Supp. 245, 248 (S.D. Fla. 1977) (applied Florida statute that was in apparent conflict with Rule 17(b) because it was "clearly substantive" and "because under the Rules Enabling Act . . . a Federal Rule cannot abridge an existing substantive right"); Weinstock v. Sinatra, 379 F. Supp. 274, 277 (C.D. Cal. 1974) (mem.) ("Rule 17(b) applies only to the capacity of a corporation to sue or be sued in those actions coming to the federal court in the exercise of their jurisdiction in cases *excluding* diversity of citizenship."); Power City Communications, Inc. v. Calaveras Tel. Co., 280 F. Supp. 808, 810-12 (E.D. Cal. 1968) (in diversity action, conflict between California door-closing statute and Rule 17(b) resolved in favor of capacity provisions of California statute); *see also* WRIGHT et al., *supra* note 45, § 1569 (discussing in detail the interaction between Rule 17(b) and the *Erie* doctrine); Recent Case, 82 HARV. L. REV. 708, 709-10 (1969) (suggesting that in diversity actions, *Erie* requires the application of state substantive law despite Rule 17(b)). *But see* Lottman v. Piper Indus., Inc., 726 F. Supp. 384, 385 (N.D.N.Y. 1989) (federal district court in New York applied Rule 17(b) and applied Tennessee law to determine corporate capacity despite contrary New York provision); Johnson v. Helicopter & Airplane Serv. Corp., 404 F. Supp. 726, 729-30 (D. Md. 1975) (applying 17(b) because if a corporation can be sued in its state of incorporation it may be sued in any other federal court).

167 *Velasquez*, 123 N.J. at 526, 589 A.2d at 158 (Stein, J., dissenting). *See supra* note 166 for a listing of federal diversity cases in which state door-closing statutes were applied where Rule 17(b) would have allowed suit.

168 *Velasquez*, 123 N.J. at 526, 589 A.2d at 158, 163. *See infra* text accompanying notes 171-75 for an explanation of Justice Stein's application of a governmental-interest choice-of-law analysis and determination that New Jersey would most likely have permitted Velasquez to proceed against Leyden in New Jersey.

169 *Velasquez*, 123 N.J. at 526-27, 589 A.2d at 158 (Stein, J., dissenting). *Accord* PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 846 (3d ed. 1988) [hereinafter HART & WESCHLER]:

> Rule 17(b) of the Federal Rules of Civil Procedure requires that a corporation's capacity to sue be determined by the law of the state of incorporation. This provision may be viewed as a pro tanto modification of *Klaxon*—as the statement, in other words, of a uniform federal choice-of-law rule on the question of capacity.

Id. *See also infra* note 170.

17(b) apparently violated the precept that federal courts must apply the choice-of-law rules of the forum state.[170]

Consequently, the justice analyzed New Jersey choice-of-law rules, which he asserted the federal court should have applied, to determine whether New Jersey conflict rules would have favored the application of New Jersey or Illinois law.[171] In so doing, Jus-

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[170] *Velasquez*, 123 N.J. at 526-27, 589 A.2d at 158 (Stein, J., dissenting). In *Klaxon*, Justice Reed extended the *Erie* principle to apply to choice of law. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941). In determining that federal courts were required to apply the choice of law rules predominating in the state where the federal court was situated, the Justice enunciated: "Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. . . . [A]nd the proper function of the federal court is to ascertain what the state law is, not what it ought to be." *Id.* at 496-97. Justice Reed asserted that this rule would further the purpose of *Erie* to promote uniformity between federal and state courts in a single state. *Id.* at 496. Although recognizing that the rule might indeed hamper horizontal uniformity by precipitating different results *among* federal courts in neighboring states, the Justice characterized this as a problem inherent in our federal system. *Id.*

The *Klaxon* rule that federal courts must apply the forum state's choice-of-law provisions is universally applied. *See* Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 31 (3d Cir. 1975); White v. Smith, 398 F. Supp. 130, 133 (D.N.J. 1975); Gross v. Texas Plastics, Inc., 344 F. Supp. 564, 565 (D.N.J. 1972). The rule is controversial, however, because, as Justice Reed acknowledged in his opinion in *Klaxon*, it may actually promote forum shopping among federal courts. *See Klaxon*, 313 U.S. at 496. Although Congress is presumably empowered by either the Full Faith and Credit Clause or the Necessary and Proper Clause to enact a uniform federal choice-of-law rule, to date it has not done so. *See* HART & WECHSLER, *supra* note 169, at 794 (noting that it is within Congressional authority to promulgate a national choice-of-law rule for the federal courts).

[171] *Velasquez*, 123 N.J. at 527, 589 A.2d at 158 (Stein, J., dissenting). The dissent questioned Franz's and Leyden's argument that there was no choice-of-law issue to be resolved. *Id.* at 528, 589 A.2d at 159 (Stein, J., dissenting). The justice rejected the defendant's contention that when a corporation's internal affairs are the subject of litigation, the law of the state of incorporation controls. *Id. But see* Gross v. Texas Plastics, Inc., 344 F. Supp. 564, 566 (D.N.J. 1972) (the state of incorporation normally retains exclusive power to regulate internal corporate affairs). According to Justice Stein, the instant case involved more than Leyden's internal affairs. *Velasquez*, 123 N.J. at 528, 589 A.2d at 159 (Stein, J., dissenting). For example, the justice explained, Velasquez's claim implicated New Jersey's interest in compensating people injured within its borders by allegedly defective machinery. *Id.* In addition, Justice Stein claimed that "the interest of this plaintiff, and that of similarly-situated plaintiffs, in recovering damages against foreign corporations for post-dissolution products-liability claims" was of paramount concern. *Id. See* Ramirez v. Amstead Indus., Inc., 86 N.J. 332, 349-50, 431 A.2d 811, 820 (1981) (worker was injured in New Jersey by a defective machine manufactured by a foreign corporation that dissolved prior to the accident; New Jersey imposed liability on the purchasing corporation which continued to manufacture the product line). Justice Stein commented: "In adopting the 'product line' approach to successor liability, we emphasized that under New Jersey decisional law, [s]trict liability for injuries caused by defective products placed into the stream of commerce is an enterprise liability, one that

tice Stein articulated that New Jersey opted to follow a governmental-interest approach to resolve the intricacies of choice-of-law problems.[172] The first step in this analysis, the dissent noted, was to determine whether the respective state laws conflicted.[173] The dissent illustrated the conflict between Illinois and New Jersey law; Illinois presumptively barred post-dissolution claims and New Jersey permitted such claims if brought in conformance

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continues so long as the defective product is present on the market." *Velasquez*, 123 N.J. at 529, 589 A.2d at 160 (Stein, J., dissenting) (quoting *Ramirez*, 86 N.J. at 351, 431 A.2d at 821).

Justice Stein further addressed the "obvious shortcomings" of statutes, such as the Illinois Business Corporations Act, which preclude recovery on all claims arising after corporate dissolution. *Id.* at 531, 589 A.2d at 161 (Stein, J., dissenting). The justice perceived New Jersey's adoption of successor liability as one solution to the problem of corporate statutes that barred post-dissolution claims. *Id. See Ramirez*, 86 N.J. at 351, 431 A.2d at 821 (adopting successor liability). As an alternative, the justice observed that although it was a "novel" approach, other courts faced with circumstances similar to that of Velasquez, elected to apply the forum state's law because the foreign corporation conducted business there. *Velasquez*, 123 N.J. at 531, 589 A.2d at 161 (Stein, J., dissenting). *See, e.g.*, Dr. Hess & Clark, Inc. v. Metalsalts Corp., 119 F. Supp. 427, 429 (D.N.J. 1954) (allowing suit in New Jersey against a dissolved Illinois corporation, even though an Illinois statute would have barred the suit, because the corporate defendant subjected itself to New Jersey law by voluntarily conducting business in the state); Trounstine v. Bauer, Pogue & Co., 44 F. Supp. 767, 770 (S.D.N.Y. 1942) (although the law of the state of incorporation is paramount, corporation may additionally be subject to the laws of a state in which it conducts business). Justice Stein therefore posited that if res judicata were *not* applied to Velasquez's claim, a choice-of-law issue would "unquestionably" arise. *Velasquez*, 123 N.J. at 531-32, 589 A.2d at 161 (Stein, J., dissenting).

[172] *Id.* at 527, 589 A.2d at 158 (Stein, J., dissenting). Justice Stein explained that the New Jersey courts once applied the *lex loci delicti* rule to determine the applicable law in tort cases. *Id.* Although the *lex loci delicti* rule was predictable, the dissent noted it was inflexible, often precipitating unjust results. *Id. See* Pfau v. Trent Aluminum Co., 55 N.J. 511, 514-15, 263 A.2d 129, 131 (1970) (noting the inequities of the *lex loci delicti* approach). The dissent stated that the "more flexible" governmental-interest choice-of-law analysis was adopted after the demise of *lex loci delicti*. *Velasquez*, 123 N.J. at 527, 589 A.2d at 158 (Stein, J., dissenting). *See, e.g.*, Mellk v. Sarahson, 49 N.J. 226, 229, 229 A.2d 625, 626 (1967) (rejecting the *lex loci delicti* rule in favor of the governmental-interest approach). Justice Stein announced that under the governmental-interest approach, the law of the state with the most substantial interest in the point in controversy controls. *Velasquez*, 123 N.J. at 527, 589 A.2d at 159 (Stein, J., dissenting) (quoting White v. Smith, 398 F. Supp. 130, 134 (D.N.J. 1975)).

[173] *Id.* at 532, 589 A.2d at 161 (Stein, J., dissenting). *See, e.g.*, White v. Smith, 398 F. Supp. 130, 134 (D.N.J. 1975) ("Governmental interest is determined by closely scrutinizing the underlying interests and public policy of the forum law vis-a-vis the interests and policies of other states whose laws are at variance with forum law, but whose laws, nevertheless, are at least arguably applicable."); Veazy v. Doremus, 103 N.J. 244, 248, 510 A.2d 1187, 1189 (1986) (in applying the governmental-interest analysis, refer to each state's laws and determine if there is a conflict on an "issue-by-issue basis").

with statutory guidelines.[174]

Justice Stein then recited that the second step of the analysis required an identification of the governmental policies that support each state's rule, and a determination of how each state's contacts to the litigation affect those policies.[175] Although Justice

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[174] *Velasquez*, 123 N.J. at 532-33, 589 A.2d at 161-62 (Stein, J., dissenting). *Compare* ILL. ANN. STAT. ch. 32, ¶ 12.80 (Smith-Hurd 1989) (setting forth provisions of the Illinois Business Corporations Act barring all claims that accrue against a corporation subsequent to its dissolution) *with* N.J. STAT. ANN. § 14A:12-12 (West 1969) (allowing creditors of a dissolved corporation to present their claims to the corporation within six months after dissolution) *and* N.J. STAT. ANN. § 14A:12-13 (West 1969) (permitting creditors of a dissolved corporation to file claims after the six month period for good cause shown).

Justice Stein was particularly attentive to the good cause exception in § 14A:12-13. *See Velasquez*, 123 N.J. at 532, 589 A.2d at 161 (Stein, J., dissenting). The justice observed that creditors like Velasquez could, upon the required showing of good cause, satisfy their claims against shareholders like Franz who possess the distributed assets of the corporation. *Id.* The dissent acknowledged that the New Jersey statutes did not explicitly refer to post-dissolution claims. *Id.* at 532, 589 A.2d at 162 (Stein, J., dissenting). The justice, however, then referred to the Commissioner's Comment to the 1972 Amendments and stated that the Legislative intent in promulgating the good cause provision was to address post-dissolution claims. *Id.* The Commissioner's Comment reads in relevant portion:

> It was the view of the Commission that it is important to compel all creditors who may reasonably be expected to file their claims to do so within the prescribed time and to provide for the barring of the claim upon failure to do so. On the other hand, the Commission recognized that there will be certain classes of claims which at the time of the notice to creditors might not be known either to the corporation or to the "creditor", such as products liability claims, the cause of action for which might not accrue until several years after the date of the order barring creditors.

N.J. STAT. ANN. app. § 14A:12-13 (West 1990) Commissioner's comment.

The dissent, cognizant of the fact that Leyden may not have been qualified to conduct business in New Jersey, further noted that foreign corporations operating in New Jersey, with or without a certificate of authority, were amenable to suit for "post-dissolution products-liability claims filed within a reasonable period after the claims accrued." *Velasquez*, 123 N.J. at 533, 589 A.2d at 162 (Stein, J., dissenting). *See infra* note 176 (explaining that due to the procedural barriers of the case, Velasquez was unable to conduct discovery to determine Leyden's relationship to New Jersey). *See also* N.J. STAT. ANN. § 14A:13-2(2) (West 1969) ("A foreign corporation which receives a certificate of authority under this act shall, until a certificate of revocation or of withdrawal is issued be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character."); N.J. STAT. ANN. § 14A:13-2(3) (West 1969) ("A foreign corporation which transacts business in this State without a certificate of authority under this act shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a foreign corporation procuring such certificate of authority."). Justice Stein therefore concluded that the respective statutory provisions demonstrated a conflict under the first prong of the governmental-interest analysis. *Velasquez*, 123 N.J. at 533, 589 A.2d at 162 (Stein, J., dissenting).

[175] *Velasquez*, 123 N.J. at 533, 527-28, 589 A.2d at 159, 162 (Stein, J., dissenting). *See* Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 32 (3d Cir. 1975) (the second

Stein conceded that it was premature to conclusively establish Leyden's contacts with New Jersey on an incomplete record, he maintained that the competing governmental policies were discernable.[176] The justice acknowledged that Illinois had an interest in uniformly regulating corporations organized in its state.[177] In contrast, the dissent charged that New Jersey's interest was in compensating persons injured within its confines.[178] Justice Stein reiterated that the record was not sufficiently developed to make a final determination, but considered it highly probable that New Jersey's interests and hence New Jersey law would prevail.[179]

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step of the governmental-interest choice-of-law analysis requires identification of the contacts between the respective litigants and interested jurisdictions); *accord* White v. Smith, 398 F. Supp. 130, 134 (D.N.J. 1975). In elucidating the last step of the governmental-interest analysis, Justice Stein continued: "If a state's contacts are not related to the policies underlying its law, then that state does not possess an interest in having its law apply. Consequently, the qualitative, not the quantitative, nature of a state's contacts ultimately determines whether its law should apply." *Velasquez*, 123 N.J. at 528, 589 A.2d at 159 (Stein, J., dissenting) (citations omitted).

176 *Id.* at 533-34, 589 A.2d at 162 (Stein, J., dissenting). Justice Stein explained that because Velasquez's complaint was dismissed on procedural grounds by both the federal court and the law division, full-scale discovery had not yet been conducted. *Id.* Indeed, plaintiff Velasquez claimed:

> As far as the record before this Court is concerned, we lack full knowledge of New Jersey's interest in the case. What involvement did the defendant manufacturer have with New Jersey? Was it qualified to do business here? Was the sale of the machine an isolated event or did that firm have substantial New Jersey involvements?

Brief for Appellant at 15-16, Velasquez v. Franz, 123 N.J. 498, 589 A.2d 143 (1991) (No. 30-882). Justice Stein, unable to fully ascertain each state's contacts to the litigation, nevertheless perceived that the policies underlying each state's law were apparent. *Velasquez*, 123 N.J.at 534, 589 A.2d at 162 (Stein, J., dissenting).

177 *Id.*, 589 A.2d at 162 (Stein, J., dissenting).

178 *Id.*, 589 A.2d at 163 (Stein, J., dissenting). The dissent asserted that New Jersey's liberal products-liability law was reflective of the state's interest in "securing adequate compensation for persons injured while residing or working" in New Jersey. *Id.* *See* Scanlon v. General Motors Corp., 65 N.J. 582, 590, 326 A.2d 673, 677 (1974) ("The doctrine of strict liability in tort is firmly established in the law of this state."); Heavner v. Uniroyal, Inc., 63 N.J. 130, 146-152, 305 A.2d 412, 421-424 (1973) (tracing the historical progression and development of strict liability in New Jersey); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 312 (1965) ("The purpose of strict liability is to insure that the cost of injuries . . . resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.").

179 *Velasquez*, 123 N.J. at 534-35, 589 A.2d at 163 (Stein, J., dissenting). The Justice, supported by his explication of New Jersey's liberal stance towards product liability claims, advanced:

> The question becomes whether this State, having articulated and enforced its interest in securing compensation for persons injured by defective products, is impotent to assert that interest when the out of

Justice Stein then stressed the relevance of the res judicata issue in light of his analysis.[180] The justice emphasized that had the district court fully appreciated the issues at stake and undertaken what he perceived to be the appropriate analysis, it would have been obligated to apply New Jersey law to determine Leyden's capacity to be sued.[181] The dissent, however, adding that the enigma of Rule 17(b) had frequently been acknowledged even outside of decisional law, conceded that the error in the federal court's disposition of the case resulted from compliance with the literal language of the Rule.[182] Accordingly, Justice Stein posited that the determinative issue was whether the district

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state manufacturer of the offending product, sued in a New Jersey court, filed its dissolution papers before the injury occurred and its state's corporate laws bar the claim.

Id.

180 *Id.* at 535, 589 A.2d at 163 (Stein, J., dissenting).

181 *Id.* In sum, Justice Stein asserted that the United States District Court for the District of New Jersey, the forum that initially rejected Velasquez's claim, should have concluded that Federal Rule of Civil Procedure 17(b) could not be applied to determine Leyden's capacity to be sued. *Id.* *See supra* note 166 and accompanying text (detailing federal decisions that held Rule 17(b) inapplicable to diversity litigation). The justice stated that the district court should have instead applied New Jersey choice-of-law rules. *Velasquez*, 123 N.J. at 527, 589 A.2d at 158 (Stein, J., dissenting). For an explanation of the rule that federal courts sitting in diversity must apply the forum state's choice-of-law rules, see *supra* note 170 and accompanying text. Justice Stein next stated that the district court should have applied New Jersey's governmental-interest choice-of-law analysis. *Velasquez*, 123 N.J. at 527, 589 A.2d at 158 (Stein, J., dissenting). *See supra* notes 171-75 and accompanying text for an examination of the governmental interest analysis. Finally, the justice surmised that had the federal court performed this analysis, it would most likely have perceived New Jersey's interest to be the "dominant one" and accordingly applied New Jersey law to determine Leyden's lack of capacity to be sued. *Velasquez*, 123 N.J. at 535, 589 A.2d at 163 (Stein, J., dissenting).

182 *Velasquez*, 123 N.J. at 535, 589 A.2d at 163 (Stein J., dissenting). Justice Stein stressed that the mistaken application of Rule 17(b) could not properly be construed as "mere legal error" because "[a]lthough the district court's conclusion was clearly erroneous, the error resulted from the court's application of Rule 17(b)'s plain language to the facts before it." *Id.* For critical commentary on the Rule 17(b) corporate capacity provisions, see 3A MOORE et al., *supra* note 3, ¶ 17.21 (acknowledging that Rule 17(b) was qualified by *Erie* considerations); Laura E. Little, *Out of Woods and Into the Rules: The Relationship Between State Foreign Corporation Door-Closing Statutes and Federal Rule of Civil Procedure 17(b)*, 72 VA. L. REV. 767, 807-809 (1986) (recognizing the need for a legislative amendment or a Supreme Court decision to resolve the "conflict" between state door-closing statutes and Rule 17(b)); Recent Case, *supra* note 166, at 709-12 (noting the conflicting interpretations of Rule 17(b) and the choice-of-law and *Erie* problems implicated by the Rule); Philip Marcus, *Suability of Dissolved Corporations—A Study in Interstate and Federal-State Relationships*, 58 HARV. L. REV. 675, 691-92 (1945) ("The committee which drafted [Rule (17(b)] apparently did not intend that the state of incorporation could prevent the corporation from being sued elsewhere, but the language used is not happily phrased.") (footnote omitted).

court's erroneous application of Rule 17(b) justified a departure from usual rules of preclusion.[183]

The justice suggested that a definitive resolution of the issue hinged on the court's view of the proper role of claim preclusion.[184] The dissent catalogued instances where courts have advocated flexibility in applying res judicata to accommodate the interests of justice.[185] Thus, the dissent postulated, the quandary was between competing views of res judicata, both necessarily exacting, but one of which "nevertheless tolerates an isolated exception in unique circumstances in order to avoid injustice."[186]

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[183] *Velasquez*, 123 N.J. at 536, 589 A.2d at 163-64 (Stein, J., dissenting).

[184] *Id.*

[185] *Id.* at 536-39, 589 A.2d at 164-66 (Stein, J., dissenting). The dissent referred to Justice Cardozo's poignant language in Reed v. Allen:

> A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this is a way he failed to follow. Because of that omission he is left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow. A little of the liberality of method that has shaped the law of restitution in the past is still competent to find a way.

Reed v. Allen, 286 U.S. 191, 209-10 (1932) (Cardozo, J., dissenting) (citations omitted).

See cases cited *supra* note 154 (flexible approach to res judicata endorsed and doctrine eschewed where application inequitable); *see also* WRIGHT et al., *supra* note 45, §§ 4415, 4426 (exceptions to preclusion rules); Cleary, *supra* note 4, at 349 ("Many, if not most, res judicata cases are the result of a procedural error on the part of counsel. Each case should be decided with reference to the basic objectives of the rule."); Barry K. Simmons, *Federated Department Stores, Inc. v. Moitie: Several Issues But Only One Holding*, 34 MERCER L. REV. 1133, 1137 (1983) ("Policy considerations exist . . . that militate against the use of res judicata in certain instances. These considerations are centered primarily around a general concern for public policy and simple justice and usually arise when res judicata causes a particularly harsh result."); William A. Bain, Jr., Recent Decisions, 52 MICH. L. REV. 289, 290 (1953) (judicial departure from res judicata where the rule would otherwise be technically applicable "is an extremely liberal approach but not without respectable authority"); George K. Meuth, Case Comment, U. ILL. L. REV. 306, 307 (1952) ("*res judicata*, although hoary with the wisdom of age, must nevertheless be amenable to the dictates of inherent justice in a proper case"); Recent Case, *Exception to Res Judicata When Policy Basis of Rule Is Inapplicable*, 101 U. PA. L. REV. 297, 299 (1952) ("exceptions to res judicata seem desirable as a means of avoiding foolish or unjust results"); Note, *Res Judicata—Where Inapplicable*, U. NEWARK L. REV. 335, 341 (1939) ("In the final analysis, the doctrine of *res judicata* is but a rule of procedure, based on public policy; and it should not be construed in such a manner as to work injustice.").

[186] *Velasquez*, 123 N.J. at 538, 589 A.2d at 165 (Stein, J., dissenting). The dissent demonstrated that one view of res judicata was expressed by Justice Rehnquist in the Supreme Court's most recent ruling on the subject. *Id.* at 536, 589 A.2d at 164

Stressing the distinctive character of the case, Justice Stein articulated that he would grant relief from the otherwise final federal judgment.[187] The dissent conceded that Velasquez's failure to appeal arguably militated against its conclusion.[188] The justice excused, however, Velasquez's course of action, reasoning that the mandate of Rule 17(b) did not preserve any ground for an assignment of error.[189] As such, Justice Stein maintained that

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(Stein, J., dissenting). Justice Rehnquist, in a particularly stern opinion, chastised the Ninth Circuit for attempting to recognize an exception to res judicata for reasons of "simple justice." *See* Federated Dep't. Stores, Inc., v. Moitie, 452 U.S. 394, 400-01 (1981). The Justice affirmatively declared: "[T]his Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." *Id.* at 400. Justice Blackmun, however, concurring in *Federated*, espoused a somewhat more pliable view of res judicata when he expressed: "I, for one, would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals referred to as 'overriding concerns of public policy and simple justice.' " *Federated Dep't Stores*, 452 U.S. at 402-403 (Blackmun, J., concurring). For a view similar to that of Justice Blackmun, see MOORE et al., in which the authors wrote:

> It has been said that res judicata makes black white and crooked straight. In some cases its application produces a demonstrably incorrect result. The principle that litigation must come to an end, however, is a very important one, and the fact that some decisions will be incorrect in a way that can later be demonstrated is a necessary price. Yet there are some cases that illustrate that unflagging application of the doctrine sometimes produces harsh and even undesirable results. This is particularly true in cases in which the party is misled into technical error or by changes in the law.

MOORE et al., *supra* note 3, ¶ 0.405[12] (footnotes omitted). *Cf.* Printing Mart-Morristown, Inc., v. Rosenthal, 650 F. Supp. 1444, 1451 (D.N.J. 1987) (New Jersey's entire controversy doctrine applied with "great reluctance" where the policies behind the doctrine would not be fostered).

187 *Velasquez*, 123 N.J. at 542, 589 A.2d at 167 (Stein, J., dissenting). Justice Stein advocated a more "pragmatic approach" towards res judicata. *Id.* at 537, 589 A.2d at 164 (Stein, J., dissenting). The justice advocated that the public interest occasionally necessitated a relaxation of preclusion rules. *Id.* at 539, 589 A.2d at 166 (Stein, J., dissenting). *Cf.* La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1276 (2d Cir. 1974) (observing that res judicata is a doctrine of fairness and although technically applicable, its "rigid application" was unwarranted); Schum v. Bailey, 578 F.2d 493, 506 (3d Cir. 1978) (Gibbons, J., concurring) (departing from "strict adherence to finality" where fraudulent representations induced claimant to litigate in a forum with less favorable choice-of-law rules).

188 *Velasquez*, 123 N.J. at 541, 589 A.2d at 167 (Stein, J., dissenting).

189 *Id.* The justice acknowledged that the determinative factors bearing on the decision of whether or not to grant relief from the otherwise final federal judgment could not be expressed in categorical terms. *Id.* at 540, 589 A.2d at 166 (Stein, J., dissenting). The justice referred to the RESTATEMENT, *supra* note 43, § 74 for guidance. *Id.* Comment g to that section provided:

> It is said that the granting of relief is in the "discretion" of the court. This does not mean it is a matter of idiosyncratic choice whether relief

Velasquez should have been permitted to proceed with his claim, notwithstanding his failure to appeal.[190]

In conclusion, the Justice emphasized that the rationalization for granting Velasquez's requested relief, despite the technical applicability of res judicata, involved other factors in addition to the alleged error below.[191] First, the justice advanced, allowing an equitable exception to res judicata would afford Velasquez an opportunity to litigate, for the first time, the choice-of-law issue.[192] Second, Justice Stein attested that granting relief from the federal judgment would advance the *Erie* goal of vertical uni-

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> is to be granted, for what is required is the exercise of "sound discretion." What is meant is that the decision involves taking account of several incommensurable factors, some relating to the particular case and others to the larger system of administered justice. The factors relating to the particular case include the magnitude and consequences of the judgment, the relative clarity with which it appears that the judgment was unjust, the relative fault of the parties (fraud being different from mistake or change of circumstances), the requirements of diligence . . . and the equities in the interests of reliance. Factors relating to the system of justice are the degree of diligence and competence expected of counsel (since many of the cases involve lapses on their part), the extent to which the court should rely on the adversary presentations in contrast with seeking a just result on its own initiative, the balance to be struck between finality and correctness of judgments, and the distribution of responsibility for deciding upon relief between the trial court and the appellate court. Given this variety of relevant factors, the criteria for granting relief cannot be stated in categorical terms.

RESTATEMENT, *supra* note 43, § 74 cmt. g. Focusing on the Restatement's requirement of due diligence, Justice Stein posited that Rule 17(b) "preempted any choice-of-law arguments and mandated application of Illinois law." *Velasquez*, 123 N.J. at 541, 589 A.2d at 167 (Stein, J., dissenting). Justice Stein continued:

> Unless counsel had been aware of the decisions that repudiated *Rule* 17(b)'s application in diversity cases, an appeal was pointless. In this case, Rule 17(b) frustrated litigation of the choice-of-law question at trial and obscured the need to appeal from the district court's erroneous determination that the Rule mandated application of Illinois law.

Id.

190 *Id.*

191 *Id.* The justice repeated that he was not advocating a denial of preclusive effect simply because the federal dismissal was wrong. *Id.* In fact, Justice Stein noted, "[i]f no more were involved than that, plaintiff's effort to gain compensation for his injuries would have to yield to the overriding interest in finality of judgments." *Id.*

192 *Id.* at 541-42, 589 A.2d at 167 (Stein, J., dissenting). The dissent emphasized that the choice-of-law issue was never briefed, argued or adjudged. *Id.* at 540, 589 A.2d at 167 (Stein, J., dissenting). Hence, recognition of an exception to res judicata, according to Justice Stein, "would not afford plaintiff a 'second bite' at the choice-of-law apple; plaintiff ha[d] yet to bite once." *Id.* at 541-42, 589 A.2d at 167 (Stein, J., dissenting). *Cf.* Desrosiers v. American Cyanamid Co., 377 F.2d 864, 872 (2d Cir. 1967) ("The merits of the plaintiff's grievance were not determined. The

formity by affording litigants in federal court pursuant to diversity jurisdiction the same treatment given to litigants in the forum state.[193] Finally, the justice explained that allowing Velasquez to proceed in the New Jersey courts would foster judicial administration by stressing the need for revision of Rule 17(b) for the benefit of subsequent litigants.[194]

Courts, in the interests of fairness, finality and efficient judicial administration have adhered almost invariably to the mandate of res judicata.[195] On occasion, however, the principle that justice should be served in every case has prevailed over the equally salutary rule of claim preclusion.[196] The *Velasquez* majority's punctilious discussion of the preclusive effect of a 12(b)(6) dismissal, although technically sound,[197] needlessly elevated form over substance.[198] The majority opinion therefore advo-

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defendant was not subjected to the hardship of a full trial nor is it now required to relitigate questions of fact previously tried and determined.").

193 *Velasquez*, 123 N.J. at 542, 589 A.2d at 167 (Stein, J., dissenting).

194 *Id. See generally* Little, *supra* note 182, at 783-809 (delineating varying judicial responses to Rule 17(b) and proposing an interim solution to the problem).

195 *See* Cleary *supra* note 4, at 344-49 (exploring the primary justifications for the doctrine of res judicata); VESTAL *supra* note 1, at V-7 to -12.

196 *See generally* WRIGHT et al., *supra* note 45, § 4415 (exceptions to claim preclusion); *accord* FRIEDENTHAL et al., *supra* note 3, § 14.8; *see also* cases cited *supra* note 154 (recognizing the possibility of occasional exceptions to res judicata).

197 As noted, the majority concluded that the federal dismissal reached the merits of Velasquez's claim and was therefore entitled to preclusive effect. *Velasquez*, 123 N.J. at 515, 589 A.2d at 152. This construction of the binding effect of a 12(b)(6) dismissal for failure to state a claim for relief is, for the most part, widely accepted. *See supra* note 113 discussing cases that construe a 12(b)(6) dismissal as a judgment on the merits. *But see* MOORE et al., *supra* note 3, ¶ 0.409[1.-2] (several jurisdictions, notably those not adhering to the liberality of the federal pleading rules, do not treat a 12(b)(6) dismissal as an adjudication on the merits).

198 The majority, unwilling to depart from a rigid interpretation of res judicata, should have strived for a more acquiescent construction of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 1 (The Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."). Just two months after the New Jersey Supreme Court rendered its decision in *Velasquez*, it decided a doctrinally similar case and reached a contrary conclusion by construing the Rules "pragmatically." *See* Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 417, 591 A.2d 592, 601 (1991). In *Watkins*, a unanimous court concluded that state law claims brought in a New Jersey state court were not barred by a prior federal judgment that dismissed federal law claims that were grounded on the same cause of action, when the federal claims were dismissed for lack of standing to sue. *Id.* at 401-02, 591 A.2d at 593-94. Justice Pollock, writing for the court, noted that a dismissal for lack of standing to sue was not specifically mentioned in Rule 41(b) as a dismissal *not* going to the merits but posited that "Rule 41(b) . . . is interpreted pragmatically, not rigidly." *Id.* at 416-17, 591 A.2d at 601. The justice concluded that the federal dismissal for lack of standing to sue was not a decision on the merits because it was more akin to a lack of subject matter jurisdiction, a ground explicitly mentioned in Rule 41(b) as a decision without prejudice. *Id.* at 416-18, 591

cated that, even in extenuating circumstances, justice to an individual litigant must succumb to an uncompromising rule of finality.

In contrast, Justice Stein's dissenting opinion recognized that while res judicata is ordinarily entitled to utmost deference, the doctrine should not be applied if it would be inequitable to do so.[199] The dissent's view of res judicata is not aberrational.[200] Justice Stein joined an amalgam of noted scholars who have endorsed a view, albeit a minority view, that res judicata must occasionally yield to higher concerns.[201] The justice's equitable

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A.2d at 601-02. Justice Pollock explained: "Our definition of standing is more generous than the federal definition. [A] federal court's prior determination that a plaintiff does not have standing under a federal civil rights statute should not preclude a state court from considering the issue of standing under state law." *Id.* at 422, 591 A.2d at 604 (citations omitted). The court therefore held that the plaintiffs were barred from bringing the action again in federal court, but were free to assert state law claims in New Jersey state court. *Id.* at 423, 591 A.2d at 604. In reaching this conclusion, Justice Pollock discussed and distinguished the court's prior holding in *Velasquez*. *Id.* at 418, 591 A.2d at 602. In doing so the Justice stated: "In *Velasquez*, we held that a federal court dismissal *based on defendant's lack of capacity to be sued* barred relitigation in the courts of this state. Such a dismissal falls *within the ambit* of dismissals for failure to state a claim." *Id.* (emphasis added). Justice Pollock thus acknowledged that, in form, Velasquez's federal claim was dismissed pursuant to Rule 12(b)(6) but, in substance, the dismissal was predicated on the defendant's lack of capacity to be sued.

The *Velasquez* majority was unable to gather any precedential authority to support its conclusion that a 17(b) dismissal for lack of capacity to be sued was an adjudication on the merits. Instead, the majority construed the federal dismissal as one for failure to state a claim for relief under Rule 12(b)(6). The distinction is merely one of semantics—Velasquez's claim was dismissed pursuant to Rule 12(b)(6) *because* Leyden lacked the capacity to be sued under the directive of Rule 17(b). As noted, Rule 41(b) directs that dismissals for lack of jurisdiction, improper venue and failure to join a party under Rule 19 are not considered adjudications on the merits. FED. R. CIV. P. 41(b). The Rule also states, however, that unless the order of dismissal reflects a contrary intention, any other dismissal *is* an adjudication on the merits. *Id.* Thus, read literally, Rule 41(b) would seem to dictate that the federal dismissal in *Watkins* for lack of standing to sue should have been on the merits. Yet, the *Watkins* court professed that it would apply Rule 41(b) flexibly and held that the federal dismissal for lack of standing did not reach the merits and did not preclude a later suit in the New Jersey state courts. *See Watkins*, 124 N.J. at 417, 423, 591 A.2d at 601, 604. The *Velasquez* majority should have interpreted Rule 41(b) "pragmatically," as it did in *Watkins*, and concluded that a dismissal for lack of capacity to be sued in federal court was not determinative of Leyden's capacity to be sued in state court. This interpretation would not have undermined the purposes of res judicata and would have been consistent with the prevalent view that the Federal Rules of Civil Procedure are to be liberally construed.

199 *Velasquez*, 123 N.J. at 201, 589 A.2d at 153 (Stein, J., dissenting).

200 *See* cases cited *supra* note 154 (embracing practical interpretations of res judicata).

201 For commentary from some of the more notable proponents of a more lenient application of res judicata see Justice Blackmun's concurring opinion, joined by

interpretation of the doctrine is, therefore, at least warranted and, in light of the issues implicated by *Velasquez*, may very well be compelled.[202]

Justice Marshall, in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 402-04 (1981) (Blackmun, J., concurring); Justice Brennan's conclusion on behalf of a majority of the United States Supreme Court in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964); Justice Rutledge's dissenting opinion in Angel v. Bullington, 330 U.S. 183, 201-11 (1947) (Rutledge, J., dissenting); Justice Cardozo's dissenting opinion, joined by Justices Brandeis and Stone, in Reed v. Allen, 286 U.S. 191, 209-10 (1932) (Cardozo, J., dissenting).

202 For reasons why the *Velasquez* dissent appears a more just solution, it is necessary to demonstrate precisely why the majority opinion was unduly harsh. The United States District Court for the District of New Jersey relied on Federal Rule of Civil Procedure 17(b) in applying Illinois law to dismiss Velasquez's claim. *Velasquez v. Franz*, No. 86-2413, slip. op. at 4 (D.N.J. Mar. 23, 1987). The district court, conceding that the result was "unjust," nevertheless posited that it was constrained to dismiss the claim due to the mandate of Rule 17(b). *Id.* at 4, 6. The district court's application of Rule 17(b), however, was directly contrary to numerous federal decisions that conclusively held the Rule inapplicable to actions in the federal court based on diversity of citizenship. *See* cases cited *supra* note 166. The sentiment behind these decisions is that the *Erie* doctrine forbids the Rule's application. *See id.* Hence, in dismissing Velasquez's claim the district court contravened a fundamental precept of federal litigation: that a federal court sitting in diversity must apply state substantive law, including the choice-of-law provisions of the forum state. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."); Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941) (a federal court exercising diversity jurisdiction must apply the conflict rules of the forum state). While the federal court's virtually unquestioned application of Rule 17(b) resulted in a manifest injustice to Velasquez, the New Jersey Supreme Court's blind adherence to res judicata compounded this result. Instead of delving into the substance of the federal disposition, the *Velasquez* majority performed only a perfunctory analysis focusing on the form of the federal order of dismissal. *See* Velasquez v. Franz, 123 N.J. 498, 510, 589 A.2d 143, 149 (1991). Contending that the federal case was dismissed pursuant to Rule 12(b)(6), the majority looked exclusively to the preclusive effect of a dismissal for failure to state a claim for relief. *Id.* at 507, 589 A.2d at 148. The majority refuted the contention that the federal dismissal rested on Rule 17(b). *Id.* at 510, 589 A.2d at 149. The majority added that, even assuming that the federal court dismissed Velasquez's claim pursuant to Rule 17(b), that Rule was a rule of substantive law and was therefore entitled to preclusive effect. *Id.* at 510, 589 A.2d at 149-50. The characterization of Rule 17(b) as a rule of substantive law, however, only perpetuated the error committed by the federal court. Under the *Erie* analysis as refined by Hanna v. Plumer, 380 U.S. 460 (1965), when a Federal Rule conflicts with a state law, as it did in *Velasquez*, the federal rule will only be applied if it is constitutionally authorized. *Hanna*, 380 U.S. at 471. In turn, a Federal Rule is only constitutional if it is rationally capable of classification as either procedural or substantive. *Id.* at 472. Thus, by declaring that Rule 17(b) was a rule of substantive law, the *Velasquez* majority essentially concluded that Rule 17(b) was unconstitutional. The majority was apparently forced to conclude that Rule 17(b) was a rule of substantive law. Otherwise, it could not have given preclusive effect to the federal court judgment. Thus, the majority's analysis was goal-oriented because it determined that Velasquez should be barred from the present action, rationalizing its approach by calling Rule 17(b) a rule of substantive

In most instances, the harsh consequences of res judicata that Justice Stein sought to avoid are necessary to further the doctrine's fundamental goals of finality and repose.[203] In *Velasquez*, however, the application of res judicata failed to further these goals. Instead of preserving finite judicial resources, the very doctrine that was intended to promote finality actually induced superfluous litigation. Velasquez was deprived of redress, and Leyden and Franz, instead of responding to a products-liability claim, haggled for four long years over an arcane procedural issue. In the process, both parties incurred expenses and hardships that could have been ameliorated by a more lenient view of res judicata. Although res judicata is generally an obligatory doctrine, its application in *Velasquez* contravened its paramount goal of simple justice.

The United States Supreme Court, in its most recent decision on the topic, declared that the current posture of res judicata is synonymous with justice.[204] Thus, the movement toward an equitable view of the doctrine, if such a movement ever definitively existed, was forestalled. Perhaps this result is justified in view of increasingly overcrowded dockets; or perhaps it is the price we must pay for a litigious society. Limited judicial resources and the pursuit of inherent fairness in the aggregate require that those who have had their day in court be estopped from attempting to accomplish in several suits what could have been accomplished in just one. This judicial "fairness," however, may be strangely disturbing to individuals like Mr. Velasquez, who, engulfed in a procedural quagmire, are denied redress under the surmise of an absolute rule.

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law. *See Velasquez*, 123 N.J. at 510, 589 A.2d at 149-50. By refusing to accept Justice Stein's *Erie* analysis, however, and by instead looking solely to the question of whether a 12(b)(6) dismissal was on the merits, the majority avoided the complex *Erie* problems implicated by the case. *See id.* at 512, 589 A.2d at 150. Perhaps the *Velasquez* majority realized that had it acknowledged the error in the federal court, it would inevitably have been confronted with an *Erie* problem that would have precluded it from relying on res judicata in dismissing Velasquez's claim. Hence, the majority avoided the issue altogether and thereby resisted an opportunity to render an equitable result.

203 *See* VESTAL, *supra* note 1, at V-8 to -12 (enumerating the policies and goals of res judicata).

204 Federated Dep't Stores, Inc., v. Moitie, 452 U.S. 394, 401 (1981).