COMMENT

THE RES JUDICATA STANDARD OF CONFIRMED ARBITRATION AWARDS IN WISCONSIN

This Comment examines both the Wisconsin Employment Relations Commission and the civil res judicata standards to determine the scope of the res judicata doctrine as it applies to arbitration awards confirmed under the Wisconsin Arbitration Act. This examination is necessary to inform bargaining partners about the scope of permissible conduct pursuant to a confirmed award. The Comment concludes that each standard may equally advance considerations of finality, resource economy and long-run negotiation efficiency. Yet the civil standard better protects parties' due process rights and supports the essential function of arbitration as a dispute resolution mechanism separate from the court system. The civil res judicata standard should therefore be applied to arbitration awards confirmed under the Wisconsin Arbitration Act.

In labor arbitration,[1] employers and employee unions contractually agree to forego litigation of disputes arising under collective bargaining agreements[2] and instead submit to an impartial arbitrator outside the court system for dispute resolution.[3] In Wisconsin this alternative dispute resolution process[4] is governed by the Employment

1. The scope of this Comment is limited to labor as opposed to commercial arbitration because the Wisconsin statutory framework at issue in this Comment applies only to labor arbitration.

2. A collective bargaining agreement is a contract negotiated by an employer and the majority of its employees covering the terms and conditions of employment. WIS. STAT. § 111.02 (1985-86).

3. Stradinger v. City of Whitewater, 89 Wis. 2d 19, 277 N.W.2d 827 (1979).

4. Alternative dispute resolution processes (ADRs) are designed to provide disputing parties with a resolution process separate from, and alternative to, traditional litigation. In addition to arbitration, ADRs include mediation, conciliation, mini-trials, neighborhood justice centers, use of private judges, ombudsmen, and organized complaint centers. Each type of ADR is designed to handle particular kinds of disputes between parties with particular relationships. Arbitration, for example, is designed to resolve contractual disputes between parties with ongoing relationships, primarily in commercial or employment settings.

Arbitration, like other ADRs, has advantages over traditional litigation. It is generally faster and less costly than litigation. As such, parties are freer, in terms of time and budgets, to resolve a wider range of disputes. Further, because arbitrators often specialize in certain types of issues, they have expertise the judiciary lacks to handle technical issues that frequently arise in employment or commercial settings. Finally, arbitration is less formal and more relaxed than traditional litigation. This encourages parties to become more involved in the dispute resolution process and thereby educates them about dispute avoidance and management. *See generally* E. JOHNSON JR., V. KANTOR, E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 2, 39 (1977); Kirst, *Will the Seventh Amendment Survive ADR?*, 1985 Mo. J. Dispute Resolution 45, 46 (1985).

Arbitration also provides benefits to the general public by removing contract and commercial disputes from the judicial forum. Court dockets are lightened and operating expenses are reduced by the smaller volume of these cases which courts must hear. Therefore, scarce judicial

Peace Act[5] in conjunction with the Wisconsin Arbitration Act.[6] These statutory provisions empower arbitrators[7] to resolve disputes by interpreting the respective rights of parties to collective bargaining agreements and allow circuit courts to confirm the awards made by arbitrators, at the request of either party to the award.[8] By confirming an award, the court finalizes it and gives it the effect of a judgment at law.[9]

Wisconsin employers and employee unions that confirm arbitration awards often wonder what future conduct will violate the confirmed award. If an arbitrator's award finds that an employer violated its collective bargaining agreement with a union by requiring employees to work overtime on Christmas, for example, will the employer violate this same award by requiring overtime work on Rosh Hashana? The answer to this question lies in the standard of res judicata applied to confirmed awards.

At present, however, the standard of res judicata which applies to confirmed awards is unknown because parties may enforce labor arbitration awards either through court procedures or through the administrative procedures of the Wisconsin Employment Relations Commission (WERC).[10] Res judicata standards differ under each of these

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resources are saved for cases best suited for traditional litigation. *See* JOHNSON, KANTOR, SCHWARTZ, *supra* at 3; *see generally* J. MARKS, E. JOHNSON, JR., P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION (1984).

5. The Wisconsin Employment Peace Act [hereinafter Employment Peace Act], WIS. STAT. § 111.10 (1985-86), states:

> Parties to a labor dispute may agree in writing to have the commission act or name arbitrators in all or any part of such dispute, and thereupon the commission shall have the power so to act. The commission shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in ch. 788.

6. The Wisconsin Arbitration Act [hereinafter Arbitration Act] is comprised of WIS. STAT. § 788 (1985-86). WIS. STAT. § 788.01 (1985-86) states that arbitration agreements are valid, irrevocable and enforceable. It also states that labor arbitration agreements are only enforceable under the Act when made in conjunction with the Employment Peace Act. WIS. STAT. § 110.10 (1985-86) provides that any arbitration award may be confirmed within one year of issuance unless the award is vacated, modified or corrected under WIS. STAT. § 788.10 (1985-86) (providing specific and limited circumstances under which a court will modify or vacate an award). WIS. STAT. § 788.14(3) (1985-86) is especially important for purposes of this Comment. It provides that when a court enters judgment confirming an award, the award "shall have the same force and effect, in all respects, as and be subject to, a judgment in an action, and it may be enforced as if it had been rendered in an action in the court in which it were entered."

7. For a discussion concerning how parties select arbitrators, see *infra* notes 22-24 and accompanying text.

8. WIS. STAT. § 788.09 (1985-86); *see supra* note 6.

9. WIS. STAT. § 788.14(3) (1985-86); *see supra* note 6.

10. The Wisconsin Employment Relations Commission (WERC) provides state-supported arbitration services for private, municipal and state employees and employers operating under collective bargaining agreements. The service is free of charge for all parties. The WERC has no authority to review or vacate arbitration awards but does have authority to enforce them when one party to an award refuses to abide by it. *See* WIS. STAT. §§ 111.06(1)(f), 111.06(1)(g), 111.06(2)(c), and 111.06(2)(d) (1985-86) of the Employment Peace Act (pertaining to private em-

procedures. No reported Wisconsin case discusses this issue, but employers and employee unions confront it each time they confirm an arbitration award.

Section 788.14[11] of the Wisconsin Arbitration Act raises the issue of whether the civil or the WERC res judicata standard applies to confirmed arbitration awards. This section of the Act states that, once confirmed, an arbitration award has "the same force and effect . . . as . . . a judgment in an action,"[12] implying that arbitration awards take on res judicata effect upon confirmation. While Wisconsin courts have held that the doctrine of res judicata applies to all arbitration awards,[13] none has specified the standard or scope of the doctrine which applies to confirmed awards.

Wisconsin courts might apply two standards to confirmed awards: the civil res judicata standard or the WERC res judicata standard. Wisconsin courts apply a "transactional"[14] res judicata standard to civil actions. Under this standard, if two actions between the same parties or their privies[15] arise from the same transaction, res judicata will bar the second action as to all matters which were, or might have been, litigated

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ployers and employees); WIS. STAT. §§ 111.70(3)(a)(5), 111.70(3)(b)(4) (1985-86) of the Municipal Employment Relations Act [hereinafter MERA] (pertaining to municipal employers and employees); and WIS. STAT. §§ 111.84(1)(e) and 111.84(2)(d) (1985-86) of the State Employment Labor Relations Act [hereinafter SELRA] (pertaining to state employers and employees). *See also* Wis. Employment Rel. Comm'n. v. Teamsters Loc. No. 563, 75 Wis. 2d 602, 250 N.W.2d 696 (1977). For an explanation of how parties to collective bargaining agreements use the WERC to enforce their arbitration awards, see *infra* notes 22-25 and accompanying text.

11. WIS. STAT. § 788.14(3) (1985-86); *see supra* note 6.

12. WIS. STAT. § 788.14(3) (1985-86).

13. Dehnart v. Waukesha Brewing Co., 21 Wis. 2d 583, 589, 124 N.W.2d 664, 667 (1963); Decker v. Ladish-Stoppenback Co., 203 Wis. 285, 234 N.W. 355 (1931). In *Dehnart*, the Wiseonsin Supreme Court held that although res judicata does apply to arbitration awards, it did not bar Dehnart's action in this case because the underlying issue had not been decided in the previous arbitration. In the previous arbitration, the arbitrator found that Dehnart violated his collective bargaining agreement with his employees by transferring work to a nonunion facility. The union confirmed the award and brought enforcement proceedings against Dehnart to collect back pay. Dehnart argued that he owed limited back wages because his plant would have closed for economic reasons if he had not transferred work to another plant. The circuit court held the arbitrator had previously ruled on Dehnart's claim and barred it as res judicata. The Supreme Court overturned that ruling, holding that Dehnart's claim was not barred because the arbitrator had not ruled on this issue.

14. The RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) describes a transaction as a grouping of faets related in time, space, origin and motivation. *See infra* note 58 and accompanying text.

15. The RESTATEMENT OF JUDGMENTS § 83 comment a (1943) defines "privity" in the following way:

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. The word "privy" includes those who control an action although not parties to it. . . , those whose interests are represented by a party to the action. . . , and successors in interest to those having derivative claims.

in the first action.[16] Courts could apply the civil standard to confirmed arbitration awards, reasoning that upon confirmation, an award becomes identical to civil judgment in all respects. The WERC, by contrast, applies a broader res judicata standard to arbitration awards. Under this standard, a grievance[17] is considered res judicata if it concerns the same parties, issues, material facts and remedies as a prior arbitration award.[18] The WERC applies this standard flexibly, giving the doctrine a different effect depending on whether factual or legal claims are at stake. Courts could choose to apply this standard to confirmed awards, reasoning that although a confirmed award has the effect of a judgment, it is not identical to one in all respects because it results from arbitration rather than court action.

Wisconsin courts need to determine which of these res judicata standards applies to confirmed awards because each standard would have a substantially different effect on the post-award conduct of parties subject to the confirmed award. For example, the civil res judicata standard focuses on the disputed transaction in a current suit to determine if it is barred by the res judicata effect of a previous suit involving the same transaction.[19] Under the civil standard, parties could engage in conduct similar to that involved in a previously arbitrated dispute if this conduct arose from a transaction different from that involved in the prior arbitration. Parties would be required to arbitrate simultaneously all issues arising from one transaction, and res judicata would bar subsequent arbitration of any issue not raised in that arbitration.

The RESTATEMENT (SECOND) OF JUDGMENTS (1982) has abandoned the nomenclature of "privity," and speaks in terms of persons who are "legally affected by a judgment . . . by reason either of being a party or equivalent participation in the litigation, or from having a legal relationship that is derivative from one who was a party. . . ." *See* RESTATEMENT (SECOND) OF JUDGMENTS introductory note to ch. 4 (1982).

Wisconsin courts continue to use the terms "privity" in case law, but do so consistently with the RESTATEMENT (SECOND) OF JUDGMENTS (1982). *See* Landess v. Schmidt, 115 Wis. 2d 186, 190, 340 N.W.2d 213, 215-16 (1983).

16. DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983); *Landess*, 115 Wis. 2d at 186, 340 N.W.2d at 213; *accord* Barbian v. Lindner Bros. Trucking Co., 196 Wis. 2d 291, 296, 316 N.W.2d 371, 374 (1982); Leinmert v. McCann, 79 Wis. 2d 289, 293-94, 255 N.W.2d 526, 528-29 (1977).

17. Grievance arbitration must be distinguished from interest arbitration. Issues in grievance arbitration involve alleged violations of an existing contract, or interpretation of an existing contract. In interest arbitration, however, terms of a contract being formed are to be settled. While the Employment Peace Act provides procedures for interest arbitration for municipal and state employees, the Arbitration Act is not applicable to these provisions. Therefore, interest arbitration awards cannot be confirmed, and the res judicata issue never arises. As such, this Comment applies only to grievance arbitration.

18. Moraine Park Vocational, Technical, & Adult Educ. Dist. v. Anderson, Dec. No. 22009-B (WERC 1985); Wisconsin State Employees Union (WSEU) v. Wisconsin, Dec. No. 20145-A (WERC 1983), *aff'd by operation of law*, Dec. No. 20145-B (WERC 1983); Local 310, Int'l Union of Operating Eng'rs v. Wisconsin Pub. Serv. Corp., Dec. No. 11954-D (WERC 1974).

19. *See infra* note 58 and accompanying text.

The WERC res judicata standard, conversely, focuses not on the transaction in which a dispute arose, but on the conduct and factual circumstances of a dispute to determine when res judicata bars a second arbitration. If a dispute involves the same conduct and factual circumstances as a previous dispute, res judicata will bar the disputing parties from initiating a second arbitration proceeding. Under this standard, parties could separately arbitrate various types of conduct arising from one transaction, but could not rearbitrate similar conduct arising from several different transactions.

Due to these differences in the civil and WERC res judicata standards, bargaining partners cannot predict the scope of permissible conduct pursuant to a confirmed arbitration award. They likewise do not know if they have forfeited the opportunity to arbitrate an issue because they did not include it in a prior arbitration concerning the same transaction. This uncertainty may hamper efficient dispute negotiations between employers and employee unions because neither party will know which rights are specified by the res judicata effect of previous awards and which rights are currently negotiable. To help parties understand the scope of permissible conduct pursuant to confirmed arbitration awards, Wisconsin courts need to specify the standard of res judicata which applies to confirmed awards.

This Comment suggests that the standard of res judicata applied to confirmed awards should fulfill diverse policy and practical considerations behind arbitration and the res judicata doctrine. Most importantly, courts should favor the policy of maintaining arbitration as an alternative dispute resolution process in which the judiciary has minimal involvement. Courts should also examine the effects of each standard on the finality and resource economy goals of the res judicata doctrine. Finally, courts should evaluate each standard pragmatically to determine which better promotes parties' due process rights and efficient bargaining relationships.

This Comment concludes that the civil standard of res judicata is more appropriate for confirmed awards because it best promotes the role of arbitration as an alternative dispute resolution mechanism without sacrificing finality, resource economy, due process, or efficient bargaining relationships. Section I of the Comment explains the WERC and court procedures through which employers and employee unions may enforce grievance arbitration awards. Section II then discusses how the WERC and civil res judicata standards operate in court and WERC enforcement procedures. Section III examines each standard in light of policy and practical considerations central to arbitration and the res judicata doctrine. Weighing these considerations, Section IV concludes that the civil res judicata standard should be applied to con-

firmed arbitration awards because it better promotes the balance of these policy and practical considerations.

I. WERC AND COURT ENFORCEMENT OF ARBITRATION AWARDS IN WISCONSIN

The res judicata standard applicable to confirmed arbitration awards is unclear because arbitration awards may be enforced through judicial or administrative procedures, and each procedure employs a different res judicata standard. Before examining the discrepancy between these two res judicata standards, however, it is first important to understand how the discrepancy arises. For this purpose, this Section of the Comment discusses the methods through which parties to collective bargaining agreements obtain and enforce labor arbitration awards in Wisconsin.

The grievance arbitration process in Wisconsin begins when parties to a collective bargaining agreement cannot independently resolve a labor dispute[20] and seek outside help from an arbitrator. At this initial stage, parties will obtain an arbitrator pursuant to procedures specified in their collective bargaining agreements. Parties may either engage in common law arbitration[21] or statutory arbitration. If the parties choose to use common law arbitration, they will obtain an arbitrator privately.[22] Because neither the Arbitration Act nor the Employment Peace Act applies to common law arbitration,[23] parties using this system may enforce their awards only through breach of contract actions.[24]

If the parties to a collective bargaining agreement have chosen to use statutory arbitration, the Arbitration Act and the Employment Peace Act set forth the procedures they must follow. Wisconsin Statute sections 788.01[25] and 110.10[26] specify that the Arbitration Act will apply to labor arbitration only if the bargaining partners agree to let the

20. The "parties" here involved may be employer and employee groups in the private sector or the public sector. The public sector groups include both municipal and state employees and employers.

21. For an example of common law arbitration in Wisconsin, see Madison v. Frank Lloyd Wright Found., 20 Wis. 2d 361, 382-385, 122 N.W.2d 409, 420-22 (1963).

22. Parties having chosen common law arbitration often obtain arbitrators through the American Arbitration Association.

23. WIS. STAT. §§ 111.10 and 788.01 (1985-86) reciprocally specify that both chapters apply only to statutory arbitration in which bargaining partners obtain an arbitrator through the WERC. These provisions, therefore, do not apply to common law arbitration in which parties obtain arbitrators from private services.

24. Because the statutory provisions examined in this Comment do not apply to the res judicata issue raised in common law arbitration, it is not discussed further in this Comment.

25. WIS. STAT. § 788.01 (1985-86); *see supra* note 6.

26. WIS. STAT. § 111.10 (1985-86); *see supra* note 5.

WERC participate in the arbitration by acting as, or naming arbitrators for, the dispute.[27] Once the parties have chosen an arbitrator, arbitration will take place as provided by the Arbitration Act.[28] These statutory provisions authorize the arbitrator to direct the taking of depositions for evidentiary use in the proceedings,[29] to issue subpoenas,[30] to hear disputes,[31] and finally to issue written awards.[32] The statute further provides that once an award is issued, a court may vacate or modify the award only in very limited circumstances.[33]

When the arbitrator issues an award which neither party contests,[34] the parties have two alternatives to ensure that their bargaining partners comply with the award. The first alternative involves no further action under the Arbitration Act. Parties may simply return to their employment relationship and implement the award. Both parties are contractually bound, under their collective bargaining agreement, to abide by the award.[35] As such, no further statutory action is necessary. However, if either party believes that the other will not implement the award, or if either wants a more official record of the award, the parties have a second procedural alternative.[36] Within one year of issu-

27. The Wisconsin Supreme Court has also held that WIS. STAT. § 111.10 (1985-86), and thus the Arbitration Act, will apply if the WERC supplies parties with a list of names from which they may choose an arbitrator. Layton School of Art and Design v. WERC, 82 Wis. 2d 324, 262 N.W.2d 218 (1977). The court in *Layton* also pointed out that concerning public sector employes, the WERC similarly provides a panel of names from which they may choose an arbitrator. WIS. STAT. §§ 111.86 and 111.77(3) (1985-86). However, these provisions specifically state that the arbitrators chosen will be appointed by the WERC. *Layton*, 82 Wis. 2d at 346, 262 N.W.2d at 228.

28. *See supra* note 6; the Employment Peace Act specifies that private sector arbitration will take place pursuant to the Wisconsin Arbitration Act and WIS. STAT. § 111.10 (1985-86). Identical provisions for municipal and state employees are found in WIS. STAT. §§ 111.73(3) and 111.86 (1985-86) respectively.

29. WIS. STAT. § 788.07 (1985-86).

30. WIS. STAT. § 788.06(2) (1985-86).

31. WIS. STAT. § 788.06(1) (1985-86).

32. WIS. STAT. § 788.08 (1985-86).

33. The circuit court confines its power to vacate or modify arbitration awards to protect the arbitrator's province to settle disputes on their merits. Parties to collective bargaining agreements have bargained for the decision of an arbitrator rather than a judge. Therefore, to afford parties the benefit of their bargains, the judiciary will interfere with arbitration awards only in extreme circumstances.

WIS. STAT. §§ 788.10 and 788.11 (1985-86) specify conditions necessary for vacation or modification of an arbitration award. In general, WIS. STAT. § 788.10 (1985-86) states that an award will be vacated only if it were obtained by fraud, or where the arbitrator was guilty of misconduct. WIS. STAT. § 788.11 (1985-86) states that awards will be modified only in cases of mathematical miscalculation or where the arbitrator issued an award based on conduct that was not in dispute.

34. Parties could contest the award by making an application to the circuit court to vacate the award under WIS. STAT. § 788.10 (1985-86) or to modify the award under WIS. STAT. § 788.11 (1985-86).

35. 6 C.J.S. § 120 (1975); Pick Indus., Inc. v. Gebhard-Berghammer, Inc., 264 Wis. 353, 59 N.W.2d 798 (1953).

36. *See supra* note 35.

ance, either party may confirm the award in the circuit court,[37] thus giving the award the force and effect of a judgment in an action at law.[38]

Parties to an arbitration award also have two alternative procedures through which to enforce their awards if one party subsequently engages in conduct forbidden by the award. First, if the award was confirmed, parties can enforce it under the Arbitration Act.[39] Because Wisconsin Statute section 788.14(3) gives a confirmed award the force and effect of a judgment, a party violating a confirmed award can be held in contempt of court.[40] When a party chooses to enforce an arbitration award under the Arbitration Act, the WERC is not involved in the procedure.[41] Alternatively, regardless of whether the award is confirmed, parties may enforce it through the WERC.[42] Using this procedure, either party may file an unfair labor practices complaint[43] with the WERC if it believes that the other party to an arbitration award is violating its terms. The WERC will then conduct unfair labor practice pro-

37. WIS. STAT. § 788.09 (1985-86); *see supra* note 6.

38. WIS. STAT. § 788.14(3) (1985-86); *see supra* note 6.

39. Parties who have not previously confirmed their awards could enforce them through contempt proceedings in one situation: enforcement through contempt proceedings would be possible if violation of an award occurred within one year of the award's issuance. A party could then first confirm the award under WIS. STAT. § 788.09 (1985-86), and thereafter motion the circuit court to hold in contempt the party violating the award.

40. WIS. STAT. § 785.01(b) (1985-86) defines contempt of court as intentional disobedience, resistance, or obstruction of authority, process or order of court. Following Wisconsin courts' definition of contempt, a party violating a confirmed arbitration award could feasibly be charged with either civil contempt under WIS. STAT. §§ 785.01(3), 785.02, and 785.04(2) (1985-86), or with criminal contempt under WIS. STAT. §§ 785.01(2), 785.02 and 785.04(2) (1985-86). In State v. King, 82 Wis. 2d 124, 129, 262 N.W.2d 80, 82 (1978), the court stated that criminal contempt charges seek to vindicate the authority of the court and are punitive in nature. Civil contempt charges, on the other hand, seek to enforce a private right of action and are remedial in nature. *See also* Schroeder v. Schroeder, 100 Wis. 2d 625, 302 N.W.2d 475 (1981).

41. Milwaukee County v. District Council 48, AFSCME, 109 Wis. 2d 14, 27, 325 N.W.2d 350, 357 (Ct. App. 1982). In *Milwaukee County*, the court of appeals discussed the alternate award enforcement paths in Wisconsin. It explained that WERC involvement was unnecessary if parties sought direct review under the Wisconsin Arbitration Act. Yet the court also stated that the legislature "obviously preferred initial WERC review to assure some measure of expertise and to permit the court to benefit from this expertise." *Id.* at 29, 325 N.W.2d at 357. The court further explained that WERC review upholds the tradition of limited court review to assure that arbitration remains inexpensive and quick.

42. The WERC has authority to enforce the terms of an arbitration award where one party has refused to abide by the award. *See* WIS. STAT. §§ 111.06(1)(f), 111.06(1)(g), 111.06(2)(c), and 111.06(2)(d) (1985-86) of the Employment Peace Act; WIS. STAT. §§ 111.70(3)(a)(5) and 111.70(3)(b)(4) (1985-86) of MERA; and WIS. STAT. §§ 111.84(1)(e) and 111.84(2)(d) (1985-86) of SELRA.

43. Unfair labor practices are employer and employee practices specifically prohibited in the Employment Peace Act. The unfair labor practices specified are numerous, but generally concern interfering with employee or employer rights, encouraging or discouraging membership in any labor organization, and requiring compliance with collective bargaining agreements.

ceedings in which a WERC examiner conducts a hearing[44] and issues an award specifying the rights and duties of each party under the arbitration award at issue. If either party is dissatisfied with the order, it may file a petition with the WERC requesting the Commission as a body to review the examiner's decision.[45] Either party may alternatively request that the circuit court review the examiner's decision.[46] Following this review, the WERC or the circuit court will issue a new or modified order, or will affirm the examiner's original decision. If either party fails to comply with this final order, the WERC can petition the circuit court to enforce the award through its contempt powers.[47]

Because the Wisconsin Legislature has provided two enforcement routes, through the WERC and the judicial system, questions arise concerning the standards of enforcement in the alternate proceedings. The WERC's conclusion as to what conduct violates an arbitration award may differ from the circuit court's conclusion on the same issue. These alternative conclusions arise from the different standards of res judicata which the court and the WERC may apply in enforcement proceedings. If a party initiates WERC enforcement proceedings, the WERC will apply a "materially similar fact" res judicata standard to the conduct at issue. If the award is confirmed and the same party initiates enforcement proceedings in the circuit court, however, the court might apply either the WERC or the civil res judicata standard.[48] The result of enforcement proceedings could differ greatly depending on which res judi-

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44. WIS. STAT. § 111.07 (1985-86) specifies procedures followed in unfair labor practice proceedings under the Employment Peace Act, MERA and SELRA. *See* WIS. STAT. § 111.70(4)(a) (1985-86) of MERA and WIS. STAT. § 111.84(4) (1985-86) of SELRA. *See also* WIS. ADM. CODE §§ ERB 2, 12, 22 and 31 (1986). The party allegedly violating the award may file an answer to the complaint; each party may take depositions and file briefs with the WERC. *See* WIS. STAT. § 111.07(2)(a)-(b) (1985-86).

45. WIS. STAT. § 111.07(5) (1985-86); WIS. ADM. CODE §§ ERB 12.06, 12.07, 12.08, 12.09, 22.06, 22.07, 22.08, 22.09 (1986). The WERC has repeatedly held that when enforcing arbitration awards in unfair labor practice proceedings, it applies the standards set forth in the Wisconsin Arbitration Act and will not enforce awards repugnant to those standards. Teamsters Local 563 v. City of Neenah, Dec. No. 10716-C (WERC 1973); Kasprzak v. Jefferson Bd. of Educ., Dec. No. 13698-B (WERC 1978). It is also possible for the WERC to defer to the judgment of an arbitrator if it concludes the unfair labor practices proceeding was prematurely filed and that arbitration is the proper remedy. *See* Local 465, Allied Indus. Workers of Am. v. Handcraft Co., Dec. No. 10300 (WERC 1971).

46. Upon petition, the WERC may affirm, set aside, modify or reverse the examiner's findings, conclusions of law, or order based on the criteria set forth in WIS. STAT. §§ 788.10 and 788.11 (1985-86). The WERC may take similar action on its own motion. *See* WIS. STAT. § 111.07(5) (1985-86); WIS. ADM. CODE § ERB 12.09, 22.09 (1986).

47. WIS. STAT. §§ 227.16(1)(a) and 111.07(7-8) (1985-86); WIS. ADM. CODE §§ ERB 12.09, 22.09 (1986). *See supra* note 40.

48. No reported Wisconsin cases tell the courts which standard of res judicata to apply to confirmed awards.

cata standard courts apply.[49] To illustrate the need to clarify the standard applicable to confirmed awards, the next Section of this Comment will briefly explain the res judicata doctrine and examine the divergent results reached when each standard is applied.

II. WERC AND COURT APPLICATION OF THE RES JUDICATA DOCTRINE

In its most basic form, the res judicata[50] doctrine asserts that once a claim or cause of action has been adjudicated and a judgment has been rendered on its merits, the same matter cannot be raised in a subsequent action between the same parties or their privies.[51] The fundamental policy behind the doctrine is finality.[52] The doctrine requires that at some point, litigation over any controversy must end.[53] Three significant effects follow from this policy. First, it prevents repetitious litigation[54] by limiting each litigant to "one day in court." Second, by preventing repetitious litigation, the res judicata doctrine preserves judicial resources and promotes efficient judicial administration,[55] thus allowing the judiciary to devote time and resources to new claims and issues. Finally, prevention of repetitious litigation promotes fairness by

49. WIS. STAT. §§ 111.06(1)(f), (1)(g), (2)(c) and (d) (1985-86) of the Employment Peace Act; WIS. STAT. §§ 111.70(3)(a)(5), (b)(4) (1985-86) of MERA; WIS. STAT. §§ 111.84(1)(e), (2)(d) (1985-86) of SELRA. *See also supra* note 40.

50. The common law doctrine of res judicata is expansive and intricate, especially when considered in conjunction with corresponding doctrines of collateral estoppel and stare decisis. Under the collateral estoppel doctrine, parties are prevented from raising issues actually litigated in a previous action, even if a subsequent suit is based on a different cause of action than the prior suit. Collateral estoppel is distinguished from res judicata in that the former applies only to matters actually litigated. Res judicata, however, applies to matters which were, or could have been, previously litigated. The doctrine of stare decisis is also similar to collateral estoppel and res judicata, but it requires that courts adhere to general precedents established in previously litigated cases between other parties. For a descriptive analysis of these doctrines, see R. CASAD, RES JUDICATA IN A NUTSHELL (1976).

This Comment is not intended as an exhaustive study of res judicata or accompanying doctrines, but only as an analysis of its application in a very narrow set of circumstances. As such, this Comment emphasizes the doctrine's fundamental policies rather than its intricacies.

51. *See* CASAD, *supra* note 50, at 18, 24; RESTATEMENT (SECOND) OF JUDGMENTS §§ 24, 25 and 27 (1982). Under the Restatement res judicata rules, a claim is held res judicata if it was, or could have been, raised in a previous action. A judgment need not be rendered on the claim to preclude its relitigation in a subsequent action. An issue is considered res judicata on the other hand, only if it was actually litigated in a previous action. A court must have rendered judgment on the issue before it will have res judicata effect.

52. DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983); *Landess*, 115 Wis. 2d at 190, 340 N.W.2d at 215-16 (1983); *see generally* CASAD, *supra* note 50.

53. *DePratt*, 113 Wis. 2d at 310, 334 N.W.2d at 885; *Landess*, 115 Wis. 2d at 191, 340 N.W.2d at 216.

54. *See* CASAD, *supra* note 50, at 172-74; *see also supra* note 53.

55. *Landess*, 115 Wis. 2d at 191, 198, 340 N.W.2d at 216, 222; Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 918 (1982).

assuring that a defendant will not continually be forced to defend against the same claim or issue.[56]

A. The Civil Res Judicata Standard in Wisconsin

Wisconsin courts give effect to res judicata policies of finality by holding that final adjudications are conclusive in subsequent actions between the same parties, or their privies, concerning all transactions that were, or might have been, previously litigated.[57] A transaction is defined, under the Restatement (Second) of Judgments, according to similarity in time, space, origin or motivation.[58] The doctrine applies even when a plaintiff puts forth evidence on different theories, or seeks remedies not demanded in the first action.[59]

Landess v. Schmidt[60] illustrates Wisconsin courts' application of the res judicata doctrine in civil action. In *Landess,* the appellant had operated a milk hauling service for Borden's Dairy. After using Landess' service for several years, Borden refused to accept further deliveries from him and arranged for another hauler to collect milk from local farmers. Landess sued Borden, alleging that the company tortiously interfered with his business relations with area farmers and breached an implied contract with him. The court granted summary judgment for Borden.[61] The following year, Landess again sued Borden, as well as several milk haulers, alleging conspiracy.[62] Quoting from *DePratt v. West Bend Mutual Insurance Co.,*[63] the Wisconsin Court of Appeals held that Landess' claim was barred as res judicata because it arose out of the same transaction as the previous suit.

The court's reasoning in *Landess* illustrates key factors which Wisconsin courts consider to determine the res judicata effect of prior litigation. The court examined both claims in terms of time, space, and origin. Comparing the breach of contract and conspiracy claims, it noted

56. *DePratt,* 113 Wis. 2d at 311, 334 N.W.2d at 885; *Landess,* 115 Wis. 2d at 191, 340 N.W.2d at 216.

57. *See supra* note 16.

58. The RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) defines a transaction as a grouping of facts linked in time, space, origin and motivation. The Restatement also suggests that courts consider practical issues, such as forming convenient trial units and conforming to parties' expectations, when defining transactional units.

Under the transactional standard of res judicata, a plaintiff is barred from relitigating any claim arising from a previously litigated transaction, whether or not the second claim was actually litigated in the previous suit. The Wisconsin Supreme Court adopted the Restatement's transactional standard in *DePratt,* 113 Wis. 2d at 311, 334 N.W.2d at 886.

59. *Landess,* 115 Wis. 2d at 192, 340 N.W.2d at 216.

60. *Id.* at 186, 340 N.W.2d at 213.

61. Landess v. Borden, 667 F.2d 628 (7th Cir. 1981).

62. *Landess,* 115 Wis. 2d at 190, 340 N.W.2d at 215.

63. 113 Wis. 2d at 311, 334 N.W.2d at 886.

that both allegedly occurred at the same point in time. Further, all parties did business in the same geographical area. Finally, both claims originated between milk haulers and Borden's Dairy. Pointing out the claims' similarities in time, space, and origin, the court of appeals concluded that both arose from the same transaction and that Landess' conspiracy claim could have been litigated in his first suit against Borden. Therefore, the court held that the res judicata doctrine barred Landess' second action. The court's opinion stressed that although the court would not deprive a litigant of his day in court, relitigation of identical claims was undesirable and wasteful of judicial resources.[64]

Landess illustrates the transactional analysis Wisconsin courts apply to determine when res judicata bars relitigation of a claim or issue. Wisconsin courts will hold that res judicata bars an action if they find identity of parties and transactions as defined by time, space, origin and motivation. Claims, issues or forms of relief not initially raised cannot be presented in a second suit if the parties are identical and the actions arose from the same transaction as the previous suit.[65]

B. The WERC Standard of Res Judicata

Unlike Wisconsin's civil res judicata standard, the WERC applies a broader, nontransactional standard of res judicata to arbitration awards. Under the standard, res judicata bars arbitration of a second grievance concerning the same parties, issues and material facts as a prior award.[66] Further, the WERC standard does not preclude separate arbitration of a claim which could have been raised in a previous arbitration.[67]

Two decisions illustrate the WERC application of these principles. The first decision, *Moraine Park Vocational, Technical & Adult Education District v. Anderson,*[68] demonstrates factors that influence the WERC's determination of when two grievances contain "materially similar facts." In *Anderson,* an employee in the district's cosmetology department filed a grievance with her union, alleging that the district violated its labor contract by requiring her to extend her teaching contract by forty-six days and that the district's contract extension policy was unreasonable.[69] The union attempted to submit these grievances to arbitration but the district refused to participate on the grounds that

64. *See supra* note 16.

65. *See supra* note 58 and accompanying text.

66. WSEU v. Wisconsin, Dec. No. 17313-B (WERC 1982); WSEU v. Wisconsin, Dec. No. 20200-A (WERC 1983); Moraine Park Vocational, Technical & Adult Educ. Dist. v. Anderson, Dec. No. 22009-B (WERC 1985).

67. *WSEU,* Dec. No. 20200-A (WERC 1983).

68. Dec. No. 22009-B (WERC 1985).

69. *Id.* at 6.

both of the allegations were res judicata under a previous arbitration award.[70] The district then filed a prohibited practice complaint[71] with the WERC alleging that the union failed to comply with the previous arbitration award by filing the employee's grievances.

The WERC examiner hearing the complaint first reviewed the previous arbitration award in issue.[72] In that grievance an arbitrator had held that the parties' collective bargaining agreement and past practices gave the district the right to require a teacher in an unspecified department[73] to accept an extended teaching contract. The arbitrator also held that the eight-day extension in that case was reasonable. Comparing the previous award to the current grievance, the examiner determined that the contractual language and issues in each situation were identical[74] and that the length of time for which the contract was extended was insignificant. The examiner concluded that no material factual differences existed between the two cases and that, therefore, the current grievances were barred as res judicata.[75] The union petitioned for review of this decision.

Upon review, the Commission first stated that res judicata would apply to the current grievance only if it shared an identity of parties, issues and material facts with the previous arbitration award.[76] Given party identity, the Commission turned directly to the facts and issues in each grievance. The Commission first stated that the prior arbitration award clearly established the district's right to require extended contracts. As such, the district was not required to rearbitrate this issue.[77] The Commission made this determination without examining any possible factual differences between the past and present grievances. Concerning the reasonableness of the district's requirement, however, the Commission did examine the factual circumstances of each grievance. It concurred with the union's argument that the prior arbitrator had

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70. *Id.*

71. *See supra* note 43.

72. Moraine Park Fed'n of Teachers Local 3338 v. Moraine Park Vocational, Technical and Adult Educ. Dist., (WERC 1983) (Petri, arb.).

73. The *Anderson* decision does not specify the department in which the employee concerned in the previous grievance worked. However, the Commission did state that most of the evidence adduced at that arbitration concerned the LPN program, because the District had a past practice in that department dealing with extending teachers' contracts. Thus, essentially, the WERC in *Anderson* compared the fact situation in the cosmetology department to the practice in the LPN department. The WERC considered any factual differences concerning the department in which the employee worked in the previous grievance to be irrelevant.

74. *Anderson*, Dec. No. 22009-B, at 6.

75. *Id.*

76. *Id.* at 8 n.3; *WSEU*, Dec. No. 20145-A (WERC, 1983), *aff'd by operation of law*, WSEU v. Wisconsin, Dec. No. 20145-B (WERC 1983); WSEU v. Wisconsin, Dec. No. 20910-B (WERC 1985).

77. *Anderson*, Dec. No. 22009-B, at 8.

not considered whether the cosmetology department attempted to accommodate employees' vacation schedules when requiring extended contracts. The Commission also stated that information communicated to employees involved in the previous arbitration differed from that communicated to cosmetology department employees, although the Commission did not specify the nature of this information.[78] Because of these factual differences, the Commission determined that the res judicata effect of the prior arbitration award did not bar arbitration of the reasonableness issue raised in the current grievance.[79]

Anderson illustrates that the WERC applies its "materially similar fact" res judicata standard differently to factual and legal issues. Grievance arbitration often involves mixed questions of fact and law. Yet WERC decisions generally indicate that decision makers classify disputed interpretations of contractual provisions as legal issues. Factual issues, on the other hand, are classified as those disputes arising over the application of a set contractual provision in varying circumstances.[80] Where an issue presents a legal question, such as the employer's right to extend contracts in *Anderson,* the WERC examines factual circumstances cursorily and will bar a second grievance on the same issue as res judicata regardless of possible factual differences between the first and second grievances. This policy generally precludes rearbitration of legal issues. Yet when an issue is factual, such as the reasonableness of extending a particular contract in *Anderson,* the WERC conducts a more extensive factual examination. Despite party and issue identity in two grievances, the WERC will not give res judicata effect to a factual issue in a second grievance unless its circumstances are materially similar to those at issue in a previous grievance. Therefore, the WERC will more often require rearbitration of factual issues.

The WERC used a similar analysis in *WSEU v. Wisconsin.*[81] This decision is also significant because it illustrates that the WERC res judicata standard will not preclude rearbitration of an issue if different claims or remedies are raised in the second arbitration. In *WSEU v. Wisconsin,* the parties disputed whether all employees in certain state-run facilities were entitled to rest breaks under their collective bargaining agreement. In a previous arbitration of the same issue concerning a single employee, the arbitrator held that the collective bargaining agreement required the state to provide rest breaks to that particular

78. *Id.* at 9.

79. *Id.*

80. *Anderson,* Dec. No. 22009-B; *WSEU,* Dec. No. 20200-A; *WSEU,* Dec. No. 20145-A, *aff'd by operation of law,* Dec. No. 20145-B.

81. Dec. No. 20200-A (WERC 1978) (Zeidler, arb.).

employee.[82] In *WSEU v. Wisconsin,* the union sought to apply the terms of that award to all similarly situated employees. When the state refused to comply with the union's request, the union filed unfair labor practice proceedings alleging that the res judicata effect of the previous award applied to this situation. It claimed that all material issues had been decided in the previous arbitration, including the type of rest breaks[83] employees could receive and the proper interpretation of the rest break provisions of the collective bargaining agreement.[84] The state contended, on the other hand, that the res judicata principle was inapplicable to the current grievance because it concerned different issues, facts, and remedies than the prior award.[85]

Upon review, the WERC held that the second grievance was not res judicata due to material differences in the issues, facts, and remedies between the first and second grievances. The WERC stated that the previous award had not discussed rest break requirements for numerous employees in different positions. Additionally, the remedies available differed in the two grievances. In the first grievance, the remedy of giving rest breaks to one employee placed a minimal burden on the state. If the union prevailed in the second grievance, however, the remedy would require giving numerous employees different types of breaks, placing a significantly larger administrative and financial burden on the state.[86] Finally, although the second grievance could have been arbitrated concurrently with the first, the WERC concluded that it should be submitted to a second arbitration.[87] The WERC reasoned that despite the cost and repetition of engaging in similar arbitration, the union could not simply extend the previous award to other employees.[88]

WSEU v. Wisconsin and *Anderson* illustrate that the WERC res judicata standard bars rearbitration of an issue if it shows identity of

82. WSEU v. Wisconsin, Dec. No. 20200-A. When the state refused to implement this award, the WERC ordered compliance pursuant to unfair labor practice proceedings filed by the union. For WERC enforcement of this award, see WSEU v. Wisconsin, Dec. No. 17313-B (WERC 1982).

83. In the previous grievance, the state proposed implementing two types of rest breaks, depending on the positions held by the employees. For employees who were unable to leave their posts, such as those working in secured areas of correctional institutions, the state proposed a work slow-down instead of a break. For those employes able to leave their posts, the state proposed to substitute other workers for the periods during which regular employees were on break. *See* WSEU v. Wisconsin, Dec. No. 20200-A.

84. Dec. No. 20200-A, at 6.

85. *Id.*

86. In the earlier decision enforcing the arbitration award for the particular employee, the WERC reported that the State's Budget Management Analyst concluded the added cost of providing rest breaks for all employees would be between $181,731 and $1,501,793, depending on the type of break employees received. *See* WSEU v. Wisconsin, Dec. No. 20200-A.

87. Dec. No. 20200-A, at 7.

88. *Id.* at 4.

parties, remedies, and material facts with a prior arbitration award. Res judicata does not bar rearbitration if the parties are able to present different claims or possible remedies in the second dispute. Yet both decisions also show that this general rule is applied differently to factual and legal issues. For example, the WERC considered the employer's right to extend contracts in Anderson and the employer's duty to allow rest breaks in *WSEU v. Wisconsin* as legal issues involving contract interpretation. The WERC conducted minimal factual analysis in both cases. Conversely, the WERC considered the reasonableness of the employer's action in *Anderson* and the extent of the employer's duty in *WSEU v. Wisconsin* to be factual issues concerning the application of a contractual provision in certain circumstances. In each case, the WERC employed a more fact-specific analysis. Thus, both *Anderson* and *WSEU v. Wisconsin* show that the WERC res judicata standard affords flexibility to decision making by requiring different standards of review for factual and legal issues.

C. Comparing the WERC and Civil Res Judicata Standards

Landess,[89] *Anderson*[90] and *WSEU v. Wisconsin*[91] demonstrate that the civil and WERC res judicata standards differ most greatly with respect to when relitigation of issues or claims is allowed. While the civil res judicata standard precludes relitigation of different types of claims or issues arising from a single transaction, the WERC standard precludes rearbitration of similar claims or issues arising from different transactions. In *Landess,* for example, the civil res judicata standard prevented the plaintiff from litigating a conspiracy action because this claim arose from the same transaction as a previously litigated breach of contract suit. The court held that both claims could have been litigated together because they were identical in time, space, origin and motivation. In *Anderson,* by contrast, the WERC res judicata standard prevented rearbitration of a grievance concerning the employer's right to require extended teaching contracts because the factual circumstances of the second grievance were identical to those in a previous grievance. The WERC did not consider whether the two grievances arose from the same transaction when making its res judicata determination.[92] Thus, a primary difference between the WERC and civil res judicata standards is the WERC focus on material facts, rather than transactions, to determine when res judicata bars rearbitration.

89. 115 Wis. 2d at 186, 334 N.W.2d at 213; *see supra* notes 60-65 and accompanying text.
90. Dec. No. 22009-B; *see supra* notes 68-80 and accompanying text.
91. Dec. No. 20200-A; *see supra* notes 81-88 and accompanying text.
92. *See supra* text accompanying notes 68-73.

The WERC and civil res judicata standards also differ with respect to relitigation of claims that could have been raised in previous actions. For example, in *Landess* the civil res judicata standard prevented the plaintiff from bringing a conspiracy claim that could have been litigated in a previous suit.[93] In *WSEU v. Wisconsin,* however, the WERC res judicata standard allowed arbitration of a grievance concerning rest breaks for numerous employees, although this claim could have been raised in a prior arbitration.[94] These cases show that the civil res judicata standard bars separate litigation of claims which could have been litigated in previous actions while the WERC standard may permit rearbitration in similar circumstances.

Finally, the WERC and civil res judicata standards affect relitigation differently when alternate remedies are available in the second action. *Landess* shows that the civil standard bars relitigation of claims or issues despite different remedies that could have been raised in a second suit.[95] For example, despite the possibility of different remedies available in Landess' conspiracy action, the suit was barred because it arose from the same transaction as the breach of contract action. The WERC res judicata standard, on the other hand, will permit rearbitration of a claim or issue if a different remedy is available in the second arbitration. In *WSEU v. Wisconsin,* for instance, res judicata did not bar a grievance concerning rest breaks for numerous employees despite factual similarities with a previous grievance concerning rest breaks for a sole employee in part because the scope of the remedy in the second grievance differed substantially from the remedy required in the first grievance.[96] Courts applying the civil res judicata standard in the same circumstances, however, would hold the second claim barred as res judicata.

The different circumstances in which the WERC and civil res judicata standards preclude relitigation may result largely from the different policies which arbitration and civil litigation are designed to achieve. Arbitration is a dynamic remedial process designed to keep the relationship between bargaining partners running smoothly. Civil litigation, on the other hand, more often serves a static remedial function designed to correct nonrecurring conflicts between parties who often have no long-term relationship. Contemplating nonrecurring conflicts, courts tightly control claims or issues which can be relitigated through use of the transactional res judicata standard. In arbitration, however, the WERC contemplates recurring conflicts between bargaining part-

93. *See supra* text accompanying notes 58-65.

94. *See supra* text accompanying notes 81-86.

95. *Landess,* 115 Wis. 2d at 192, 340 N.W.2d at 216.

96. *See supra* text aecompanying notes 81-86. *See also* WSEU v. Wisconsin, Dec. No. 20145-A.

ners, and therefore uses a more flexible res judicata standard. The WERC recognizes that bargaining partners interact on a daily basis, and therefore allows rearbitration of the same claims or issues arising in different circumstances.

The WERC standard, therefore, is appropriate for recurring conflicts, while the civil standard is not. This distinction, however, does not solve the problem of which standard should be applied to confirmed arbitration awards. A confirmed award originates from arbitration, a process that contemplates recurring relationships. Yet upon confirmation, it is given the effect of a judgment in a legal action which generally results from nonrecurring conflicts.[97] Because a confirmed award combines the effects of arbitration and a civil judgment, its res judicata effect cannot be determined on the basis of whether it results from a recurring or nonrecurring conflict. Therefore, the determination of the most applicable res judicata standard for confirmed awards must be based on other policy factors central to arbitration and the res judicata doctrine.

III. Policy and Practical Considerations

The res judicata effect of arbitration awards confirmed under the Arbitration Act may best be determined by weighing policy and practical factors important to arbitration and the res judicata doctrine. Most significantly, the applicable res judicata standard should promote arbitration as an alternative dispute resolution mechanism in which the judiciary has minimal involvement.[98] The applicable standard should also promote finality and resource economy goals of the res judicata doctrine.[99] In addition, the standard chosen should further practical factors such as protection of parties' due process rights and promotion of efficient bargaining relationships. The res judicata standard that courts apply to confirmed awards should promote not only a majority but also the most important of these policy and practical considerations.

The most important policy courts must consider when choosing an applicable res judicata standard for confirmed awards is promotion of arbitration as an alternative dispute resolution process. This policy consideration outweighs all others because the fundamental goal of arbitration is dispute resolution outside the judicial system. Arbitration is designed to provide faster, less expensive and more specialized resolution of labor disputes than traditional litigation.[100] A res judicata stan-

97. *See supra* note 6; Wis. Stat. § 788.14(3) (1985-86).
98. *See supra* note 4.
99. *See supra* text accompanying note 50.
100. *See supra* note 4.

dard which denies these goals would defeat the purpose of the arbitration system.

Courts can best promote arbitration as an alternative dispute resolution mechanism by maintaining only a supervisory function in arbitration proceedings.[101] By limiting their power to intervene, courts preserve an arbitrator's power to settle disputes in a nonjudicial forum and give parties to labor contracts the benefit of their bargain to arbitrate, rather than litigate, disputes.[102] Generally, collective bargaining agreements set out an arbitrator's authority to resolve labor disputes through contract interpretation.[103] Wisconsin courts recognize that in negotiating these agreements, parties bargained for an arbitrator's review and interpretation of their contracts and have agreed to forego any judicial interpretation. To give parties the benefit of these bargains, courts hearing arbitration cases restrain themselves to a very limited standard of review.[104] Even when an arbitrator's contract interpretation is faulty, a court will not generally overturn the award because parties to the contract bargained for the arbitrator's interpretation.[105]

Wisconsin courts also maintain a policy of narrow review of arbitration awards to economize judicial resources and provide contracting parties the quality of arbitration for which they bargained.[106] This policy stems from the recognition that informality, expertise, and cost benefits of arbitration would be lost if the judiciary expanded its role in arbitration.[107] Further, courts realize that they have neither the skill

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101. Madison Metro. School Dist. v. WERC, 86 Wis. 2d 249, 272 N.W.2d 314 (1978); Milwaukee Professional Firefighters Local 215 v. Milwaukee, 78 Wis. 2d 1, 253 N.W.2d 481 (1977). Justice Hanley explained the role of Wisconsin courts concerning arbitration awards in *Milwaukee Professional Firefighters:*

> Judicial review of arbitration awards is very limited. The strong policy favoring arbitration as a method for settling disputes under collective bargaining agreements requires a reluctance on the part of courts to interfere with an arbitrator's award upon issues properly submitted. . . . Thus the function of the court upon review of an arbitration award is a supervisory one, the goal being merely to ensure that the parties receive the arbitration they bargained for.

Id. at 21-22, 253 N.W.2d at 491.

102. Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, 78 Wis. 2d 94, 112, 253 N.W.2d 536, 545 (1977); WERC v. Teamsters Local No. 563, 75 Wis. 2d 602, 611, 250 N.W.2d 696, 700 (1977); *Dehnart*, 17 Wis. 2d at 51, 115 N.W.2d at 494.

103. F. ELKOURI & E. A. ELKOURI, HOW ARBITRATION WORKS 225 (1976).

104. *See supra* note 101. The Wisconsin Legislature has also sanctioned a limited judicial function in the arbitration process. *Jefferson Educ. Ass'n*, 78 Wis. 2d at 112, 253 N.W.2d at 545; Local 1226, Rhinclander City Employees v. Rhinelander, 35 Wis. 2d 209, 216, 151 N.W.2d 30, 34 (1967); Teamsters Local Union 695 v. County of Waukesha, 57 Wis. 2d 62, 69, 203 N.W.2d 707, 709 (1973).

105. *Dehnart*, 17 Wis. 2d at 51, 115 N.W.2d at 493.

106. *See supra* note 4.

107. "The whole purpose of arbitration is to substitute a less expensive and less formal method of settling differences between parties for formal court litigation. In arbitration greater use may be made of persons who have a particular expertise that permits them to adjudicate and settle

nor the administrative capacity to handle arbitration on a regular basis.[108]

The res judicata standard applied to confirmed arbitration awards should reflect this strong policy favoring limited judicial involvement in arbitration to further arbitration as an alternative dispute resolution mechanism.[109] Using a narrow standard of review, courts restrict their capacity to judge the merits of labor disputes and thus preserve the arbitrator's power to resolve disputes through contract interpretation and application.[110] The civil transactional res judicata standard better promotes arbitration as an alternative dispute resolution mechanism because it does not require that courts judge disputes on their merits to determine if res judicata bars an action.

An example illustrates why the civil transactional res judicata standard promotes the policies underlying alternative dispute resolution more effectively than the WERC res judicata standard. Assume an employer and its employees have undergone arbitration to determine whether their collective bargaining agreement requires the employer to pay overtime to employees who have worked on Christmas day. Further assume that the union has won this arbitration and confirmed the award. If the employer thereafter engages in similar conduct by refusing to pay overtime on Rosh Hashana, the employee union might move to hold the employer in contempt of the award. If the reviewing court applied the civil res judicata standard to this situation, it would only compare the employer's current conduct to the transaction which gave rise to the prior award to determine whether these transactions were identical. It would not conduct an extensive factual examination of both disputes or compare and contrast their respective merits.[111]

If, on the other hand, the court applied the WERC res judicata standard to determine if the employer's current conduct was barred as res judicata, it would be required to judge the merits of each dispute. The WERC standard bases res judicata determinations on the similarity of facts and circumstances between two disputes.[112] To apply this standard, the court would be required to assume the role of the arbitrator and to analyze the factual and legal merits of each dispute to determine if the second dispute was "materially similar" to the first.

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differences that may exist on highly technical matters." Madison v. Frank Lloyd Wright Found., 20 Wis. 2d 361, 383, 122 N.W.2d 409, 421 (1963).

108. *Id.*

109. *Milwaukee Professional Firefighters Local 215*, 78 Wis. 2d at 21-22, 253 N.W.2d at 491. *See supra* note 101.

110. *Jefferson Educ. Ass'n*, 78 Wis. 2d at 111, 253 N.W.2d at 544.

111. *See supra* notes 57-65 and accompanying text.

112. *See supra* notes 66-84 and accompanying text.

By forcing a court to review the merits of both disputes, the WERC res judicata standard defeats the policy of promoting arbitration as an alternative dispute resolution in two respects. First, requiring an examination of the merits of a previous award forces courts to employ a broader standard of review than is either judicially or legislatively sanctioned for arbitration awards.[113] Courts have repeatedly held that they will use a narrow standard of review for arbitration awards to preserve the arbitrator's power to resolve disputes in a nonjudicial setting.[114] By reviewing the merits of a prior award to determine its res judicata effect on a subsequent dispute, a court would retroactively infringe upon the arbitrator's province to rule on disputes in a nonjudicial setting. Yet more importantly, the WERC res judicata standard would also deny parties the benefit of the bargain to arbitrate disputes and to abide by the awards issued. If courts determined the res judicata effect of an arbitration award by comparing its merits to the merits of subsequent disputes, these subsequent disputes would not be governed by the arbitrator's award, as the parties agreed, but by a judicial interpretation of this award. This result would directly subvert the parties' bargain to settle disputes outside the court system.[115]

It might be argued that a court could determine the res judicata effect of a confirmed award more fairly if it conducted a more extensive factual review of the previous award. Yet the parties did not bargain for this review in their collective bargaining agreement. To be fair to both parties to the contract, courts should honor the parties' bargain to abide by arbitration awards governing their conduct. The civil standard gives courts greater ability to honor these bargains and should therefore be applied to confirmed awards.

Although promotion of arbitration as an alternative dispute resolution mechanism is the most important policy factor courts must consider to determine the res judicata standard applicable to confirmed awards, the choice of standards should not rely solely on this factor. Courts should also consider each standard in terms of the goals of the res judicata doctrine, due process rights and efficient dispute negotiation. These factors are somewhat less important because none would interfere with the essential goals of arbitration as an alternative dispute resolution mechanism regardless of which standard was applied to confirmed awards. However, the civil and WERC res judicata standards

113. *See supra* notes 101 and 103.

114. Milwaukee County v. District Council 48, 109 Wis. 2d 14, 27, 325 N.W.2d 350, 357 (1982); *Madison Metro. School Dist.*, 86 Wis. 2d at 249, 272 N.W.2d at 314; *Jefferson Educ. Ass'n*, 78 Wis. 2d at 112, 253 N.W.2d at 545; *Local 1226, Rhinelander City Employees*, 35 Wis. 2d at 216, 203 N.W.2d at 36; *Teamsters Local Union 695*, 57 Wis. 2d at 69, 203 N.W.2d at 709.

115. *See supra* notes 1-4 and accompanying text.

should nonetheless be considered in terms of these factors because each factor contributes to effective use of the award confirmation process.

Because the award confirmation process relies on the res judicata doctrine to maintain the effect of a confirmed award as a final judgment at law,[116] the res judicata standard which best promotes the doctrine's goals of resource economy and finality[117] should be applied to confirmed arbitration awards. However, an analysis of the civil and the WERC res judicata standards shows that each standard promotes finality and resource economy goals in different ways. Further, neither standard appears to promote these goals significantly better than the other. On one hand, the civil standard stresses finality of a transactional unit but may allow relitigation of substantially the same issue in several different transactions. On the other hand, the WERC standard advances finality in relation to one type of conduct but does not preclude several arbitrations arising from the same transaction. It is impossible to say whether one of these forms of finality is superior to the other.

Similarly, neither standard necessarily conserves judicial resources more effectively than the other. If courts applied the WERC res judicata standard to confirmed awards, they would conduct a factual analysis of the second dispute in relation to the first. This analysis would probably be more time consuming and expensive than a transactional analysis because the court would be required to carefully review the entire record from both actions. In this sense, the transactional standard might seem less costly. However, if courts adopted the WERC res judicata standard, cost savings might result for the WERC because the wider res judicata effect of past awards would control more current grievances. As a result, the number of new disputes before the WERC would probably be reduced. Thus potentially, where cost is lowered in one area of the state's budget, it would be increased in another. Therefore, again, neither the civil nor the WERC res judicata standard appears superior. These tradeoffs indicate that finality and resource economy goals can be fulfilled in different ways under either standard and that no general rule can accommodate these policies better than another.

In addition to considering the policy effects of the WERC and civil res judicata standards, courts should examine the practical consequences of applying each standard to confirmed awards. First, courts should consider whether enforcement procedures under either standard adversely affect the bargaining partners' due process rights. Consideration of due process rights is important to ensure that confirmed awards will govern future conduct fairly.

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116. *See supra* notes 7-8 and accompanying text.

117. *See supra* notes 51-52.

The res judicata standard applied to confirmed awards should protect parties' due process rights by affording them sufficient notice of conduct which potentially violates a confirmed award.[118] If courts adopted the WERC's "materially similar facts" res judicata standard for confirmed awards, parties could be required to compare the "material facts" of their current conduct to facts of the confirmed award. This comparison would serve as their only notice of potentially violative conduct. Because it may be extremely difficult for parties to make such a comparison,[119] they risk being held in contempt despite good faith judgments that their conduct is not materially similar to the conduct at issue in a confirmed award. The WERC standard does not provide sufficient notice of permissible post-award conduct to warrant holding parties in contempt for award violation[120] and therefore does not adequately protect their due process rights.

The civil res judicata standard, on the other hand, gives parties more notice of what conduct may violate a prior award and therefore better protects due process rights. More notice is provided because the civil standard defines violative conduct more narrowly than does the WERC standard. Under the civil standard, violative conduct is limited to previously arbitrated transactions,[121] rather than certain types of conduct.[122] Unlike the WERC standard, the civil res judicata standard does not require parties to compare the material facts of their current conduct to those at issue in a prior award; they must only determine if the conduct arose from the same transaction. Therefore, parties can more easily define conduct which potentially violates a confirmed award and good faith attempts to comply with confirmed awards will be generally more successful than under the WERC res judicata standard. Because parties have more notice of what conduct may be deemed contemptuous, it is fairer to impose punishment on those who do violate confirmed awards. The additional notice provides more protection of bargaining partners' due process rights and should therefore be applied to confirmed awards.

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118. Parties violating a confirmed award could be held in contempt of court; *see supra* note 40.

119. This is especially true when employers and employee unions make this determination without the assistance of legal counsel because lay persons may be incapable of evaluating the standards courts apply to determine the "material similarity" of certain types of conduct. Therefore, application of the WERC res judicata to confirmed awards also puts a premium on the necessity of legal counsel which may greatly disadvantage one party in a collective bargaining relationship.

120. The WERC standard of res judicata raises fewer due process concerns when confined to WERC proceedings because the WERC has limited coercive powers. It can make affirmative orders, but cannot assess fines on parties violating arbitration awards.

121. *See supra* notes 57-65 and accompanying text.

122. *See supra* notes 66-80 and accompanying text.

A second practical consideration in the applicable res judicata standard for confirmed awards centers on enhancing efficient bargaining relationships under Wisconsin's arbitration statutes.[123] Promoting efficient bargaining relationships is important because it conserves bargaining partners' resources and assists the parties in applying confirmed awards to future conduct. Parties to collective bargaining agreements can negotiate disputes more efficiently if they have notice of res judicata standards that will apply to their conduct under these agreements. For example, if parties know that the WERC res judicata standard applies to confirmed awards, they will negotiate their disputes with this standard in mind. Depending on its position in a grievance, each party might be more or less willing to arbitrate if it realizes the resulting award would apply in any future situation with similar facts. Both parties could therefore negotiate the dispute considering the scope of permissible future conduct, assuming the dispute would result in a confirmed award. A similar result would occur if parties knew the civil res judicata standard applied to confirmed awards.

It might seem that courts should apply the WERC res judicata standard to confirmed awards because this standard would provide parties more notice of the scope of permissible future conduct pursuant to a confirmed award. Parties who pursue administrative remedies already have notice of the WERC "materially similar facts" res judicata standard and can gauge their future conduct accordingly. This notice would strengthen each party's bargaining position and permit more efficient dispute negotiation. Furthermore, if courts applied the civil standard, notice and bargaining efficiency would decrease because parties may not know whether their bargaining partners would enforce awards through the courts or the WERC and each forum would apply a different res judicata standard. Without notice of the res judicata effect of a future arbitration award, neither party would know whether or not undergoing arbitration was in its best interests.

The above argument is weakened, however, when one considers that, regardless of the res judicata standard applied, parties may rely on their bargaining partners' past enforcement practices to estimate the scope of permissible conduct pursuant to a confirmed award. Arbitration occurs between parties with ongoing relationships and recurring disputes. As the partners arbitrate more disputes, each will learn whether the other typically enforces through the WERC or the courts. Further, it is likely that parties will continually use the same enforcement procedures as they become more familiar and comfortable with one or the other. Therefore, over time, parties may begin to rely on the enforcement paths chosen by their partners and negotiate disputes ac-

123. *See supra* notes 20-50 and accompanying text.

cordingly. When a dispute arises, each will consider whether it is in its best interest to arbitrate considering the enforcement path its partner normally follows. As such, in the long run, dispute negotiations may be equally efficient, regardless of whether the civil or WERC res judicata standard is applied to confirmed arbitration awards.

With these arguments in mind, we can balance policy and practical considerations to determine whether the civil or the WERC res judicata standard is more appropriate for confirmed arbitration awards. When all factors are considered, the balance favors applying the civil standard to confirmed awards. Initially, the balance strongly favors the civil standard because it is essential to maintain arbitration as an alternative dispute resolution mechanism. The civil standard carries out parties' contractual intent that an arbitrator, rather than a court, judge the merits of their disputes. It also ensures that courts apply a narrow standard of review to arbitration awards. The balance further favors the civil res judicata standard because it offers superior protection of parties' due process rights than does the WERC standard by providing more notice of the scope of permissible post-award conduct.

In contrast, the balance may at the outset favor the WERC res judicata standard in terms of promoting efficient dispute negotiations. Parties currently have notice of the WERC res judicata standard and can conduct negotiations with this standard in mind. However, this advantage of the WERC standard may exist only in the short-run. Although the civil standard may cause some bargaining inefficiency at the beginning of employer-union relationships, in the long-run parties likely will rely on their partners' past practices to predict the scope of permissible post-award conduct. To the extent that each partner continually enforces awards through the same procedures, these initial bargaining inefficiencies should diminish over time.

Finally, the balance appears unaffected by the standard chosen to advance res judicata goals of finality and resource economy. Both the WERC and civil standards promote these goals in different manners. Yet while each standard may have ambiguous results in terms of advancing res judicata policy goals and bargaining efficiency, the civil standard is clearly superior for promoting arbitration as an alternative dispute resolution process and for protecting parties' due process rights. Therefore, courts should apply this standard of res judicata to confirmed arbitration awards.

IV. Conclusion

It is important that all parties to collective bargaining agreements know what res judicata standard applies to confirmed awards because the res judicata effect of these awards may significantly affect the par-

ties' future conduct. Yet Wisconsin case law does not reveal whether the civil or the WERC res judicata standard applies to confirmed awards. To choose the most appropriate standard, courts should examine key policy and practical considerations. Most importantly, the applicable res judicata standard should promote arbitration as an alternative dispute resolution mechanism. The standard chosen should also enhance effective use of the confirmation process in terms of finality, resource economy, due process rights, and negotiation efficiency.

This Comment has examined both the WERC and civil res judicata standards considering these policy and practical factors and concludes that the civil res judicata standard better promotes the balance of these factors. The civil and WERC standards may equally advance considerations of finality, resource economy and long-run negotiation efficiency. Yet the civil standard better protects parties' due process rights. Finally, and most significantly, the civil res judicata standard better supports the essential function of arbitration as a dispute resolution mechanism separate from the court system. The civil standard of res judicata should therefore be applied to arbitration awards confirmed under the Wisconsin Arbitration Act.

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