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Collateral Estoppel

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NOTE

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I. INTRODUCTION

The doctrine of collateral estoppel involves the use of an old judgment in a new action to prevent the relitigation of issues resolved by that old judgment. At common law, use of the doctrine required that the party using collateral estoppel and the party against whom it was used be the same as the parties to the prior judgment. This common law requirement of mutuality has been relaxed and since the United States Supreme Court's 1979 decision in *Parklane Hoisery Co. v. Shore*,[1] the strict common law requirement of mutuality has all but completely vanished. In *Parklane* the Court sanctioned the use of collateral estoppel by a plaintiff who was a stranger to the original suit against a defendant who was party to that suit.

The courts' search for fair results and judicial economy in the application of the doctrine led to this application of the doctrine in circumstances in which the parties were not mutual. This note traces the unsteady course which the doctrine of collateral estoppel traveled before *Parklane*. The significance of the Court's decision in *Parklane* is then analyzed. Finally, post-*Parklane* applications of collateral estoppel are discussed, including the effect of the use of collateral estoppel on the seventh amendment right to jury trial and its impact on substantive areas of law.

II. COLLATERAL ESTOPPEL: BACKGROUND TO *Parklane*

A. *Distinction Between Res Judicata and Collateral Estoppel*

Both res judicata and collateral estoppel are part of the doctrine of pre-

1. 439 U.S. 322 (1979).

clusion by prior adjudication. Preclusion by prior adjudication comes into play when a court renders a valid and final judgment on the merits of a controversy. This judgment is then used to decide the outcome of a later court action and the first judgment can, in fact, bar relitigation in the second suit of the entire claim (res judicata) or of a particular issue (collateral estoppel).[2]

The doctrine of preclusion by prior adjudication gives rise to a conflict between two fundamental goals of the law of procedure. On the one hand, rules of procedure aim at permitting the full development of each party's case, so that the merits of the case will dictate the fairness of its outcome. Yet, on the other hand, procedural rules seek to bring an adjudication to a final conclusion with reasonable promptness.[3] Both res judicata and collateral estoppel have the same objectives of promoting fairness and judicial economy.[4] But here the similarities end.

The crucial distinction between res judicata and collateral estoppel was noted by the Supreme Court in *Lawlor v. National Screen Service*:[5]

> [U]nder the doctrine of *res judicata,* a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Consequently, it is essential that a claim be characterized as either seeking to preclude an entire cause of action or a particular issue. More particularly, the Supreme Court has also said that in res judicata

> 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 to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[6]

To illustrate the effect of res judicata assume that *A* sues *B* for an alleged injury. Once a court of competent jurisdiction renders a final valid judgment on the merits of the case, both *A* and *B* are bound by the judgment and may not repeat the suit. If *A*, the plaintiff, is victorious, then all possible claims which he might have raised under the cause of action are extinguished or are "merged" into the judgment, and he may not sue

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2. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[1] at 621 (2d ed. 1980).
3. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.2 at 529-30 (2d ed. 1977).
4. 1B J. MOORE, *supra* note 2, ¶ 0.405[1] at 623.
5. 349 U.S. 322, 326 (1955).
6. Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

again on any claim he omitted from the original action.[7] Conversely, a judgment for the defendant "bars" or extinguishes his entire claim or defense and all the issues which he did or might have raised under it.[8]

In distinguishing res judicata from collateral estoppel, it is crucial to note that the doctrine of res judicata does not preclude any single issue. Rather, it acts as a bar to further litigation of the cause of action between the same parties as to every issue or defense raised and as to those which may have been presented. This application of the doctrine is known as preventing the "splitting of a cause of action."[9]

In contrast to res judicata, collateral estoppel bars relitigation of specific issues. "[T]he inquiry must always be as to the point or question *actually litigated* and *determined* in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."[10] Assume *A* sues *B* for personal injuries based on *B*'s alleged intent to cause bodily harm. In a later suit between the two on related property damage, *B* may not reopen the issue of his intent to do harm to *A*. The issue of intent was actually litigated and necessarily determined in order to arrive at an adjudication of the alleged intentional tort in the first suit. Relitigation of that issue is barred by collateral estoppel.

The terms res judicata and collateral estoppel have been used interchangeably by the courts.[11] However, it is clear that the main distinction between res judicata and collateral estoppel is that collateral estoppel may be invoked in a second suit even though it involves a different cause of action from the first suit.

B. *The Requirement of Mutuality*

The successful use of collateral estoppel, which is also known as issue preclusion[12] and estoppel by judgment,[13] requires that the party invoking it show that in the prior action the same issue was in question; that the issue was actually litigated by the parties; and that the issue was necessarily determined.[14] One of the major problems courts have faced in apply-

7. F. JAMES & G. HAZARD, *supra* note 3, § 11.3 at 533.

8. *Id.*

9. 1B J. MOORE, *supra* note 2, ¶ 0.441[2] at 3775-79.

10. 94 U.S. at 353 (emphasis added).

11. Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1947). The practitioner must be alert to the interchange and focus on the type of preclusion intended in the language. *See, e.g.*, 94 U.S. at 352; 1B J. MOORE, *supra* note 2, ¶ 0.441[1] at 3773.

12. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 28 (1964).

13. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); 94 U.S. at 353.

14. F. JAMES & G. HAZARD, *supra* note 3, § 11.16 at 563-64. *See* text accompanying note 10 *supra*. *Compare* 1B J. MOORE, *supra* note 2, ¶ 0.441[2] at 3775-76 *with* RESTATEMENT

ing this doctrine is that of determining the parties against whom the doctrine should apply. If the party asserting collateral estoppel and the party against whom it is applied are both bound by the prior judgment, collateral estoppel clearly applies. The so called-doctrine of mutuality,[15] requiring that the parties in the second suit be the same or be in privity with the parties in the first suit and therefore bound by the prior judgment, is satisfied.

Difficulty arises when a non-party in the first suit—a "stranger" to the prior judgment—attempts to prevent the relitigation of an issue in the second suit.[16] This situation is known as "nonmutuality" of judgment. More specifically, the party in the previous suit is bound by the judgment. His opponent, the "stranger," who is not bound by it, seeks to use the judgment to his advantage.

Collateral estoppel may be pleaded in two different ways where the parties are not identical. "Defensive use" occurs when a stranger to the prior judgment asserts the prior judgment as a "shield" against a plaintiff who was a party to the first suit.[17] "Offensive use" of collateral estoppel arises where a plaintiff who is a stranger to the first suit seeks to assert collateral estoppel as a "sword" against a defendant who is bound by the prior judgment.[18] In both cases, the party who is asserting collateral estoppel is a stranger to the judgment and therefore not bouund by it, but seeks to assert the judgment against the party who is bound.

Initially, the invocation of collateral estoppel was limited by the doctrine of mutuality.[19] In the interest of fairness, the mutuality requirement prevented a litigant from invoking the conclusive effect of a judgment unless that litigant would have been bound if the judgment had gone the other way.[20]Thus the use of collateral estoppel was limited to the parties in the prior suit and their privies.[21] A stranger to the judgment, having "no legal right to defend or control the proceedings, nor to appeal from

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(SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

15. 1B J. MOORE, *supra* note 2, ¶ 0.412[1] at 1801; Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301, 302 (1961). *See, e.g.,* Adamson v. Hill, 202 Kan. 482, __, 449 P.2d 536, 539 (1969).

16. Vestal, *supra* note 12, at 46.

17. 202 Kan. at __, 449 P.2d at 540.

18. *Id.*

19. "It is a principle of general elementary law that the estoppel of a judgment must be mutual." Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912).

20. 1B J. MOORE, *supra* note 2, ¶ 0.412[1] at 1801; Moore & Currier, *supra* note 15, at 302; Comment, *Collateral Estoppel: The Changing Role of the Rule of Mutuality,* 41 MO. L. REV. 521, 522 (1976).

21.
> A judgment not only estops those who were actually parties but also such persons as were represented by those who were or claim under or in privity with them. . . . Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.

225 U.S. at 128-29.

the decree"[22] was not bound and could not invoke the prior judgment to prevent relitigation of an issue previously determined by a court.

The doctrine of mutuality was rigid and, therefore, an "apparent exception" developed early.[23] The exception essentially focused on the principle of vicarious liability. No mutuality was required "where the liability of the defendant [was] altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff."[24]

The exception was justified on the grounds that intolerable "injustice . . . would result in allowing a recovery against a defendant for conduct of another when that other [had been] exonerated in a direct suit."[25] In other words, in cases of derivative liability such as indemnitor/indemnitee situations and employer/employee situations, the spectre of inconsistent judgments was intolerable even for mutuality-bound courts. Thus, the courts found it necessary to create an exception in order to avoid the unfair anomaly of inconsistent judgments which might occur if the indemnitor were to be found liable and the active party exonerated.[26]

This traditional vicarious liability exception to the mutuality rule is recognized in the *Restatement of the Law (Second) of Judgments,*[27] and it is applied today even in jurisdictions which adhere to the mutuality rule.[28] This exception has only been applied to the defensive use of collateral estoppel. That is, counsel for the defense may assert collateral estoppel as a shield against a plaintiff seeking a second chance to collect damages. To illustrate, once having tried and failed to establish the liability of a negligent truckdriver, a plaintiff may not seek damages again from the owner of the truck. The vicarious liability exception will allow the owner to assert collateral estoppel defensively.

The development of this well established exception to the requirement of mutuality did not end criticism of the doctrine.[29] Over a century ago Jeremy Bentham ridiculed the theory that justice is not advanced merely because the party asserting the estoppel was not a party to the previous

22. *Id.* at 126.
23. *Id.* at 127-28.
24. *Id.*
25. *Id.* at 128.
26. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281, 306 (1957) [hereinafter cited as Currie, *Mutuality*].
27. RESTATEMENT (SECOND) OF JUDGMENTS § 99 (Tent. Draft No. 4, 1977).
28. *See, e.g.,* Frisby v. Hurley, 236 Ark. 127, 364 S.W.2d 801 (1963); Hinton v. Iowa Nat. Mut. Ins. Co., 317 So. 2d 832 (Fla. App. 1975). For its application in jurisdictions where the mutuality rule has been repudiated, see Lober v. Moore, 417 F.2d 714 (D.C. Cir. 1969) (collecting many decisions); Eistrat v. Irving Lumber & Moulding Co., 210 Cal. App. 2d 382, 26 Cal. Rptr. 520 (1963).
29. *See* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

suit.[30] As the mutuality rule slowly eroded, the role of collateral estoppel in its application to strangers to the prior judgment altered.[31] The contention is that as long as the party against whom collateral estoppel is asserted has had his day in court, fairness, justice and judicial economy are well served.[32]

C. *The Demise of Mutuality: The* Bernhard *Doctrine*

The modern demise of mutuality of estoppel was precipitated by the landmark decision written for a unanimous California court by Justice Traynor in *Bernhard v. Bank of American National Trust & Savings Association.*[33] *Bernhard* had been preceded by litigation in which Mrs. Sather, an ailing elderly woman who made her home with the Cooks, had authorized Cook and another individual to make drafts jointly against an existing account. Cook subsequently opened a commercial account at a second bank in the name "Clara Sather by Charles O. Cook" and, without authorization from Sather, deposited and withdrew monies to cover her expenses. Eventually, Mrs. Sather did authorize a transfer of the balance of the funds in the first account to the account Cook had opened at the second bank. Shortly before Sather died, Cook withdrew the funds from this last mentioned account and deposited them in a separate account in the name of himself and his wife.

When Cook, who administered Sather's estate, filed an account with probate court accompanied by his resignation, Bernhard, along with other beneficiaries under Sather's will, objected to the account because it omitted the amounts withdrawn and transferred to Sather's second account. However, the court upheld the validity of the account, and as part of its order declared that the decedent during her lifetime had made a gift to Cook in the amount of the deposit in question.[34]

Bernhard succeeded Cook as administratrix of Sather's will, and instituted an action against the bank seeking to recover the deposit on the ground that Sather had not authorized the withdrawal. The bank pleaded two affirmative defenses: that the money on deposit was paid to Cook with the consent of Sather, and that the probate court's ruling that

30. J. BENTHAM, *Rationale of Judicial Evidence,* in 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843), *quoted in* Currie, *Mutuality, supra* note 26, at 284 n.6.

31. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 327 (1971).

32. *See, e.g.,* Rachal v. Hill, 435 F.2d 59, 62 (5th Cir. 1970) in which the court said:

> The requirement that the party against whom estoppel is claimed must have had his day in court is a recurring theme in the cases which led to the changing role of mutuality in collateral estoppel. One court noted that the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

33. 19 Cal. 2d 807, 122 P.2d 892 (1948).

34. *Id.* at 807, 122 P.2d at 893.

Sather made a gift of the money in question to Cook was res judicata.[35] Judgment was for the bank and plaintiff Bernhard appealed, arguing that the doctrine of res judicata should not apply because the defendant was not a party to the previous action, nor was he in privity with a party to that action. Therefore there was no mutuality of estoppel.

The court used the language of res judicata. However, since the second suit involved a different cause of action from that of the first suit, it is clear that collateral estoppel, not res judicata, was intended.

The lower court's application of collateral estoppel was affirmed. The court recognized that collateral estoppel "is based on the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy,"[36] merely by invoking the "facile formula" of mutuality. As to the "facile formula" of mutuality, the court noted: "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."[37] The question of the parties to whom collateral estoppel should apply was addressed as follows:

> The criteria for determining who may assert a plea of res judicata[38] differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided . . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.[39]

With those words, the *Bernhard* doctrine was molded. Under the doctrine mutuality was abolished, and the question of whether one was a party or in privity with a party to the prior action was deemed relevant only with respect to the person against whom the plea is asserted.[40]

In *Bernhard* the court formulated a three pronged test to determine the validity of a plea of collateral estoppel in the recurring and difficult non-mutuality cases. The test requires an affirmative answer to the following questions. Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final

35. *Id.* at 808, 122 P.2d at 894. *See* note 11 *supra* and accompanying text.

36. 19 Cal. 2d at 808, 122 P.2d at 894.

37. *Id.* at 808, 122 P.2d at 895.

38. The court uses res judicata interchangeably with collateral estoppel. *See* notes 11 & 35 *supra*.

39. 19 Cal. 2d at 808, 122 P.2d at 894.

40. Currie, *Mutuality, supra* note 26, at 284.

judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party in the prior adjudication?[41]

In applying the new standard to the case at bar, the court found that the issue of the money in question was identical; that the probate settlement of the account was a final judgment on the merits; and, that Bernhard, against whom the plea of collateral estoppel was asserted, was a party to the prior adjudication.[42] The court further justified the results on the ground of fairness. "[It] would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries."[43] Bernhard attempted unsuccessfully to recoup monies from Cook in the first suit. In the second action, she attempted to recoup the same sum by tactically switching her attack to the bank.

The significance of the *Bernhard* decision is that it sanctioned a third situation in which collateral estoppel might be used. At the time *Bernhard* was decided, mutuality of parties was required, except in the well-recognized exception of vicarious liability. *Bernhard* opened up the possibility that a stranger to the first suit could plead collateral estoppel in a second suit. The *Bernhard* decision charted a new direction for the application of collateral estoppel in the troublesome area where mutuality was lacking. The United States Supreme Court upheld the defensive use of collateral estoppel by strangers to the original judgment in *Blonder-Tongue Laboratories, Inc. v. University of Illinois.*[44]

D. *Defensive Use of Collateral Estoppel After* Bernhard

1. Adoption of the Defensive Use of Collateral Estoppel

It has been observed that just as blind adherence to the mutuality rule can result in waste and inequity, complete abolition of mutuality could create hardships.[45] The California court recognized this and resisted the temptation to replace fairness through mere mutuality with fairness and efficiency through blind application of the *Bernhard* three-prong test.[46]

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41. 19 Cal. 2d at 808, 122 P.2d at 895.

42. *Id.*

43. *Id.*

44. 402 U.S. 313 (1971). Numerous other courts have followed the *Bernhard* doctrine. *See* Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979); Cramer v. General Tel. & Elec. Corp., 532 F.2d 259 (3d Cir. 1978); Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950); Nickerson v. Pep Boys, 247 F. Supp. 221 (D. Del. 1965); Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); Woodcock v. Udell, 48 Del. 69, 97 A.2d 878 (1953); Ellis v. Crockett, 451 P.2d 814 (Hawaii 1969); Pat Perusse Realty Co. v. Lingo, 249 Md. 33, 238 A.2d 100 (1968); De Polo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955); Sanderson v. Balfour, 247 A.2d 185 (N.H. 1968); Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 131 A.2d 622 (1957).

45. Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mut. Cas. Co., 411 F.2d 88, 93 (3d Cir. 1969).

46. *See* text accompanying note 41 *supra*.

Thus, in *Taylor v. Hawkinson*[47] the California court denied the application of collateral estoppel to the plaintiff not because it did not meet the three-prong test, but because its application would result in unfairness to the defendant due to the effect of a compromise verdict.[48]

The rejection of the mutuality rule is based on a desire to achieve fairness with regard to the practical realities of the parties.[49] Collateral estoppel has been described as "a device to prevent relitigation of issues which have been fairly decided, where the parties are not the same but the circumstances are such that no significant harm results from its invocation."[50]

The defensive use of collateral estoppel does not lead to an automatic summary judgment for a client. On the contrary, the court will examine each claim to determine whether it would be fair to apply collateral estoppel defensively without the mutuality requirement.

For example, in the case of *Pennington v. Snow*,[51] the Alaska Supreme Court adhered to the principle that mutuality will not necessarily be required as a rule. Yet, it denied the defensive use of collateral estoppel because the particular circumstances of the prior adjudication made it unfair to give the first judgment conclusive force.[52]

Thus, where courts adopt the nonmutuality rule, there are a number of factors which are taken into consideration in determining whether, under the facts of a particular case, collateral estoppel should be applied. Some of the most important factors are the following:

1. whether estoppel is asserted offensively or defensively;[53]
2. whether there was a full and fair opportunity to litigate the relevant issue in the prior case;[54]
3. whether it would be generally unfair in the second case to use the result of the first case;[55]

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47. 47 Cal. 2d 893, 306 P.2d 797 (1957).

48. The fairness limitation was also applied in Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962), *cert. denied*, 372 U.S. 966 (1963) (in a civil case, collateral estoppel applied to issues previously determined in a criminal proceeding).

49. 411 F.2d at 93.

50. *Id.* at 95.

51. 471 P.2d 370 (Alaska 1970).

52. *Id.* at 377.

53. "[T]he courts are more inclined to permit use of the [*Bernhard*] doctrine as a 'shield' by one not a party to the first action, but not as a 'sword.' " Adamson v. Hill, 202 Kan. 482, 483, 449 P.2d 536, 540 (1969).

54. *See, e.g.*, Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d at ___, 25 Cal. Rptr. at 561, 375 P.2d at 441 (1962).

55. *See* Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir. 1967); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Albernaz v. Fall River, 346 Mass. 336, 191 N.E.2d 771 (1963).

4. whether anomalous results would follow by the assertion of collateral estoppel by a stranger to the judgment;[56]
5. whether the first case was litigated with vigor;[57]
6. whether there was incentive to litigate the first case fully due to the amount in controversy;[58] and
7. whether the subsequent use of the judgment in future litigation was forseeable during the first litigation.[59]

The demise of mutuality has been hailed as "a shining landmark of progress in justice and law administration . . . . No legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice."[60] Fairness is the unifying thread between the original rule of mutuality and the application of the *Bernhard* doctrine today. It binds the divergent results of the cases which invoke it. Mutuality was abandoned, to be replaced by the three questions articulated in the *Bernhard* opinion.[61] Yet even when these questions are answered in the affirmative, courts will not always apply collateral estoppel. Through close examination of all factors and by careful application of the spirit of the *Bernhard* decision, two policy elements have become paramount. First, there must be no unfairness in holding a party bound by an adverse adjudication reached after a fully contested trial; a party is limited to one day in court.[62] Second, there must have been a full and fair opportunity to litigate the issue.[63]

2. The Case Against the Defensive Use

The nonmutuality rule was not unanimously adopted. Because of the inconsistencies that arose from its case by case application, notions of fairness became difficult to define.[64] In the case of *Spettigue v. Mahoney*[65] the court considered the application of defensive collateral estoppel in a case in which there was no unfairness since the party had had a prior full and fair opportunity to litigate the issue. The court recognized that it is in the best public interest to preserve finality of litigation. However, the court poignantly observed a more basic reality of our adversary judicial system.

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56. *See* Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964).
57. *Id.*
58. *See* Mackris v. Murray, 397 F.2d 74, 79-80 (6th Cir. 1968); Pennington v. Snow, 471 P.2d 370, 378 (Alaska 1970).
59. *See* 327 F.2d at 956; 346 F.2d at 540-41.
60. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 37 (1965) [hereinafter cited as Currie, *Civil Procedure*].
61. *See* text accompanying note 41 *supra*.
62. *Currie, Mutuality, supra* note 26, at 315.
63. *Id.*
64. *See generally* Moore & Currier, *supra* note 15.
65. 8 Ariz. App. 281, 445 P.2d 557 (1968).

> It is the adversary system that we have espoused in our system of justice. The adversary system prevails in many aspects of the life of man but contest rulės seldom provide that one contestant must be declared the loser to a competitor whom he has never met. . . .
>
> [T]rial processes [do not] unerringly discover Truth. The selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of presentation of their testimony . . . are affected by fortuitous circumstances and variously determine the outcome of a contest.[66]

The *Spettigue* court rejected the notion that any weakness of the *Bernhard* doctrine would be cured by never applying it "to work injustice."[67] The court remarked:

> [T]his panacea is the antithesis of our system of justice . . . . Concepts of "justice" vary from man to man and from time to time and we can conceive of no more pernicious an evil than for an appellate court to lay down law in high-sounding language but in such broad terms that its application to the particular case cannot be determined with any degree of certainty until the highest court in the particular judicial heirarchy has made its august pronouncement as to what is "justice."[68]

For eloquent and broad sweeping reasons, many courts continue to adhere to the mutuality requirement.[69]

3. Defensive Use and the Goal of Judicial Economy

Nonmutuality in the defensive use of collateral estoppel promotes its underlying policy of judicial economy in two ways. First, it encourages parties to consolidate their claims in the initial litigation to the greatest extent possible.[70] Secondly, it indirectly has a pervasive tendency to avoid

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66. *Id.* at 283, 445 P.2d at 562.

67. Currie, *Civil Procedure, supra* note 60, at 37.

68. 8 Ariz. App. at 284, 445 P.2d at 564. *See also* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel,* 76 MICH. L. REV. 612, 679 (1978). The authors conclude that the abandonment of mutuality harms the system of civil sanctions by weakening the impact of the burden of persuasion on trial outcome. Consequently, mutuality should be retained in order to preserve the delicate balance in our judicial system.

69. *See* Clyde v. Hodge, 413 F.2d 48 (3d Cir. 1969); Suggs v. Alabama Power Co., 271 Ala. 168, 123 So. 2d 4 (1960); Hogan v. Bright, 214 Ark. 691, 218 S.W.2d 80 (1949); Hill v. Colonial Enterprises, Inc., 219 So. 2d 51 (Fla. Dist. Ct. App. 1969); Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969); Stillpass v. Kenton Co. Airport Bd., Inc., 403 S.W.2d 46 (Ky. 1966); Pace v. Barrett, 205 So. 2d 647, (Miss. 1968); Kaylor v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967); Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964); Booth v. Kirk, 53 Tenn. App. 139, 381 S.W.2d 312 (1963); Swilley v. McCain, 374 S.W.2d 871 (Tex. 1964); Raz v. Mills, 233 Or. 452, 378 P.2d 959 (1963). In Louisiana, adherence to the rule of mutuality is dictated by the Civil Code as exemplified in Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967) and Lafayette Mem. Park, Inc. v. Trinity Universal Ins. Co., 191 So. 2d 318 (La. App. 1966). Commentators and scholars also urge the retention of the requirement of mutuality. *See, e.g.,* Note, *Nonmutuality: Taking the Fairness Out of Collateral Estoppel,* 13 IND. L. REV. 563 (1980); Note, *supra* note 68; Moore & Currier, *supra* note 15.

70. Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a*

the subsequent litigation altogether, which further supports the underlying policy of collateral estoppel to minimize unnecessary litigation.[71]

On the other hand, nonmutuality in defensive collateral estoppel may increase litigation in two ways. First, it gives the parties an incentive to litigate their claims more fully in the original suit.[72] For example, a small liability settlement which would have previously satisfied both parties will be litigated to its fullest extent, "contrary to the public interest in minimizing litigation."[73] Secondly, it creates new issues in the second suit concerning the question of whether collateral estoppel will be applied by the court against the present adversary.[74] Consequently, any argument for the defensive use of collateral estoppel must include not only a discussion of the fairness of its application, but also a discussion of how its application will produce judicial economy.

E. *Offensive Use of Collateral Estoppel After* Bernhard

1. Offensive Use of Collateral Estoppel

The doctrine of mutuality has been eroded considerably in the defensive use of collateral estoppel,[75] namely, where a defendant who is a stranger to the prior judgment asserts the prior judgment as a defense against the plaintiff who was a party to the first suit.[76] A different and more difficult question arises where the stranger in the second suit is the plaintiff who seeks to assert collateral estoppel against the defendant who is bound by the prior judgment.[77] To illustrate, *A* sues *B*, and *B* loses. *B* now is bound by that judgment. Offensively, *C* can now seize the opportunity to sue *B* and prevent him from relitigating an issue decided in the prior suit. Thus, *B* is foreclosed from a defense which he never invoked against *C*.

The common denominator of the defensive and offensive uses of collateral estoppel in terms of judicial economy is that the estopped claimant was a prior litigant, whether plaintiff or defendant.[78] However, the application of non-mutuality to the offensive use of collateral estoppel has been not only more controversial, but also more cautiously examined by

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Nonparty, 35 GEO. WASH. L. REV. 1010, 1024-25 (1967). The note also details the impacts of modern procedures for compulsory and permissive joinders and counterclaims, which are beyond the scope of this article.

71. *Id.* at 1032.

72. Note, *Nonmutuality: Taking the Fairness Out of Collateral Estoppel*, 13 IND. L. REV. 563, 572 (1980).

73. Moore & Currier, *supra* note 15, at 309-10.

74. *Id.*

75. *See* text accompanying note 44 *supra.*

76. *See* text accompanying note 15 *supra.*

77. *See* text accompanying note 16 *supra.*

78. Note, *supra* note 70, at 1030.

courts and commentators.[79] The reason is that in terms of judicial economy, defensive use tends to promote the underlying policy[80] whereas offensive use may undermine it.

The offensive use of collateral estoppel has been criticized by many courts because it operates contrary to the policies of efficiency and fairness advocated by the spirit of the *Bernhard* doctrine. The offensive use of collateral estoppel can increase litigation in three ways. First, it increases litigation in the original suit. Just as in the defensive use, the party must vigorously litigate since he may later be precluded from relitigating.[81] The offensive use of collateral estoppel is inherently unfair to a defendant who must defend each case not knowing what additional plaintiffs or liability may be thrust upon him later on the basis of an unfavorable judgment in the first suit.[82] Offensive use of collateral estoppel may also increase litigation in the second action because the issue of whether a full and fair opportunity was available in the first suit will be litigated rather than the issues themselves.[83] Finally, offensive use of collateral estoppel increases the number of subsequent suits because "plaintiffs are not motivated to join in the first action."[84] That is, litigation may actually increase as plaintiffs wait in the wings to see the outcome of the first case rather than joining where they could.[85] For example, plaintiffs who may intervene in the initial action become reluctant to do so as long as they enjoy the possibility of relying upon a predecessor's favorable judgment. If another party wins a judgment against the defendant, the waiting plaintiff acquires a favorable judgment with which to estop the defendant on identical issues. Conversely, if the defendant wins in a prior suit, the plaintiff who waits has lost nothing. The defendant may not use the judgment against the plaintiff because the plaintiff was not a party to the original suit.[86]

As a result, many courts refuse to allow the offensive use of collateral estoppel by a plaintiff in the absence of mutuality.[87] In addition, courts allowing the defensive use of collateral estoppel by a stranger, have indi-

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79. *See* text accompanying notes 80-89 *infra.*

80. *See* text accompanying notes 70-74 *supra.*

81. Note, *supra* note 72, at 573.

82. *See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540-41 (2d Cir. 1965); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (Dist. Ct. App. 1958). *See also* Currie, *Mutuality, supra* note 25, at 287.

83. Note, *supra* note 72, at 573.

84. *Id.* at 575.

85. Reardon v. Allen, 88 N.J. Super. 560, ___, 213 A.2d 26, 32 (1965).

86. Note, *supra* note 72, at 575.

87. *See e.g.*, Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (Dist. Ct. App. 1958); Albernaz v. Fall River, 346 Mass. 336, 191 N.E.2d 771 (1963); Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (1965).

cated that offensive use would be disallowed absent mutuality.[88]

2. The Case for Offensive Use

The offensive use of collateral estoppel was defended by some as early as 1926,[89] and criticized by others because of its potential to "unduly oppress" the defendant. Oppression can result where multiple plaintiffs watch, without risk while the defendant vigorously defends each and every claim, hoping for an adverse finding that can be asserted against the defendant in their own suits.[90]

However, in spite of the criticism, the offensive use of collateral estoppel without mutuality was allowed in the leading case of *B. R. De Witt, Inc. v. Hall.*[91] In strong language the court held the rule of mutuality a "dead letter" and "inoperative" in the case.[92] Over a strong dissent emphasizing unfairness to the defendant, the court pointed out in the instant case that the issues were identical to the first proceeding; that the defendant in the instant case—who was also the defendant in the first case—offered no reason for not being held to the determination (of negligence) in the first action; and that it was unquestioned that the first action was defended with full vigor and opportunity to be heard. Consequently, there was no reason either of policy or precedent to apply the mutuality rule.[93] A number of courts contemporaneous with *De Witt* also permitted the use of collateral estoppel offensively in the absence of mutuality.[94]

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88. *See, e.g.,* Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 238 N.E.2d 55 (Mass. 1968).

89. *See* Comment, *Privity and Mutuality in the Doctrine of Res Judicata,* 35 YALE L.J. 607 (1926).

90. Currie, *Mutuality, supra* note 26, at 287.

91. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). *See* King, *Collateral Estoppel and Motor Vehicle Accident Litigation in New York,* 36 FORDHAM L. REV. 1 (1967); Note, *Collateral Estoppel: The Demise of Mutuality,* 52A CORNELL L.Q. 724 (1967); Recent Cases, *Civil Procedure — Abandonment of the Mutuality Requirement,* 22 ARK. L. REV. 491 (1968); Case Comment, *Res Judicata — Mutuality of Estoppel Rule Abandonned in New York,* 47 BOSTON U.L. REV. 636 (1967); Case Comment, *Estoppel: Affirmative Use of a Judgment by a Nonparty,* 52 MINN. L. REV. 768 (1968); Case Note, *Collateral Estoppel — The Doctrine of Mutuality: A Dead Letter,* 47 NEB. L. REV. 640 (1968).

92. 19 N.Y.2d at ___, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.

93. *Id.* at ___, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.

94. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970); Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mut. Cas. Co., 411 F.2d 88 (3d Cir. 1969); Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718 (5th Cir. 1969); United States v. Webber, 396 F.2d 381 (3d Cir 1968); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964); Maryland *ex rel.* Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd* as to this ground *sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed,* 379 U.S. 951 (1964); Gorski v. Commercial Ins. Co., 206 F. Supp. 11 (E.D. Wisc.

3. The Multiple Plaintiff Problem

Of special concern has been the offensive use of collateral estoppel where there is the potential for multiple plaintiffs.[95] The multiple plaintiff problem can be exemplified in a "mass tort" situation. In a well-known hypothetical[96] there was a train wreck where fifty passengers were injured, allegedly as a result of the railroad's negligence. Twenty-five passengers sued separately and all failed to establish negligence on the part of the railroad. Then passenger number twenty-six won his action. "Are we to understand that the remaining twenty-four passengers can plead the judgment in the case of No. 26 as conclusively establishing that the railroad was guilty of negligence, while the railroad can make no reference to the first twenty-five cases which it won?"[97]

Professor Currie termed such results an "aberration,"[98] and warned that "courts must be alert to the danger that [the extention of nonmutuality to offensive collateral estoppel] by merely logical processes of manipulation may produce results which are abhorrent to the sense of justice and to orderly law administration."[99] As a rule of thumb, he proposed that the aberration would be avoided if such collateral estoppel were allowed only against a party who was a plaintiff in the prior suit.[100]

Subsequently, courts faced with offensive use of collateral estoppel against a party who had been defendant in the prior suit shunned Professor Currie's rule of thumb. Instead, they proceeded to examine the particular facts on a case-by-case basis to determine if it was fair to apply collateral estoppel offensively by a new plaintiff against a prior defendant.[101]

4. Case-by-Case Approach

An examination of the facts in each particular case in order to determine if offensive use of collateral estoppel would be allowed has resulted in a case-by-case approach to the application of collateral estoppel. For example, in *Zdanok v. Glidden Company*,[102] offensive use of collateral estoppel was applied after careful review of the particular facts. The court

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1962); O'Connor v. O'Leary, 247 Cal. App. 2d 646, 56 Cal. Rptr. 1 (1967); Perkins v. Benguet Consol. Min. Co., 55 Cal. App. 2d 720, 132 P.2d 70 (1942); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

95. *See* text accompanying notes 82-86 *supra;* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

96. Currie, *Mutuality, supra* note 26, at 285-86.

97. *Id.* at 286.

98. *Id.* at 289.

99. *Id.*

100. *Id.* at 309.

101. Nevertheless, Professor Currie later applauded the particularized approach because the courts had the courage to reject "the easy course of generalization as a substitute for the ideal of justice in the individual case." Currie, *Civil Procedure, supra* note 60, at 29.

102. 327 F.2d 944 (2d Cir. 1964).

found no unfairness to the defendant because the first suit was prosecuted by Glidden with utmost vigor up to the Supreme Court of the United States. The second action was "known to . . . be lurking in the wings," and Glidden could not reasonably argue that it was unfairly surprised.[103]

It is important to note that in allowing the defensive use of collateral estoppel in *Blonder-Tongue Lab., Inc. v. University of Illinois Foundation*[104] the Supreme Court also examined the variable of fairness in terms of notice. The Court pointed out that Blonder-Tongue knew of its pending case on the validity of the same patent; therefore, it presumably was prepared to litigate and litigate to the finish against the defendant there involved.[105] The Court found no unfairness in allowing the second defendant to estop the plaintiff from reopening the issue of the validity of the patent. The Court also cited the *Zdanok* case with approval as to the method of measuring fairness, and foreshadowed that the same principle might apply were the Court facing the offensive use of collateral estoppel.[106]

The particularized approach was extended to the offensive use of collateral estoppel in multiple-tort suits in *United States v. United Air Lines, Inc.*[107] The court examined the facts of the case and found no unfairness in allowing the offensive use of collateral estoppel because "the rule of nonmutuality is not a general one but a limited one to be determined from the facts and circumstances in each case whether or not it should be applied."[108]

However, particularized treatment does not always result in permitting the offensive use of collateral estoppel. In *Berner v. British Commonwealth Pac. Airlines, Ltd.*,[109] the same court which allowed the offensive use of collateral estoppel in the *Zdanok* and *United States v. United Airlines* held that its use would be unfair in the *Berner* case. After examining the facts, the court held that Berner lacked incentive to fully litigate the first case due to the relatively small claim involved.[110]

In applying the case-by-case approach, courts have been concerned with both the opportunity[111] and the incentive[112] to litigate fully in the

103. *Id.* at 956.
104. 402 U.S. 330 (1971).
105. *Id.* at 332.
106. *Id.* at 330. The court later faced the question of the offensive use of collateral estoppel by a nonparty in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).
107. 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd* as to this ground *sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).
108. 216 F. Supp. at 726.
109. 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966).
110. 346 F.2d at 540-41.
111. 327 F.2d 944.

first action. Among the factors which have been material in such determinations are: the size of the claim;[113] the forum of the first litigation;[114] the use of initiative;[115] the extent of the litigation;[116] the competence and experience of counsel;[117] indications of compromise verdicts;[118] the foreseeability of future litigation;[119] and whether the prior judgment is final.[120]

As a result of the many factors which courts consider in order to determine whether the offensive use of collateral estoppel is applicable to the particular case, it is not surprising that the results are inconsistent. For example, in *Reardon v. Allen,*[121] the New Jersey court denied collateral estoppel after it examined the conditions of the first trial and determined that it would be unfair to allow the offensive use of collateral estoppel under the facts. Two years later in *Desmond v. Kramer,*[122] after examining the factors which showed that the first trial constituted a full and fair opportunity for the defendant to litigate, the same court allowed the offensive use of collateral estoppel. What emerges from these apparent contradictions is a common thread of fairness in the application of offensive collateral estoppel. Furthermore, fairness is evaluated in terms of the above mentioned factors[123] in light of the facts of the particular case.

There is danger in restricting a plea of collateral estoppel to a "precedent" of nonmutuality in the jurisdiction. The following is a poignant example of what may be encountered when relying too heavily on law which is in the process of being developed on a case-by-case basis. In *Di Orio v. Scottsdale,*[124] the court held that mutuality was not required as a prerequisite to applying the doctrine of collateral estoppel and allowed the offensive use without mutuality. The court recognized the result obtained under the established exceptions to the mutuality rule, but rested its decision squarely on the elements and principles of the use of offensive collateral estoppel without mutuality.

> It is generally accepted that a party who has had one full and fair opportunity to prove a claim in a court of competent jurisdiction and has failed to do so, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving of judicial admin-

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112. 346 F.2d 532.
113. *Id.*
114. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934).
115. 327 F.2d 944.
116. 216 F. Supp. 709.
117. Graves v. Associated Transport, Inc., 344 F.2d 894 (1965).
118. 47 Cal. 2d 893, 306 P.2d 797.
119. 327 F.2d 944.
120. 216 F. Supp. 709.
121. 88 N.J. Super. 560, 213 A.2d 26 (1965).
122. 96 N.J. Super. 96, 232 A.2d 470 (1967).
123. *See* text accompanying notes 111-20.
124. 2 Ariz. App. 329, 408 P.2d 849 (1965).

> istration require that this be so unless there is some overriding consideration of fairness to a litigant, which the circumstances of a particular case dictate. The finding of Di Orio's negligence in the district court came after a full opportunity on the part of Di Orio to show the very matter which he now urges. . . . We find no unfairness in applying the doctrine of collateral estoppel as a bar to Di Orio's action against the City of Scottsdale.[125]

Three years later the court was faced with a similar fact situation in *Spettigue v. Mahoney*.[126] Yet, the court here held that mutuality was required for the offensive use of collateral estoppel.

In reality, the rule proved illusive, but the search for fairness in each case was at the center of each decision. The practitioner must be prepared to argue the facts as a basis for fairness in the application of collateral estoppel as an offensive tool. Over-reliance on the law of mutuality can be fatal since courts approach each case individually.

F. *Emergence of the Fairness Requirement*

The rigidity of the original application of mutuality was based on a principle of fairness: in order to use a judgment the party must also be bound by it.[127] In abandoning the rule of mutuality, courts recognized that hardship can flow from the complete abolition of mutuality, as well as from rigid adherence to it.[128] Therefore, the propriety of using collateral estoppel in cases of nonmutuality should be determined by the facts in each case.[129] A growing number of courts are in agreement with the opinion in *Rachal v. Hill* in which the court said:

> While the requirements of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case.[130]

Indeed, this sentiment is particularized in *Parklane Hosiery Co. v. Shore*.[131] Although the many authorities already cited indicate a gradual erosion of the mutuality requirement, *Parklane* was instrumental in facilitating the demise of the rule of mutuality and the adherence to the principle of fairness. A close analysis of the Court's reasoning is therefore ap-

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125. *Id.* at ___, 408 P.2d at 852.

126. 8 Ariz. App. 281, 445 P.2d 557 (1968). *See also* text accompanying notes 64-68.

127. 1B J. MOORE, *supra* note 2, ¶ 0.412[1] at 1801.

128. 411 F.2d at 88.

129. 216 F. Supp. 709.

130. 435 F.2d 59, 62 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971). The fairness requirement is extensively treated in the *Rachal* case. *See also* text accompanying notes 53-59 and 111-20 *supra.*

131. 439 U.S. 322 (1979).

propriate and necessary.

III. *Parklane Hosiery Co. v. Shore*

A. *The Jury Trial Question: Controversy in the Federal Courts*

The Supreme Court's *Parklane* decision resolved an inter-circuit conflict between the Fifth and Second Circuit Courts of Appeals regarding the seventh amendment right to a jury trial.[132] The facts of the cases before both circuits were essentially the same. In a federal district court action tried without a jury, the Securities Exchange Commission (SEC) obtained an equitable judgment against defendants[133] who were found guilty of violation of certain securities tax laws. In a subsequent private suit for damages, plaintiffs who were not party to the first suit moved for partial summary judgment. They contended that the defendants should be estopped from relitigating the same issues decided against the defendants in the SEC suit. Arguing that collateral estoppel would deprive them of their seventh amendment right to jury trial, the defendants opposed the motion. In *Rachal v. Hill*, the Fifth Circuit declined to apply collateral estoppel because of the possible deprivation of right to jury trial.[134] However, the Second Circuit, in finding that the deprivation was constitutionally permissible, held that the defendants in *Shore v. Parklane Hosiery Co.* were not entitled to relitigate the issues.[135] Both courts based their reasoning on *Beacon Theatres v. Westover.*[136]

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132. Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977); Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).

133. In *Rachal,* the SEC, prior to the filing of the second suit, obtained a permanent injunction against Rachal for violation of §§ 5 and 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. §§ 77e and 77q(a) (1970); § 10b of the Securities Exchange Act (SEA) of 1934, 15 U.S.C. § 78j(b) (1970); and Rule 10b-5, 17 C.F.R. § 240, 10b-5 (1971). In a private action, Hill sued as representative of the stockholders and derivatively in behalf of two corporations to recover damages. Plaintiff charged Rachal with violation of 10(b) of SEA of 1934, 15 U.S.C. 78j(b); Rule 10b-5, 17 C.F.R. § 240, 10b-5, promulgated thereunder, and § 5 of the Securities Act of 1933, 15 U.S.C. § 77e.

In *Shore v. Parklane,* the SEC obtained a declaratory judgment that defendants had violated § 14(a) of the SEA of 1934, 15 U.S.C. § 78j(b). Plaintiff's class action suit was to recover damages for violation of §§ 10(b), 13(a), 14(a) and 20(a) of the SEA of 1934, 15 U.S.C. §§ 78j(b); 78m(a) and 78n(a) and rules promulgated thereunder. Securities and Exchange Comm. v. Parklane Hosiery, 422 F. Supp. 477 (S.D.N.Y. 1976). Essentially, the defendants were found guilty of issuing a false and misleading proxy statement. The plaintiff asked that the defendants not be permitted to relitigate the question decided earlier. Actually, the complaint in the private suit was filed before the SEC action. Defendants did not request a jury trial until after the resolution of the equitable suit. The *Shore* court noted that Parklane had made no effort to protect its right to jury trial which the court suggested they might have done by trying to conclude the private suit before completion of the SEC action or by requesting an advisory jury in the SEC action. 565 F.2d at 821-22.

134. 435 F.2d at 64.

135. 565 F.2d at 821.

136. 359 U.S. 500 (1959). In *Beacon,* the plaintiff, under threat of suit for violation of

1. The Rule of the Fifth Circuit: *Rachal v. Hill*

The Fifth Circuit acknowledged the erosion of the mutuality requirement but expressed doubt about the appropriateness of using collateral estoppel in *Rachal.*[137] Ultimately it based its refusal to grant collateral estoppel on the great respect that *Beacon* and its progeny had engendered for the right to jury trial.[138] The court pointed out that denial of the right to the second suit would place plaintiff in a position superior to that to which he would have been entitled had he been a party to the prior action because then defendants would have been entitled to a jury trial on the issue of liability.[139] The court did not state that its decision was constitutionally mandated.

Critics of *Rachal* have noted that *Beacon,* purportedly *Rachal's* major support, involved the resolution of legal and equitable claims within the same suit.[140] Simply by ordering that the legal claim be tried first, the Supreme Court in *Beacon* could preserve both the jury trial and the judicial economy of collateral estoppel. Yet, in *Rachal,* one had to give way to the other. Since the *Beacon* situation was inapposite to *Rachal* it was not a proper source of guidance.[141] By basing its holding on a policy favoring jury trial rather than on the mandate of the Constitution, the *Rachal* court avoided seventh amendment analysis. But the court did acknowledge that had the successive suits involved the same litigants, collateral estoppel would have applied.[142] This acknowledgement implies that the court made the right to jury trial turn on the presence of mutuality. Critics have called the distinction logically unsound[143] and they have inferred that, although the *Rachal* court made no overt seventh amendment analysis, the decision is rooted in a literal interpretation of the seventh

antitrust laws, sought: 1) a declaratory judgment that his contract was not in violation of the antitrust laws; and 2) a judgment enjoining the defendant from suing him for antitrust law violations. The defendant's counterclaim, alleging those violations, was for treble damages; he requested a jury trial. The trial court ruled that it would first decide the equitable issues without a jury. Since the equitable and the legal claims shared common factual issues any prior equitable adjudication would have precluded relitigation of those issues before the jury. The Supreme Court overruled both lower courts, holding that when legal and equitable claims in one suit share common factual issues, the trial court may not, except under very compelling circumstances, order a sequence of trials that prevents determination of the legal issues by a jury. *Id.* at 510-11.

137. 435 F.2d at 63.

138. *Id.* at 64. *See* note 136 *supra.*

139. 435 F.2d at 64.

140. Comment, *Use of Government Judgments in Private Antitrust Litigation: Clayton Act Sec. 5(a); Collateral Estoppel & Jury Trial,* 43 U. CHI. L. REV. 338, 370 (1976).

141. *Id.* at 370; Shapiro & Coquillette, *The Fetish of Jury Trials in Civil Cases: A Comment on Rachal v. Hill,* 85 HARV. L. REV. 442, 455 (1971).

142. 435 F.2d at 63 n.5.

143. Shapiro & Colquillette, *supra* note 141, at 455.

amendment.[144] Herein lies the Second Circuit's criticism of *Rachal.*[145]

2. The Rule of the Second Circuit: *Shore v. Parklane Hosiery Co.*

Four years after *Rachal,* when the Second Circuit was presented with essentially the same question, it gave collateral estoppel effect to the prior equitable determination.[146] It held that the seventh amendment applies only where disputed issues of fact exist.[147] Inasmuch as the prior litigation had resolved the factual issues, the court reasoned that "nothing remains for trial either with or without a jury."[148] Moreover, the Second Circuit claimed that *Rachal* relied incorrectly on *Beacon* for two reasons. First, *Beacon* involved only the question of order of trial within one suit.[149] Second, *Beacon's* implicit assumption is that collateral estoppel would apply to deprive a party of a jury trial once there had been a prior equitable adjudication.[150] Were it not for such a preclusive effect, the *Beacon* Court would have been indifferent to the order.[151] Finally, the court denied the defendants' claim that the seventh amendment required that they be allowed a jury trial.[152] Defendants had reasoned that since in 1791 collateral estoppel would not have been applied in the absence of mutuality to deprive them of a jury trial, it should not be applied against them now.[153] Labelling the defendants' approach to seventh amendment analysis strictly historical,[154] the court noted the petrifying effect such an analysis would have on procedural development.[155] The court cited *Ross v. Bernhard*[156] for the proposition that the strict historical approach had lost favor with the Court.[157] Moreover, even under the strict historical mode of analysis, the court held, there would be no right to jury trial in the present suit because in 1791 there was no legal analogue of an SEC

144. *Id.*

145. 565 F.2d at 820. *Cf.* Note, *Shore v. Parklane Hosiery Co.: The Seventh Amendment and Collateral Estoppel,* 66 CALIF. L. REV. 862, 868 (1978) (mutuality not hypertechnical procedural rule as Second Circuit claimed).

146. 565 F.2d at 821.

147. *Id.* at 819.

148. *Id.*

149. 565 F.2d at 820. *See* note 136 *supra.*

150. 565 F.2d at 820.

151. *Id.* at 821.

152. *Id.* The Second Circuit relied on *Beacon's* "inherent respect" for collateral estoppel. *Id.* Also, the court noted that permitting relitigation would violate principles of "fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results and achievement of the just, speedy and inexpensive determination of every action." *Id.*

153. *Id.* at 822.

154. *Id. See* notes 225-30 *infra* and accompanying text.

155. *Id.*

156. 396 U.S. 531 (1970) (application of the historical test fraught with difficulty). *See* notes 268-71 *infra* and accompanying text.

157. 565 F.2d at 823.

proceeding for injunctive relief or of a "stockholder's suit based on an implied right of action created by antifraud provisions of federal securities laws."[158]

B. *The Supreme Court's Resolution of the Circuit Court Conflict*

1. The Facts of *Parklane*

Parklane Hosiery Co. v. Shore presented "the question [of] whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issue before a jury in a subsequent legal action brought against it by a new party."[159] Leo M. Shore, a minority shareholder, brought a class action in federal district court against Parklane Hosiery Co. and twelve of its officers, directors, and stockholders[160] charging violation of sections 10(b),[161] 14(a),[162] and 20(a)[163] of the Securities Exchange Act of 1934 "as well as various rules and regulations promulgated by the Securities Exchange Commission."[164] Shore alleged that Parklane and several of its officers, directors, and stockholders had issued a false and misleading proxy statement relating to a merger. The complaint asked for damages, recission of the merger, and recovery of costs.[165] Shortly thereafter, and prior to the trial of the *Shore* case, the SEC brought an action to enjoin the merger, alleging essentially the same violations concerning the proxy statement.[166]

In the SEC action, the district court rendered a declaratory judgment against Parklane, finding the proxy statement to be materially false and misleading.[167] The Second Circuit affirmed.[168] Shore subsequently moved for partial summary judgment,[169] seeking to collaterally estop Parklane

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158. *Id. But see*, Comment, *Right to Jury Trial and Collateral Estoppel in Securities Litigation*, 42 ALB. L. REV. 733, 738 (1978); Note, *Nonmutual Collateral Estoppel and the Seventh Amendment Jury Trial Right*, 47 FORDHAM L. REV. 75, 91 (1978).

159. Shore v. Parklane Hosiery Co., Civ. No. 74-4986 (S.D.N.Y. 1976), *rev'd and remanded*, 565 F.2d 815 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979).

160. *Id.*

161. 15 U.S.C. § 78j(b) (1976).

162. *Id.* at § 78n(a).

163. *Id.* at § 78t(a).

164. 439 U.S. at 324.

165. *Id.* at 325.

166. *Id. See also* SEC v. Parklane Hosiery Co., 558 F.2d 1083, 1085 (2d Cir. 1977). The SEC alleged violations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a) (1976) (former version codified in 15 U.S.C. §§ 10(b), 13(a), 14(a) and violations of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976), as well as rules and regulations promulgated thereunder.

167. SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976).

168. 558 F.2d 1083.

169. 439 U.S. at 325. Only partial summary judgment was sought. In an action to recover under the proxy rules, a plaintiff is not entitled to relief merely by proving that the proxy

from relitigating the proxy issue. The district court denied the motion on the implicit ground that an application of collateral estoppel in such a case would deny Parklane its seventh amendment right to a jury trial.[170] In an interlocutory appeal the United States Court of Appeals for the Second Circuit reversed.[171]

As noted above, the Second Circuit was not the first court to address the issue of the use of collateral estoppel and the right to a jury trial. In a similar case, *Rachal v. Hill*,[172] the Court of Appeals for the Fifth Circuit had taken a position contrary to that of the Second Circuit. The Fifth Circuit expressed little concern for the concept of nonmutual collateral estoppel.[173] The main thrust of its opinion concerned the loss of the right to a jury trial through a prior decision in a court of equity.[174]

Because the position the Second Circuit had taken in the *Shore* case was in conflict with the position taken by the Fifth Circuit, the United States Supreme Court granted certiorari.[175] The Court had already rejected mutuality in defensive collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[176] The Supreme Court completed its repudiation of the blanket requirement of mutuality in *Parklane Hosiery Co. v. Shore*.[177]

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solicitation was materially false and misleading. He must also show that he was injured and that he sustained damages. *See id.* at 325 n.2 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-90 (1970)).

170. The grounds for denying the motion must be inferred. 565 F.2d at 818.

171. *Id.*

172. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *See* text accompanying notes 137-45 *supra*.

173. The opinion noted:

> [Although] many states still honor the rule of mutuality of estoppel, the modern trend has been to discard the rule and preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the prior action. . . . Thus it is clear that the requirements of mutuality need not be met for collateral estoppel to be applied in an action presenting a federal question in the courts of the United States.

435 F.2d at 61-62.

174. *See* text accompanying notes 137-45 *supra*.

175. 439 U.S. at 325 n.3.

176. 402 U.S. 313 (1971). *See* note 44 *supra* and accompanying text. *Blonder-Tongue* may or may not have been limited to patent infringement cases. The Court in *Blonder-Tongue* asked what the Court in *Parklane* had referred to as the "broader question": "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328, *cited in* 439 U.S. at 328.

177. 439 U.S. at 331 & n.16. The Court notes that its approach is also the approach of RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, Apr. 15, 1975) which states that there is no intrinsic difference between defensive and offensive collateral estoppel, although the latter requires a stronger showing of adequate prior opportunity to litigate.

2. The Majority Opinion — The Demise of Mutuality

In *Parklane* the Court permitted the use of nonmutual offensive collateral estoppel.[178] Following the decision in *Bernhard*, scholars had been concerned about the potential for unfairness and abuse if nonmutuality were extended to the application of offensive collateral estoppel.[179] Setting a tone of conservatism and noting that others had advanced many reasons why defensive and offensive collateral estoppel should be treated differently, the Court cited several scholars who had "expressed reservations regarding the application of offensive collateral estoppel."[180] Justice Stewart, delivering the majority opinion, noted that, unlike defensive collateral estoppel, the application of offensive collateral estoppel by a plaintiff does not necessarily promote judicial economy. The potential for later application of defensive collateral estoppel induces the plaintiff to consolidate defendants in the first action, if possible.[181] The reverse of this is true in the use of offensive collateral estoppel. Nonmutual offensive use of the plea, the Court noted, could encourage a plaintiff to "wait and see."[182]

The Court also noted that nonmutual offensive collateral estoppel has a potential for unfairness. For instance, a defendant in the first action may have had "little incentive to defend vigorously."[183] Similarly, the potential for unfairness is present when the judgment relied on may have been inconsistent with earlier judgments on the same issues.[184] Despite its cautious tone, the Court "concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[185] The Court then proceeded to explain how it had applied this philosophy to the instant case.

In delineating how the circumstances in the case before it justified per-

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178. *See* Currie, *Mutuality, supra* note 26, at 289-91. *See also* 439 U.S. at 326 n.4.

179. *See* Currie, *Mutuality, supra* note 26, at 285-87. Currie was especially concerned with the potential for what he termed "the multiple claimant anomaly." Such an anomalous decision would occur when one decision, adverse to the person against whom collateral estoppel would be asserted is inconsistent with previous decisions and the anomalous finding is then perpetuated by the application of nonmutual collateral estoppel. *Id.* at 281, 285-86.

180. 439 U.S. at 329 n.11.

181. *Id.* at 329-30.

182. *Id.* at 330. *See* Currie, *Mutulity, supra* note 26. "Wait and see" and the multiple claimant anomaly concept would go together. A plaintiff could wait for a favorable judgment in a series, and, then, arguing that this was the reliable one, try to apply offensive collateral estoppel. *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, April 15, 1975).

183. 439 U.S. at 330.

184. *Id.* at 331 n.14. It may be that, despite Professor Currie's concern, in nonmutual collateral estoppel there lies a potenial to rectify an unfairness. If all the decisions on an issue were based on the same law and facts, then one of the decisions must be unreliable. It could be the first decision just as easily as the anomalous one.

185. 439 U.S. at 331.

mitting the asymmetrical offensive application of collateral estoppel, the Court noted that "the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired."[186] Both case precedent[187] and statutory authority[188] supported the impermissibility of such consolidation. Similarly, the Court noted that there was "no unfairness . . . in applying offensive collateral estopped in this case."[189] In light of the seriousness of the allegations in the complaint by the SEC[190] and its awareness of the action brought by Shore,[191] the Court felt that Parklane Hosiery Co. "had every incentive to litigate the SEC lawsuit fully and vigorously."[192] This judgment also did not have the potential for unfairness which it would have had if it had been an anomaly following a series of judgments.[193]

In addition, the Court spoke of the potential for inequity when "the

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186. *Id.* at 332.

187. *Id.* at 332 n.17 (citing SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (1972) (an appeal from a denial of a motion for intervention in an SEC action by victims of alleged securities fraud was denied)).

> The SEC's workload, despite its limited budget and staff, would be substantially increased if such intervention were allowed. Additional issues would have to be tried in the main action. . . . For example, a private party seeking damages would have to prove scienter and causation, elements of proof not required in an SEC injunction action. . . . Already complicated securities cases would become more confused and complex. The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered. The intervention of a private plaintiff might tend to discourage or at least to complicate efforts to obtain a consent decree. We hold that the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues.

475 F.2d at 1240. Responding to appellant's reliance on *Rachal* and its argument that, because there could be no collateral estoppel effect from the equitable action in the private legal action, consolidation should be permitted, Judge Timbers said: "Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." *Id.* at 1240 n.5.

188. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b)(2). The court has broad discretion to determine whether to grant or deny permissive intervention in cases involving multiple parties and claims. *See also* 15 U.S.C. § 78u(g) which states in part:

> Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

189. 439 U.S. at 332.

190. *Id.*

191. *Id.* at 332 n.18.

192. Id. at 332.

193. "[T]he judgment in the SEC action was not inconsistent with any previous decision." *Id.* Thus the case is not subject to Professor Currie's "multiple claimant anomaly." *See* Currie, *Mutuality, supra* note 26.

second action affords procedural opportunities unavailable in the first action that could readily cause a different result."[194] Nevertheless, the Court felt that Parklane should be collaterally estopped from relitigating the question of the material falsity of the proxy statement[195] because the factual issue had already been decided. Agreeing with the Second Circuit, the Court ruled that the use of offensive collateral estoppel based on an equitable judgment did not violate defendants' seventh amendment right to a jury trial in a subsequent suit for damages.[196] Of the arguments advanced by the Second Circuit, the Court incorporated the following: (1) in 1791 an equitable judgment had estoppel effect in a court of law;[197] (2) *Beacon* implied that collateral estoppel would prevent relitigation;[198] and (3) no jury trial right exists where no disputed question of fact remains.[199]

Additionally, the Court expressed the same displeasure with the strict historical approach as did the Second Circuit.[200] The Court did not, however maintain that the approach had lost favor but rather that it had never been used.[201] Moreover, the Court did not claim there was no common law analogue to the case at bar. Rather, the Court based its freedom to deny a jury trial on logical grounds:

> The petitioners [defendants] have advanced no persuasive reason why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present. A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party.[202]

Quoting from *Galloway v. United States,* the Court explained that the seventh amendment was designed to preserve the jury trial institution "in only its most fundamental elements."[203]

Viewing both judges and juries as competent to decide issues of fact as the rules of procedure in equity or in law required, the Court dismissed

194. *Id.* at 331. The Court noted that the defendant in the first action will typically not have chosen the forum of that action. Hence, such a defendant, might have had "to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses." *Id.*

195. The implication was that the presence or absence of a jury as factfinder became a "neutral" by its not having been required in the SEC action and by the conclusion that the prior decision was reliable since no procedural opportunities had been denied the party being estopped.

196. 439 U.S. at 337.

197. *Id.* at 334.

198. *Id.* at 335.

199. *Id.* at 336-37.

200. *Id.* at 337. *See* notes 225-30 *infra* and accompanying text.

201. *Id.*

202. *Id.* at 335.

203. *Id.* at 337 (quoting Galloway v. United States, 319 U.S. 372, 392 (1943)).

"the presence or absence of a jury as a fact finder . . . [as] . . . basically neutral."[204] It saw the jury as fact finder "quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum."[205] The majority of eight justices concluded that Parklane Hosiery had had a "full and fair opportunity" to litigate its claims in the SEC action.[206]

3. The Dissent

The majority opinion, however, was accompanied by a vigorous dissent by Justice Rehnquist. Declining to comment on nonmutual collateral estoppel alone,[207] Justice Rehnquist focused his dissent on the deprivation of Parklane's right to a jury trial in the legal action. While expressing little sympathy for Parklane, he objected to the arbitrary rationale of the majority opinion.[208] Citing Blackstone's description of trial by jury as "the glory of the English law,"[209] he criticized the Court's reduction of the right to a mere "neutral."[210] Urging that the Court should have taken a narrow historical approach to the seventh amendment issue, he argued that "any change in the province of the jury, no matter how drastic the diminution of its functions can always be denominated 'procedural reform.' "[211] He agreed with the dissent in *Galloway*[212] in which "Mr. Jus-

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204. 439 U.S. at 332 n.19.

205. *Id.*

206. *Id.* at 332-33.

> Since the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury. The party seeking the retrial has already exercised his right to be heard on the issues and to cross-examine witnesses with respect to them. The interests of finality, certainty and economy of judicial resources then come into play to preclude his relitigating the same issue a second or third time . . . absent some showing of fundamental unfairness.

207. "Because I believe that the use of offensive collateral estoppel in this particular case was improper it is not necessary for me to decide whether I would approve its use in circumstances where the defendant's right to a jury trial was not impaired." 439 U.S. at 339 n.1.

208. "[T]he nagging sense of unfairness as to the way petitioners have been treated, engendered by the *imprimatur* placed by the Court of Appeals on respondent's 'heads I win, tails you lose' theory of this litigation is not dispelled by the Court's antiseptic analysis of the issues in the case." *Id.* at 338. Respondent Shore was not bound by the decision of the SEC action, yet the decision could preclude the jury's deciding the issue of material falsity of the proxy.

209. *Id.*

210. *Id.* at 332 n.19.

211. *Id.* at 346. Justice Rehnquist argued that mutuality or symmetry was required in 1791 and that to abrogate this requirement by denominating it a procedural charge and to thus affect jury function was in contravention of the seventh amendment.

212. *See id.* at 337 (quoting Galloway v. United States, 319 U.S. 372, 392 (1943)). In *Galloway* the Court had ratified the modern form of directed verdict even though the evidence was sufficient that a jury would have decided the case at common law. Justice Black, dissenting, pointed out that the common law directed verdict required that there be no evidence in favor of the non-moving party. 319 U.S. at 402 (Black, J., dissenting).

tice Black lamented 'the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantees of the Seventh Amendment.'"[213] Justice Rehnquist lamented the infringement on the guarantee in part because "juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community."[214]

The lone dissenter stated additionally that, even if it were not violative of the seventh amendment, the use of collateral estoppel in this case was against the strong federal policy in support of trial by jury.[215] Citing *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[216] which decided that the strong federal policy in favor of juries required that they be part of diversity actions in the federal courts,[217] he stated that precedent indicated that the outcome could be affected by whether a judge or jury decides the issue.[218] Noting what he perceived as an incongruity in the reasoning of the majority, he pointed out that they accepted "the proposition that it is unfair to apply offensive collateral estoppel 'where a second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.' "[219] Yet the availability of discovery, 'a device unmentioned in the Constitution,"[220] was regarded as a controlling factor in permitting the application of collateral estoppel and "the presence or absence of a jury as factfinder [as] basically neutral."[221]

Justice Rehnquist noted in expressing another concern based on federal policy grounds that the Court would be giving administrative agencies power beyond that which Congress had intended. Defendants, he argued, would be coerced to agree to consent orders in order to preserve their right to jury trial. He found a final irony in the fact that a jury would still

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213. 439 U.S. at 339 (citing 319 U.S. at 397 (dissenting opinion)). Rehnquist further argued that, though in *Galloway* the Court "upheld the modern form of directed verdict against a Seventh Amendment challenge . . . it is clear that a similar form of directed verdict existed at common law in 1791." 439 U.S. at 349.

214. *Id.* at 344 (quoting O. HOLMES, COLLECTED LEGAL PAPERS 237 (1920)).

215. 439 U.S. at 351. Justice Rehnquist used *Beacon Theatres* to support his position, as the majority had used it for theirs.

> [T]he Court held that where both equitable and legal claims or defenses are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'

439 U.S. at 351 (quoting 359 U.S. at 510-11).

216. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

217. *Id.* at 537-39, *cited in* 439 U.S. at 352.

218. 439 U.S. at 355 (citing 415 U.S. at 198). *Compare* Duncan v. Louisiana, 391 U.S. 145 (1968) *with* RESTATEMENT (SECOND) OF JUDGMENTS § 88(2), Comment d (Tent. Draft No. 2, 1975).

219. 439 U.S. at 353 (quoting 435 F.2d at 331).

220. 439 U.S. at 354.

221. *Id.* at 354 (quoting 435 F.2d at 332 n.19).

have to be impaneled in this case[222] and that the time that would be saved in not relitigating the proxy issue would be slight, since much of the time in jury trials is spent in jury selection, voir dire, and the charges.[223]

IV. *Parklane:* JUDICIAL REPEAL OF THE SEVENTH AMENDMENT?

Parklane demonstrates the seventh amendment dilemma. Fidelity to the language of the amendment will freeze the offensive collateral estoppel doctrinal development which *Parklane* seeks to forward. The problem arises when courts begin to question whether the framers of the seventh amendment specifically intended to limit its development.

There is disagreement about the analytic approach that the Court should use in seventh amendment cases. Since the amendment states that the jury trial right is to be preserved, it has traditionally been considered important that the constitutional adequacy of the present day right should be determined by reference to the right as it existed in 1791, the date of the amendment's adoption. This approach has been called the historical one. With the possible exception of one footnote,[224] the Court has never explicitly abandoned the historical approach. But to the dismay of several commentators, it has frequently sanctioned departure from 1791 practice. To justify its endorsement of the departures, the Court has used three analytic approaches. The first two, the common law analogue theory and the fundamental elements theory are purportedly grounded in 1791 practice. The third approach, which makes the present day adequacy of a legal remedy the criterion for a right to jury trial, deviates from the historical method. The Court has also hinted at a permissible functional approach.

A. *Strict Historical Approach*

A very strict interpretation of the seventh amendment would require a jury trial right for every situation in which this right existed at common law.[225] Even if this goal were desirable, there are numerous obstacles to its achievement. Historical searches yield inconsistent and inconclusive results because of gaps and inaccuracies in the records and because prac-

222. "[T]he Court will have simply added a powerful club to the administrative agencies' arsenals that even Congress was unwilling to provide them." 439 U.S. at 355-56.

223. *Id.* at 355 n.24.

224. *See* notes 234 & 266 *infra* and accompanying text.

225. McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover,* 116 U. PA. L. REV. 1, 13 (1967). For a plea that the Court use the strict historical test *because* jury trial is very inefficient and ought to be restricted, *see* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Decision Making,* 70 NW. U. L. REV. 486, 489 (1975).

tices in 1791 were not uniform.[226] It has been noted, too, that the common law itself was then in a state of change[227] and that in terms of common law principles there is nothing sacrosanct about the year 1791 that warrants binding the Constitution to the details of its practices.[228] Additionally, judicial decision according to a historical standard will yield illogical and unfair results.[229] Finally, it has been argued that the strict historical approach would stultify doctrinal development in areas where the very survival of the judicial system demands reform and in areas where the framers of the seventh amendment never intended the amendment to exert its influence.[230]

B. *Common Law Analogue*

Frequently the Court will find that a right to jury trial exists in a newly devised cause of action if that cause of action has a roughly equivalent 1791 counterpart.[231] The Court used this approach in *Curtis v. Loether*[232] where the plaintiff, a black woman, charged the defendant with a violation of fair housing provisions of the 1968 Civil Rights Act. Finding the plaintiff's cause of action an analogue of a common law tort claim, the Court ruled the defendant entitled to a jury trial in spite of the plaintiff's objection to the delay and the possible racial prejudice against her that would ensue from a jury trial.[233]

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226. For comments about difficulties with the historical approach, see Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 335-37 (1966); Shapiro & Coquillette, *supra* note 141, at 448-50; Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 652-53 (1973).

227. Wolfram, *supra* note 226, at 736.

228. *Id.* at 731.

229. *See* text accompanying notes 96-101; McWilliams, *Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 MISS. L.J. 1, 25 (1977) (strict historical test begs the question of which informing principle is meant to guide the amendment's application).

230. 319 U.S. 372. *See* Shapiro & Coquillette, *supra* note 141, at 454-55.

231. Often the Supreme Court uses the common law analogue idea to decide whether a jury trial right extends to actions brought to enforce newly created statutory rights. Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 12-13 (1976). Of Congress' power to create statutory rights with or without a right to jury trial, Kane observes:

> If Congress wants to provide for summary proceedings in areas traditionally tried at law, it must do so explicitly and with clearly expressed, well-documented reasons why a jury trial has become an inadequate procedure. Congress cannot simply provide that a statutory cause of action which historically would have provided a jury trial must now be tried to the court. . . . Exceptions to these rules appear . . . if the character of the action . . . no longer resembles . . . [a] common law counterpart such as in statutes providing for workmen's compensation and no fault insurance.

Id. at 24-26.

But see 565 F.2d at 822 (common law analogue approach unsatisfactory).

232. 415 U.S. 139 (1974).

233. *Id.* at 194. *See also* Pernell v. Southall Realty, 416 U.S. 363, wherein a landlord

C. *Fundamental Elements*

The Court has used a fundamental elements approach on occasion to reach the decision that a particular post-1791 procedure does not result in an unconstitutional deprivation of right to jury trial. In the leading case, *Galloway v. United States*,[234] the petitioner claimed that granting a motion for a directed verdict against him was a violation of his right to jury trial.[235] Even though in 1791 the trial court had the power to withdraw a case from the jury by a party's demurrer to his opponent's evidence, the demurring party was forced to assent to the truth of his opponent's evidence; denial of the challenge led to adjudication by the judge.[236] The *Galloway* petitioner argued that his opponent faced no similar risk when he moved for a directed verdict.[237] Unpersuaded by the petitioner's argument, the Court wrote that the seventh amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details varying then [1791] even so widely among common law jurisdictions."[238] The Court has repeated its *Galloway* language again and again.[239]

Although there is agreement that the fundamental elements approach

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sought recovery of real property in a summary proceeding authorized by Congress. The Court held that a right to jury trial existed because the action was the common law analogue of an ejection action. Both served the same function, in spite of the great differences in detail and evidence that Congress intended no jury trial. Both *Curtis* and *Pernell*, immediate predecessors to *Parklane* in the Court's jury trial cases, were cited as an indication that the Court had returned to the historical approach after a 12 year departure from it. Kane, *supra* note 231, at 22-23.

For discussion of the Court's departure from a historical approach, see text accompanying notes 244-63 *infra*.

234. 319 U.S. at 372.

235. *Id.* at 388.

236. *Id.* at 390.

237. *Id.*

238. *Id.* at 392. Justice Black, dissenting, observed that the risk imposed on the challenger served to prevent a frivolous demurrer to the evidence. *Id.* at 403. *See also* Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery*, 64 CORNELL L. REV. 1002, 1021-22 n.78 (1979) (reasoning of *Galloway* majority opinion suspect). In *Parklane*, Justice Rehnquist approved the *Galloway* result, calling the motion for directed verdict substantially equivalent to the demurrer to the evidence, 439 U.S. at 346. Although he endorsed the *Galloway* result, he also cited Justice Black's dissent in *Galloway* to lament the gradual erosion of the seventh amendment. *Id.* at 340.

239. Colgrove v. Battin, 413 U.S. 149, 156 (1973) (in civil suit, a jury of six not violative of seventh amendment). *See also* Baltimore & Caroline, Inc. v. Redman, 295 U.S. 654 (1935) (judgment n.o.v. not violative of seventh amendment); Gasoline Products Co. v. Champlain Refining Co., 283 U.S. 494 (1931) (though not permitted at common law, allowing court to order partial new trial preserves substance of jury trial right); Walker v. New Mexico & S.P.R. Co., 165 U.S. 593, 596 (1897) (where jury's answers to specific interrogatories conflict with general verdict, entering judgment on basis of special answers is not violative of the seventh amendment.

is sound in its refusal to tie the Court to specific 1791 procedures,[240] there has been recognition that analyses purporting to retain fundamental elements are dangerously amorphous.[241] They invite subjectivism[242] and obscure the fact that the Court is simply subordinating one principle to another. Unless the Court defines the core and the contours of a fundamental right to jury trial, it remains free to call any legal doctrine a mere procedural detail.[243]

D. *Complications in Seventh Amendment Analysis as a Result of Merger*

The merger of law and equity courts complicated seventh amendment analysis. A line of cases beginning with *Beacon Theatres v. Westover* shows that the Court has departed from its traditional approaches and has determined the right to jury trial not by a reference to 1791 practices but by reference to one of the *criteria* that determined equitable jurisdiction in 1791.[244] Noting that inadequacy of remedy at law was a basis for equitable jurisdiction in 1791, the *Beacon* Court held that legal jurisdiction and its concomitant right to jury trial can be determined by the present day adequacy of the legal remedy.[245] Because merger and procedural reform have afforded litigants more satisfactory legal remedies, the scope of legal jurisdiction has thus expanded.[246]

It has been suggested that this expanded right to jury trial is limited to the sphere of cases where analysis has been complicated by merger and procedural reform.[247] Since preservation of the minimum standards of that right is the only concern of the seventh amendment, the expansion of the right maybe a matter of judicial policy rather than of constitutional imperative.[248] Finally, it has been noted that the Court might use the new approach to validate other nonhistorical approaches that *diminish* the right to jury trial.[249]

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240. Wolfram, *supra* note 226, at 652.

241. Note, *supra* note 238, at 1026-28, (decisionmaking by characterization).

242. *Id.*

243. This was Rehnquist's argument in *Parklane.* 439 U.S. at 347.

244. *See* James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 687 (1963); McCoid, *supra* note 225, at 12.

245. 359 U.S. at 508. *See* text accompanying notes 249-52 *infra.*

246. *Id.*

247. McCoid, *supra* note 225, at 12.

248. *Id.*

249. F. JAMES, CIVIL PROCEDURE § 8.10 (1965). Defendants in an administrative proceeding are not entitled to a jury trial even though the remedy sought makes the action seem legal. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm., 430 U.S. 442 (1977) where plaintiffs protested the determination of a fine against them in an administrative proceeding. They claimed that the seventh amendment entitled them to a jury trial since the fine constituted a legal claim for damages. The Court disagreed. It held that "in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues

In *Beacon Theatres* the Court enunciated the following policy. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. . . . As such their existence today must be determined not by precedents decided under discarded procedures but in the light of the remedy now made available."[250] Subsequently, in *Dairy Queen v. Wood,*[251] the Court reaffirmed this approach.[252]

The approach in these cases culminated with *Ross v. Bernhard*[253] where the Court went beyond its *Beacon* standard. In *Ross,* the Court examined a traditionally equitable cause of action, the shareholder's derivative suit,[254] and divided the claim into its component issues. Finding the main issue to be a request for damages, the Court declared the entire claim to be legal and the parties entitled to a jury trial.[255] The Court decided that the equitable facet of the suit, the standing of the shareholders to sue, could be resolved at law now that merger presented no procedural impediment.[256] Logically, perhaps, the nature of the central issue should characterize the entire claim. But logical appeal cannot obscure the fact that *Ross* is unfaithful to the historical approach.[257]

Furthermore, in a footnote, the *Ross* Court hinted that right to jury

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in its sovereign capacity to enforce public rights created by statutes," then the seventh amendment does not require a jury trial. *Id.* at 450.

Collateral estoppel effect also has been given to administrative agency proceedings. United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). The following factors are considered in deciding whether determinations of an agency acting in a judicial capacity will receive collateral estoppel effect: adequacy of notice to the parties, right to counsel, right to subpoena witnesses, right to present arguments through documentation and examination of witness, and opportunity for judicial review. Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation,* 46 GEO. WASH. L. REV. 65, 87-90 (1977).

250. 359 U.S. at 507.

251. 369 U.S. 469 (1962).

252. *Id.* at 478. Plaintiff in *Dairy Queen* sought an accounting to establish the amount of money defendant owed him from an alleged breach of contract. Plaintiff contended that defendant was not entitled to a jury trial because an accounting was a purely equitable claim. The Court disagreed. Noting that *present day* inadequacy of the legal remedy determined equitable jurisdiction, the Court stated that because the Federal Rules of Civil Procedure allow a court appointed master to help the jury with very complicated issues, it would be a rare case in which the legal remedy in an accounting was inadequate. *Id.* The Court noted, too, that modern procedural changes that have cured formerly inadequate legal remedies will cause the scope of equitable jurisdiction to diminish. *Id.* at n.19.

253. 396 U.S. 531 (1970).

254. 396 U.S. at 538-91. *See* Note, *Ross v. Bernhard: Uncertain Future of the Seventh Amendment,* 81 YALE L.J. 112, 119 (1971).

255. 396 U.S. at 538-39.

256. *Id.* at 539-40.

257. Kane, *supra* note 231, at 10-11; Note, *supra* note 231, at 1119. However, since *Ross,* the Court has used the common law analogue approach. *See* text accompanying notes 236 & 237 *supra.*

trial might be determined also by the practical limitations and abilities of the jurors.[258] A complexity exception for the right to jury trial suggests a blatantly functional approach.[259] However, both advocates and opponents of a complexity exception purport to have evidence of 1791 practices supporting their respective positions.[260] Because the Court mentioned the exception only in a footnote and because the Court has never repeated it in the twelve years since *Ross,* some argue that it cannot serve as an imprimatur for radical departures from the historical approach.[261]

In this line of cases the Court based its holding on the adequacy of the modern day remedy rather than on 1791 practices. Since these cases expanded the right to jury trial, the integrity of the seventh amendment was not compromised.[262] Critics have suggested that the Constitution would, however, prohibit the use of the novel approach to *abridge* the right to jury trial.[263]

E. Parklane *and Other Seventh Amendment Cases*

One group of critics claimed that *Parklane* amounted to a judicial repeal of the seventh amendment. From their viewpoint it is said that nonmutuality cannot be used to deprive a party of a right to jury trial where he would have had that right in 1791.[264] However, it has been noted that there is no evidence that the framers of the seventh amendment ever intended to limit development in principles of collateral estoppel.[265] Moreover, the rigid historical approach would place the Court in a logically untenable position. Access to the jury would depend on whether the parties in the first suit were the same as those in the second.[266] The central concern of the historical position, however, cannot be overlooked. The language of the seventh amendment requires a historical approach because the further the analysis departs from history, the less faithful it

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258. 396 U.S. at 538 n.10.

259. *See* Kane, *supra* note 231, at 11 (welcoming the functional approach implied in the *Ross* footnote). *But see* Wolfram, *supra* note 226, at 644 (functional approach would give judge disturbingly broad discretion).

260. *See Non-jury Trial of Civil Litigation: Justifying A Complexity Exception to the Seventh Amendment,* 15 U. RICH. L. REV. 897 (1981) and Arnold, *Historical Inquiry into the Right to Trial by Jury,* 128 U. PA. L. REV. 829 (1980) (no evidence of 1791 complexity exception). *Contra,* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 81 COLUM. L. REV. 43 (1980).

261. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making,* 70 NW. U. L. REV. 486, 526 (1975); Wolfram, *supra* note 226, at 644-45.

262. Kane, *supra* note 231, at 11.

263. Note, *supra* note 145, at 868.

264. *See* Note, *supra* note 158, at 91; Comment, *Collision Course: Collateral Estoppel and the Seventh Amendment: Parklane Hosiery Co. v. Shore,* 57 DEN. L.J. 115, 126 (1979).

265. Shapiro & Coquillette, *supra* note 141, at 454.

266. *Id.*

is to the command of the language.

The *Parklane* Court's dedication to preserving only the fundamental elements of the right to jury trial is amply supported by precedent, but those fundamental elements remain undefined.[267] Unless the Court establishes criteria for their isolation and delineates an absolute boundary for the right, the Court will be free to call any reform that limits access to the jury a mere incident or detail.[268]

The *Parklane* Court characterized its holding as a natural extension of *Beacon*,[269] but *Beacon* applied primarily to new remedies that were a consequence of merger.[270] Also, *Beacon*, as the *Rachal* court noted, manifested great respect for jury trials.[271] The *Parklane* Court's reliance on *Beacon* for the proposition that jury trials may be dispensed with is awkward.[272] But this *Beacon-Parklane* incompatibility is only apparent because *Beacon* addressed a different situation (the situation of several claims embodied in one suit) and because *Beacon* recognized, even within the one suit situation, the possibility of exceptions to its rule.[273] The *Parklane* Court cited *Katchen v. Landy*,[274] a successor to *Beacon*, as a permissible exception to the *Beacon* rule and as a sanction for its own holding.[275] In *Katchen*, the Court permitted equitable determination of issues in a bankruptcy court even though that determination would have collateral estoppel effect in a subsequent legal suit.[276]

267. *See* notes 234-39 *supra* and accompanying text.

268. *See* notes 240-43 *supra* and accompanying text.

269. 439 U.S. at 335.

270. McCoid, *supra* note 225, at 15.

271. 435 F.2d at 64. *See* Comment, *supra* note 264, at 124 (*Parklane* subverts thrust of *Beacon*).

272. The *Parklane* Court characterized *Beacon's* holding as "no more than a general prudential rule." 439 U.S. 334. *Beacon* manifested great respect for jury trials, but the Court seemed anxious to minimize its impact. Note that *Beacon* implied that its rule was constitutionally mandated. 359 U.S. at 510.

The *Parklane* Court's position requires careful circumvention of *Beacon*. The Parklane Court claims that *Beacon* recognized an estoppel effect but then disclaims the magnitude of *Beacon's* concern with the jury trial right. Finally, the *Parklane* Court claims its fact situation falls within the exceptions recognized by *Beacon*. *See* note 273 *infra* and accompanying text.

See Comment, *supra* note 264, at 125 (view that Meeker v. Ambassador Oil Corp., 307 F.2d 875 (10th Cir. 1962), *rev'd per curiam*, 375 U.S. 160 (1963) criticizes *Parklane's* reliance on *Beacon*).

For a clarification of the different propositions *Beacon* has been claimed to support, see Shapiro & Coquillette, *supra* note 141, at 445-46.

273. 359 U.S. 510. The *Beacon* Court held that when trying legal issues first would threaten irreparable harm to a party, the trial court might in its discretion decide to try the equitable issues first. *See* note 174 *supra* for facts and central holding of *Beacon*.

274. 439 U.S. 322, 334 (quoting Katchen v. Landy, 382 U.S. 323, 339 (1966)).

275. 439 U.S. at 334.

276. Petitioner in *Katchen* claimed that a bankruptcy court's summary order that he surrender certain alleged voidable preferences was a denial of his seventh amendment right to

Parklane fits comfortably within the framework of the Court's prior seventh amendment analysis. Yet, even though the Court used historical allusions, it cannot be denied that elsewhere and in *Parklane* the flexible approach represents a balancing of competing interests.[277] *Parklane* is reasonable if assessed in terms of competing policies.[278] An equitable judgment did have estoppel effect in a court of law in 1791.[279] Expansion of the effect to include nonmutual parties does not depart from the 1791 practice in a major way. Moreover, the incursion on the 1791 model is not significant because there is no evidence that framers of the seventh amendment intended the right to trial by jury to provide citizens with a defense to collateral estoppel.[280] Hopelessly crowded court dockets, judicial embarrassment from inconsistent judgments, and harrassment from multiple lawsuits demand the development of collateral estoppel.[281] There is no logical reason to deny the effect merely because of an absence of mutuality.

V. THE *Parklane* Impact — Use or Abuse?

A. *Current Scope of Offensive Collateral Estoppel*

The *Parklane* rule was neither a blanket approval nor rejection of the collateral estoppel doctrine, but rather was a recognition that under certain circumstances offensive collateral estoppel is a useful doctrine. The

jury trial. The Court held that bankruptcy proceedings were one of the permissible exceptions to the rule of *Beacon;* providing a jury trial would destroy the procedure Congress had prescribed in the Bankruptcy Act. 382 U.S. at 339.

277. *See* Comment, *supra* note 158, at 735; Comment, *Offensive Collateral Estoppel: Reconciling the Jury Trial Right and Judicial Convenience — Parklane Hosiery Co., Inc. v. Shore,* 5 U. DAYTON L. REV. 207, 211 (1980).

278. For policy considerations, see Note, *supra* note 145, at 871-73; Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions — Rachal v. Hill,* 71 COLUM. L. REV. 1329, 1337 (1971) (misallocation of SEC effort if private plaintiff is unable to derive estoppel benefit); Comment, *Federal Courts and Procedure — Collateral Estoppel — Collateral Estoppel Effect on Prior Equitable Determinations in SEC Actions Upon Subsequent Private Legal Actions Does Not Violate the Seventh Amendment Right to Jury Trial,* 10 CUM. L. REV. 619, 631 (1979) (makes subsequent class action suit a police weapon for the SEC). *See also* Comment, *supra* note 140, at 358-61 (allowing defendant consent decree by right may frustrate goals of antitrust law).

279. Shapiro & Coquillette, *supra* note 141.

280. *Id.*

281. For a comment that *Parklane's* impact on judicial economy is mixed, see Comment, *Judgments — Res judicata — Estoppel — Right to Trial by Jury — A Party Who Had Issues Determined Against Him in a Prior Equity Action May Be Collaterally Estopped from Relitigating Identical Issues in a Subsequent Legal Action Notwithstanding the Nonmutuality of the Parties, and Without Violating the Right to a Jury Trial,* 48 CIN. L. REV. 611, 619 (1979). *See also* Note, *supra* note 238, at 1018 (length of administrative agency litigation will increase and frustrate main goal of agency proceedings); Note, *Collateral Estoppel and the Right to a Jury Trial,* 57 NEBRASKA L. REV. 863, 875-76 (1976) (threat of estoppel will increase SEC power to obtain consent decrees requiring as much private litigation as if there were no estoppel effect).

Court did offer guidelines for determination of its applicability and did articulate instances where its use should be avoided:[282] "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, . . . for other reasons, the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow [its] use . . . ."[283]

The unfairness concept includes instances where a defendant did not vigorously litigate because of nominal damages or lack of foreseeability regarding potential exposure,[284] where reliance is placed on a judgment which is itself inconsistent,[285] where the second action provided procedural opportunities not available in the previous action,[286] and where for other reasons, use would be unfair.[287] Then the Court, in a step by step approach, applied these guidelines to the facts before them and concluded that application of offensive collateral estoppel was appropriate.

The Supreme Court displayed its own uncertainty regarding the scope of offensive collateral estoppel when it defined the doctrine by identifying instances where the doctrine is inapplicable. Currently, the doctrine is best defined by examination of its application in various circumstances and of any trends in the use of "broad discretion" by federal courts. There is great potential for the use or abuse of collateral estoppel by skillful and imaginative courts and attorneys. In an extreme situation, a court may have to decide the applicability of collateral estoppel between a "wait and see" plaintiff[288] and a defendant who has the resources and ingenuity to litigate the same issue indefinitely. Clearly, a court's ability to use broad discretion provides the only appropriate resolution to this problem.

B. *Supreme Court Decisions following* Parklane

In *Montana v. United States*,[289] the Supreme Court emphasized sev-

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282. 439 U.S. at 330.

283. *Id.* at 331.

284. *Id.* at 330-31. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3 App., 1976).

285. 439 U.S. at 330. *See* cases cited in note 314 *infra;* Katz v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979) (possible jury compromise barred use of offensive collateral estoppel); *accord,* 1B J. MOORE, *supra* note 2, at § 0.443[4]; RESTATEMENT (SECOND) OF JUDGMENTS § 88(4) (Tent. Draft No. 3 App., 1976).

286. 439 U.S. at 330. *See* Standefer v. United States, 447 U.S. 10 (1980).

287. 439 U.S. at 331. *See* Olegario v. United States, 629 F.2d 204, 215 (2d Cir. 1980) (offensive collateral estoppel denied because naturalization litigation was an issue of national concern which necessitated re-examination of the issue).

288. 439 U.S. at 330.

289. 440 U.S. 147 (1979). The Government, in a second action in federal court, was barred from relitigating the issue of validity of gross receipts tax imposed on public contractors. The issue had been decided adversely by the Montana Supreme Court. Although this is a defensive application of collateral estoppel, the Court examined other instances where col-

eral points regarding party and issue identification in the collateral estoppel analysis. In looking to substance over form, it held that although the United States was not the actual litigant in the initial proceeding, it had significant interest and control in the previous action.[290] This interest and control dictated that the Government be precluded from relitigation.

Perhaps in recognition of gaps in *Parklane*, the Court held that the collateral estoppel analysis must inquire into whether the issues in each action were substantially the same, whether changes in controlling facts or law necessitated relitigation of an issue, and whether other special circumstances barred preclusion.[291] Preclusion, in addition to protecting litigants and promoting judicial economy, now "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[292] Thus, the potential impact of collateral estoppel recognized in *Parklane* was expanded in *Montana*.

The Supreme Court has maintained its preference for a general rule and apparently has no intention of narrowing the *Parklane* rule or of ranking the factors in the "full and fair opportunity" analysis.[293] The Supreme Court has expressly stated that it will not fashion any collateral estoppel doctrine. It will, instead, determine whether the traditional estoppel requirements apply in a case by case approach.[294] The Court does mention that policy arguments which promote the use of the doctrine are factors to be considered.[295] The implications of the *Parklane* test can be determined only by a review of federal court decisions, for it is there, not in the Supreme Court, that trends will develop. Limitations inherent in a "broad discretion" analysis dictate that the remainder of this article focus on different areas of the law and the application of collateral estoppel to each area.

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lateral estoppel may result in unfairness to litigants. This decision was announced approximately one month after the *Parklane* decision.

290. *Id.* at 155.

291. *Id. Compare* the factors examined in *Montana with* those contained in RESTATEMENT (SECOND) OF JUDGMENTS §§ 68.1, 88 (Tent. Draft No. 3 App., 1976). Close scrutiny reveals acceptance by the Court of most restrictions in the RESTATEMENT. *See generally* A. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464 (1981).

292. 440 U.S. at 154.

293. Allen v. McCurry, 101 S. Ct. 411, 415 n.7 (1980). For a discussion of the case, see text accompanying note 340 *infra*. Defensive use of collateral estoppel was granted because the plaintiff had a full and fair opportunity to litigate and comity between state and federal courts should be promoted. 101 S. Ct. at 415.

294. 101 S. Ct. at 415 n.7.

295. *Id.* at 415.

C. *Areas of Law and Use of Collateral Estoppel*

1. Tort Actions

a. Personal Injury—Negligence

Collateral estoppel may have valuable application to liability, contribution, and indemnification problems in tort law. Judicial economy may realistically be promoted by using the doctrine where issues are straightforward, parties are limited, and the preclusive effect is carefully tailored to the circumstances. Litigants may effectively use offensive collateral estoppel to pin defendants to a previous adverse issue determination; however, problems arise when offensive use attempts to bar defendants who are remotely related or to preclude issues which are not sufficiently similar.

In *Southern Pacific Transportation v. Smith Material Corporation,*[296] plaintiff railroad was successful in limiting its liability by offensive use of a previous declaratory judgment which apportioned contribution based on degree of fault.[297] The Fifth Circuit anticipated possible abuse of the ruling and created an exception which cancelled the preclusive effect if the railroad was sued by a passenger seeking to hold the railroad to a higher standard of care.[298]

The preclusive effect does not necessarily have to be limited to the same cause of action. *Collins v. Seaboard Coastline Railroad Company*[299] indicates that offensive collateral estoppel can be extended to aid a plaintiff who has suffered because of the injury or death of another. In *Collins,* the wife of an injured automobile passenger was able to use the previous ruling in her husband's personal injury suit to preclude defendant's relitigating liability in her action for loss of consortium.[300] The district court held that no injustice was placed upon the defendant as he had already litigated the issue of liability.

The ability of an individual to reap the benefits of a plaintiff's verdict is somewhat compromised when the individual is a party to both suits but in a different capacity. In *Alderman v. Chrysler Corporation,*[301] the Eastern District Court of Virginia addressed the application of defensive issue preclusion. Plaintiff individually brought suit for personal injury and lost. She then refiled as administratrix of the estate of her husband in a

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296. 616 F.2d 111 (5th Cir. 1980). The judgment relied upon by plaintiff held that the railroad was 25% liable and the defendant truck company 75% responsible for a collision. *Cf.* Norfolk and W. Ry. Co. v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980) (offensive collateral estoppel denied in similar accident because plaintiff did not meet the mutuality requirement which should be retained in common disaster circumstances).

297. 616 F.2d at 113.

298. *Id.* at 116.

299. 516 F. Supp. 31 (S.D. Ga. 1981).

300. *Id.* at 33.

301. 480 F. Supp. 600 (E.D. Va. 1979).

wrongful death action based on the same accident.[302] The ruling indicated that plaintiff, insofar as her own interests were involved, was precluded from relitigating the issue of breach of warranty. Claims of beneficiaries who had not had their "day in court" were not precluded.[303]

Because the area of tort law allows for many interpretations of negligence[304] and contributory negligence standards, it may be unfair for a previous judgment to bind a defendant where the elements of the standards are significantly different. Concern will be raised when a previous judgment which barred recovery because of contributory negligence subsequently is used to preclude liability litigation in a comparative negligence jurisdiction. As *Parklane* indicates, it will be in the discretion of the trial court to review the issue and determine whether interests of fairness compel relitigation of the issue.[305]

Offensive collateral estoppel, when correctly applied, may reduce the amount of time and resources required of courts and litigants. When a careful judge, using "broad discretion," constructs a concise pretrial order or grants partial summary judgment limiting the scope of issues and evidence to be presented, both parties to the lawsuit may enjoy benefits.[306]

b. Products Liability Actions

The use of offensive collateral estoppel in products liability actions involves both potential benefits and risks to the litigants.[307] The benefits may be recognized when a defendant has manufactured a product which causes injury to numerous plaintiffs and the issues presented in each ac-

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302. *Id.* at 604. The district court had to balance the unfairness of allowing Alderman to relitigate the breach of warranty allegation against the unfairness of preclusion to beneficiaries who were not parties to the first suit. The issue is further complicated since Alderman was obviously a beneficiary under the second suit.

303. *Id.* at 608.

304. *See* Young v. United States, 518 F. Supp. 921 (S.D.N.Y. 1981). Offensive collateral estoppel was refused in action brought under the Federal Tort Claims Act. The Government was allowed to relitigate adequacy of warnings and consent form for swine flu vaccination which had been held inadequate under Ohio law. The district court held that collateral estoppel did not apply so that adequacy of warning could be determined by New York and federal standards. *But see* Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979).

305. 439 U.S. at 331.

306. *See* Friends for all Children, Inc., v. Lockheed Aircraft Corp., 497 F. Supp. 313, 315 (D.D.C. 1980). A previous decision regarding causation of injury to infant airline passengers precluded defendant's relitigation of that issue. The case demonstrates the effective use of motions *in limine,* motions for partial summary judgment, pretrial orders, and special verdicts of juries to appropriately identify precluded issues. *Id.* at 315-16.

307. *See generally* Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal,* 15 NEW ENGLAND L. REV. 1 (1979). The author recognizes the potential unfairness to manufacturer-defendants of the use of offensive collateral estoppel and proposes to limit its use by preserving the privity requirement and by narrowing the use to situations where the product defects are proven by empirical evidence.

tion are identical. However, injustice to a defendant may result when issues are not narrowly construed and the preclusive effect is too expansive. Asbestos litigation, particularly in the district courts of Texas, exemplifies the potential for both use and abuse.

In *Flatt v. Johns-Manville Sales Corporation*,[308] plaintiff was able to preclude two defendant manufacturers from relitigating several issues which were elements of the strict liability allegation.[309] This was a disturbing ruling because one manufacturer had not been involved in previous litigation and did not manufacture the type of product which had been the subject of litigation.[310] The use of offensive collateral estoppel established for the plaintiffs that products containing asbestos were defective and unreasonably dangerous to users, that asbestos was a known cause of lung disease and that no "state of the art" evidence could be presented.[311] After determining that threshold collateral estoppel had been satisfied,[312] the district court held that no additional procedural advantages were present,[313] inconsistent verdicts did not prohibit preclusion,[314] and that estoppel effect was at least foreseeable to defendant Johns-Manville.[315]

In a later asbestos action,[316] defendants' challenge to the repeated use of offensive collateral estoppel was rejected. Defendants, who had not been parties to previous actions, were determined to have sufficient interests and relation to allow estoppel to be used against them.[317] Recognizing

308. 488 F. Supp. 836 (E.D. Tex. 1980). Plaintiffs sued manufacturers alleging strict liability under RESTATEMENT (SECOND) OF TORTS § 402A (1965).

309. 488 F. Supp. at 838-41.

310. *Id.* at 841. Co-defendant Certain-Teed was not a party to any adverse judgment in asbestos litigation. The instant manufacturers' products were cement pipes containing asbestos; the previous defendants' products were insulation products. For previous rulings in asbestos litigation in this jurisdiction, see Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973) (insulation products containing asbestos found unreasonably dangerous to users), *cert. denied*, 419 U.S. 869 (1974); Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980) (offensive collateral estoppel allowed but plaintiff failed to prove sufficient exposure).

311. 488 F. Supp. at 841-42.

312. *Id.* at 840.

313. *Id.* at 841. The district court reasoned that federal procedural rules currently in effect were those operating at the time of previous actions for which collateral estoppel effect was sought.

314. Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980). For cases in other jurisdictions which rejected offensive collateral estoppel, see McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 355 (S.D. Miss. 1980); Tretter v. Johns-Manville Corp., 88 F.R.D. 329 (E.D. Mo. 1980).

315. 488 F. Supp. at 841. The court *did not* state whether the estoppel effect was foreseeable by defendant Certain-Teed. Query: would the unforeseeable exception cited in *Parklane* prohibit estoppel effect against Certain-Teed?

316. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981).

317. *Id.* at 1361. The Amended Omnibus Order clearly describes the rulings regarding precluded issues, issues to be proven at trial and the court's desire that "discretion" be

the potential impact of the decision on defendants who had not participated in previous litigation, the Texas District Court allowed the manufacturers to file an interlocutory appeal to the Fifth Circuit.[318]

Although defendants may argue undue hardship, plaintiffs still must prove the sufficiency of the asbestos exposure, the injury, and manifestation of that injury.[319] The ultimate effect of the rulings is unknown. The *Flatt* decision should alert asbestos manufacturers nationwide that such use of offensive collateral estoppel may have significant effect upon the industry in the future. This rule represents an extreme, if not excessive extension of the "full and fair opportunity" test and demands further judicial review.

In *Ezagui v. Dow Chemical Corporation,*[320] offensive collateral estoppel regarding adequacy of a drug's package insert warning was not prohibited because of previous inconsistent verdicts.[321] The effect of this ruling was magnified since inadequacy of warnings establishes "a prima facie case of product defect"[322] in the Second Circuit. In establishing product defect through inadequacy of warning, another factor of subjectivity is added, and the impact of collateral estoppel and the potential for unfairness is increased.

As indicated by the *Flatt* and *Ezagui* decisions the effects of offensive use of collateral estoppel is unlimited. "Fairness" must be closely analyzed since the effect of one adverse judgment may be applied to a manufacturing defendant currently unidentified. If issues of liability are given preclusive effect, will this effect extend to cover punitive awards where a manufacturer is found to be guilty of wanton or wilful misconduct?[323]

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reviewed.

318. *Id.* at 1363. In Brief for Petitioner, Johns-Mansville v. Hardy, No. 81-2204 (5th Cir., filed Sept. 18, 1981) Owens-Illinois, urged that the *Hardy* district court ruling of identity of interests violated due process because the privity requirements upheld in *Parklane* had been violated. *See* 439 U.S. at 327 n.7. *Accord, In Re* Queeny/Corinthos, 503 F. Supp. 365 (E.D. Penn. 1980) (offensive collateral estoppel denied in products liability action because defendant was neither a party, privy, or participant in previous litigation and therefore did not have opportunity to litigate).

319. 488 F. Supp. at 842.

320. 598 F.2d 727 (2d Cir. 1979). In the medical malpractice and products liability action, the plaintiff was able to use a previous decision, Parke-Davis & Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969), to preclude relitigation of the adequacy of a warning for a vaccination.

321. The inconsistent verdict, based upon introduction of new evidence relating to product/chemical defect, was Vincent v. Thompson, 50 A.D.2d 211, 377 N.Y.S.2d 118 (App. Div. 1975). This decision was determined not to affect the previous Eighth Circuit decision regarding warning.

322. 598 F.2d at 733.

323. *See In Re* Northern Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation, No. C 80-2213 S.W. (N.D. Cal. June 25, 1981) (conditional order certifying nationwide class of women for litigation of punitive damage claim). The class represents those women who allege that they have been injured because of their use of the Dalkon Shield, an intrauterine

The application of "broad discretion" in products liability actions must carefully balance the potential for unfairness against interests in protecting litigants from expense and harassment of relitigation.

2. Criminal Actions

It has been established that resolution of issues in criminal proceedings may be the basis of collateral estoppel in subsequent civil proceedings.[324] The overall acceptance of the doctrine depends on the verdict reached in the criminal proceeding and the type of court which is hearing the subsequent action. Special interests including defendant's fifth amendment protections[325] and the government's interests in prosecution[326] are factors which cannot be ignored. Because of double jeopardy protections, the use of offensive collateral estoppel in two or more criminal proceedings is questionable. Offensive use of criminal convictions in later civil proceedings is frequent and appropriate. In subsequent civil proceedings, questions may be raised regarding differences in procedural and evidentiary practices and the "full and fair opportunity" must be adjusted to appropriately analyze the circumstances.

a. Use of Previous Criminal Verdicts in Subsequent Criminal Actions

In *Standefer v. United States*, the petitioner challenged his indictment for aiding and abetting.[327] He attempted to assert defensive collateral estoppel because the principal in the alleged activity had been previously acquitted on certain counts.[328] Estoppel was sought because the Government had been given one full and fair opportunity to litigate issues regarding his involvement.

The Supreme Court rejected estoppel because of the undue hardship which would be placed upon the prosecution. Limitations included re-

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contraceptive device manufactured by A.H. Robins Co., Inc. *But see In Re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (preliminary trials as to damages for defaulting manufacturers have no effect on defendants with liability actions pending). *See also In Re* Nissan Motor Corp. Antitrust Litigation, 471 F. Supp. 754 (S.D. Fla. 1979). *See generally* Weinberger, *supra* note 307, at 36-39.

324. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1961). *See generally* Note, *Civil Procedure — The Admissibility of Criminal Convictions as Collateral Estoppel in Subsequent Civil Actions*, 13 WAKE FOREST L. REV. 445 (1977); *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

325. United States v. Keller, 624 F.2d 1154, 1157 (3d Cir. 1980) (estoppel barred introduction of evidence regarding previous acquittal of defendant).

326. Standefer v. United States, 447 U.S. 10, 24 (1980).

327. *Id.* at 11. The principal, an Internal Revenue Service agent, had been convicted on several counts of accepting paid vacations from the head of Gulf Oil Corporation's tax department. *Id.* at 12.

328. *Id.* at 12-13.

strictions in discovery and evidentiary procedures and prohibition of appeal or judicial review when an acquittal was clearly against the weight of the evidence.[329] A proposal for pretrial hearings in a criminal action to determine possible deprivation of "full and fair opportunity" was rejected because it would conflict with interests in judicial review and economy.[330] Perhaps the most important factors considered by the Supreme Court in estoppel determination were the "important federal interest in the enforcement of criminal law"[331] and vindication of the public interest.[332]

The "full and fair opportunity" test merges with fifth amendment double jeopardy concerns when the prosecutor attempts to use convictions or acquittals offensively against the defendant.[333] The Third Circuit Court of Appeals held that application of collateral estoppel must be considered because of recent multiple statutory offenses arising from one criminal act.[334] Collateral estoppel may protect a defendant not only from reprosecution but also from introduction of evidence of crimes of which defendant was acquitted.[335]

b. Use of Previous Criminal Verdicts in Subsequent Civil Actions

The use of a previous criminal conviction in subsequent civil proceedings requires a different analysis of the previous criminal proceeding than that discussed above. More specifically, emphasis is placed on identity of parties in the actions, the verdict of the criminal proceeding and the similarities in the factual circumstances.

In *Allen v. McCurry*,[336] the Supreme Court held that plaintiff was barred, in his civil action, from relitigating the constitutionality of search

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329. *Id.* at 22-23. "Under contemporary principles of collateral estoppel [these factors] strongly [militate] against giving an acquittal preclusive effect." 447 U.S. at 23. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 3, 1976).

330. 447 U.S. at 24.

331. *Id. Accord,* RESTATEMENT (SECOND) OF JUDGMENTS §§ 68.1(e)(i) and 88(8) (Tent. Draft No. 3, 1976).

332. 447 U.S. at 25.

333. 624 F.2d at 1158-59. Plaintiff, the prosecutor, should not be allowed "two bites of the apple" and courts should scrutinize any attempts to separate actions which would be analogous to a "wait and see" plaintiff. *Id.* at 1157. Scrutiny should be similar to that used to determine whether the plaintiff could have easily joined the first action. 439 U.S. at 331.

334. 624 F.2d at 1157 (citing Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970)).

335. 624 F.2d at 1157. *See* United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979). *But see* Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1978), *cert. denied,* 444 U.S. 877 (1979). The *Keller* court did not reach a conclusion regarding the constitutional scope of collateral estoppel. 624 F.2d at 1159-60. Because of inter-circuit conflict, the extension of constitutional scope will probably be offered to the Supreme Court for review.

336. 101 S. Ct. 411 (1980). Plaintiff had been convicted on heroin and assault charges. He then filed a civil action suit based on 42 U.S.C. § 1983 (1979). *See* Engleman v. Harvey, 518 F. Supp. 655 (E.D. Mo. 1981) (plaintiff collaterally estopped from relitigating illegality of a wiretap).

and seizure because the issue was thoroughly addressed in the state court criminal proceedings.[337] Relying on *Montana*, the Court held that essential issues of fact previously determined could be used to preclude litigation in a party's different cause of action. Plaintiff's inability to file a federal habeas corpus was determined not to compromise his "full and fair opportunity" afforded in the criminal proceeding and appeal.[338]

A criminal conviction may be used offensively in a civil action to preclude defendant's claim that no wrong was committed. These situations must be closely examined so that only identical issues are precluded. In a civil suit for damages resulting from deprivation of constitutional rights and assault and battery,[339] a plaintiff was able to benefit from defendant's previous criminal conviction. To promote and maintain consistency in judgments, the district court allowed collateral estoppel to apply to the pendent state claim based on assault and battery since the issues regarding the intentional tort in the civil and criminal proceedings were identical.[340]

Previous criminal decisions are more frequently used for estoppel purposes in civil proceedings because of the nature of burden of proof. It has been held that a previous acquittal in a criminal action did not bar relitigation of the issue in a civil action.[341] The rationale was that there may have been enough evidence to convict on a preponderance of the evidence even though there had not been enough to convict on the criminal standard of beyond a reasonable doubt.[342] When there has been a conviction based on the criminal standard, there is a strong implication that the preponderance standard would also be met.[343]

In determining the use of collateral estoppel based on previous criminal proceedings, it is necessary to examine the identity of the party seeking estoppel, the type of proceedings, the possibility of constitutional considerations and the presence of any special interests or concern. The courts demonstrate some reluctance in applying estoppel against the Govern-

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337. 101 S. Ct. at 413.

338. *Id.* at 418.

339. Vela v. Alvarez, 507 F. Supp. 887 (S.D. Tex. 1981). *See* Wolfson v. Baker, 623 F.2d 1074, 1075 (5th Cir. 1980) (criminal indictment for securities violation used defensively in civil action to prohibit relitigation of plaintiff's knowledge of illegality).

340. 507 F. Supp. at 890-91. To do otherwise would ignore the criminal conviction and defeat the purposes of collateral estoppel as stated in *Parklane.*

341. *See* Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980) (dismissal of federal charges for assault and battery did not prohibit litigation by private litigant in civil court).

342. *Id.* at 89.

343. *See* SEC v. Everest Management Corp., 466 F. Supp. 167, 174 n.9 (S.D.N.Y. 1979) (plaintiffs sought injunctive relief for future violations). "Because of the higher standard of proof and the numerous safeguards surrounding a criminal trial, a conviction . . . is *conclusive*" in later civil actions between the same parties and concerning same issues. *Id.* at 172 (emphasis added).

ment unless there is a clear double jeopardy violation. Private litigants, especially those who may have been victims of criminal activity, may be afforded estoppel benefit. They must prove that issues essential to their civil proceeding are identical to those essential to a previous criminal conviction. The threshold requirements of *Parklane* and *Montana* are essential whenever a collateral estoppel argument is based on previous criminal proceedings.

3. Administrative Proceedings

The use of an administrative determination with collateral estoppel effect was approved by the Supreme Court in *United States v. Utah Construction & Mining Co.*[344] There have been many challenges to this use because some judicial safeguards are absent in administrative hearings. Again, the "full and fair opportunity" test must be adjusted and balanced against special governmental interests in promoting confidence in the administrative agency.[345] It is conceivable that both the fairness to litigants and confidence in agencies may be maintained when courts appropriately exercise their discretionary power.

Continental Can Co. v. Marshall[346] strongly illustrates the application of fairness principles in administrative and subsequent civil proceedings. In this case, the manufacturer was faced with numerous citations regarding noise levels at approximately eighty plants.[347] Continental argued that continual citations and hearings before the Secretary of Labor constituted harassment and violation of due process.[348] The Court of Appeals for the Seventh Circuit analyzed three issues regarding application of estoppel: 1) whether collateral estoppel threshold requirements were met;[349] 2)

344. 384 U.S. 394, 421 n.18 (1966). The use is approved "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Id.* at 422. *See generally* Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123 (1977); Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977).

345. This is not to say that administrative agency decisions should be given *carte blanche* approval, but rather interests in consistency and cooperation between the courts and agencies are furthered where decisions are honored by the other party. Since administrative agencies were organized because of economy and streamlining concerns, prohibition of collateral estoppel would smack in the face of that very purpose.

346. 603 F.2d 590 (7th Cir. 1979). Continental's previous attempt to use offensive collateral estoppel had been rejected by the OSHA Review Commission. *Id.* at 593.

347. *Id.* at 592. Manufacturer sought injunctive relief against present and future prosecutions by the Secretary of Labor. Continental was cited for Occupational Safety and Health Act violations under 29 C.F.R. § 1910.95(b)(1) (1974).

348. 603 F.2d at 593. Fairness demanded that both parties be bound by previous stipulations and the Administrative Law Judge's ruling that Continental implement only those improvements which were economically and technically feasible. *Id.* at 592.

349. *Id.* at 593-94. The court decided the issue in previous Continental litigation was identical to the instant one and that differences in noise levels, geographic locations and

whether the plaintiff had to exhaust all administrative channels before obtaining judicial relief;[350] 3) whether denial of use would bear undue hardship upon plaintiff so as to justify injunctive relief.[351]

In determining whether collateral estoppel was appropriate, the "full and fair opportunity" test was adjusted or expanded to consider procedures unique to administrative hearings.[352] A balancing between the undue hardship placed upon Continental in exhausting all administrative remedies and the exhaustion of administrative remedies doctrine favored protecting plaintiff from repetitive litigation. In gaining the benefit of collateral estoppel, the manufacturer was able to avoid untold litigation expense and hopefully, to channel those funds to rectify the problems under consideration.

Often, policy considerations and changes in legal climate[353] dictate that an issue, which could theoretically be the basis of collateral estoppel, be relitigated.[354] In *Western Oil & Gas Ass'n v. United States E.P.A.*,[355] the Environmental Protection Agency was not barred from relitigating the issue on air quality control standards since California's standards were unique to that state and independent of other states' findings.[356] The Ninth Circuit upheld the *Parklane* mandates when it stated that the "circumstances of each case must provide the touchstone for decision."[357]

Administrative agencies have also been barred from relitigating issues which have previously been fully litigated in state agency proceedings.[358] In *United States v. ITT Rayonier, Inc.*, the Environmental Protection Agency sought an enforcement action against a pulpmill regarding water

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industrial machinery were insignificant. *Id.* at 595. The court probably felt that the defendant was changing the rules in the middle of the game, since he earlier stipulated that findings for one plant would apply to several others. *Id.* at 592, 595. Issues in the previous administrative hearing were identical, were actually litigated, were essential to the judgment and were final. *See* Hughes v. Heyl & Patterson, Inc., 647 F.2d 452 (4th Cir. 1981) (offensive use denied because issues not sufficiently identical in this action to recover benefits from the employer corporation).

350. 603 F.2d at 596-97 (citing United States v. American Honda Motor Co., 273 F. Supp. 810 (N.D. Ill. 1967) (exhaustion rule not compromised because agencies had made factual determination regarding the identical issues).

351. 603 F.2d at 597.

352. *Id.*

353. Western Oil & Gas Ass'n v. United States E.P.A., 633 F.2d 803, 809 (9th Cir. 1980).

354. *Id.*

355. *Id.*

356. *Id.* The case is "sufficiently separable from [another] case to warrant reexamination of legal issues." *Id.* Perhaps in the area of environmental law, differences in geographic location, climate conditions, and population trends will bar collateral estoppel effects between federal forums. This may be an area where requirements of identical issues may be carried to an extreme.

357. *Id.* at 809-10.

358. United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980).

pollution discharge permits.[359] In the interests of judicial economy and cooperation, the Ninth Circuit held that the relationship between the Environmental Protection Agency and the Washington Department of Ecology was "sufficiently 'close' "[360] to warrant issue preclusion.[361] By supporting the state agency, the Court may have attempted to promote cooperation between agencies who shared mutual interests in enforcement.[362]

Administrative proceedings seek finality in decisions in the same manner as civil proceedings. This finality promotes judicial economy, avoids needless relitigation, fosters confidence in the agency,[363] and maintains consistency in judgments.[364] Because of the interest in economy associated with development of administrative agencies, collateral estoppel should be applied when the guidelines of *Parklane* are met and no unfairness results. The potential fairness or unfairness resulting from the use of collateral estoppel is only determined by analysis of the use of "broad discretion" and its adherence to guidelines offered by *Parklane.*

V. CONCLUSION

The search for a fair and just result in the application of collateral estoppel on a case by case approach is the very essence of our judicial system today. The mutuality requirement has not been totally eroded; nor has the application of nonmutuality been exclusively adopted. Both rules provide a vehicle by which the application of collateral estoppel can serve judicial economy without sacrificing fairness. Since *Parklane* the courts appear to apply neither rule rigidly where unfair results would yield.

Parklane has been a catalyst in the development and change of offensive collateral estoppel. The *Parklane* Court's adherence to the nonmutuality rule highlighted a struggle within the nation's courts to realize appropriately the goal of collateral estoppel: fairness coupled with judicial economy. *Parklane* encourages discretionary practices. The application of

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359. *Id.* at 999.

360. *Id.* at 1003.

361. *Id.*

362. *Id. See* Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979), *cert. denied,* 445 U.S. 952 (1980).

363. *See* Consolidated Express, Inc. v. New York Shipping Ass'n, 641 F.2d 90 (3d Cir. 1981). The Third Circuit, on remand from the Supreme Court, stayed consideration of the collateral estoppel issue pending final factual determinations of the National Labor Relations Board. The Supreme Court, by this action, demonstrated its approval of both the agency's fact finding capacity and estoppel use of previous administrative decisions.

364. *See* Moore v. Allied Chemical Corp., 480 F. Supp. 377 (E.D. Va. 1979). Previous rulings by Occupational Safety and Health Association barred plaintiff Moore from alleging that he was unaware of the danger of Kepone in his action for intentional infliction of emotional distress. The findings of fact which were the basis of collateral estoppel were the result of admissions and stipulations made in an administrative proceeding. *Id.* at 386.

offensive and defensive collateral estoppel in the federal courts after *Parklane* demonstrates both the benefits and harms which may result from the exercise of broad discretion. The Court laid down a general rule with relatively few guidelines. Future expansion regarding issue and party identification is unpredictable.

Certain safeguards have been either expressly or impliedly incorporated into the doctrine; however, these are not absolute. The United States Supreme Court noted that the privity requirement will be maintained to avoid constitutional violations. As evidenced by the *Flatt* decision, however, interpretation of privity may be extended so far as to effectively abrogate the requirement. Also, an examination of all the circumstances relevant to a particular action promotes fairness in a court's broad discretion. This, too, may be carried to such an extreme that the doctrine is either misapplied or not applied at all. The instances where collateral estoppel should not be applied, as identified by the Supreme Court, are subject to varying interpretation. This may work to a party's detriment or advantage. Analysis of the federal courts' application of collateral estoppel indicates that the doctrine has and will be a source of debate regarding the appropriateness of discretionary practices.

Inherent in any new doctrine is the tedious process of carving out guidelines which limit discretion and rigidity. New standards will undoubtedly emerge by judicial accretion. The future should eliminate the extremes, and some degree of predictability and a return to judicial economy is foreseeable. Perhaps a temporary sacrifice in judicial economy in order to develop flexible standards is a small price to pay where the goal, indicative of the doctrine itself, is for a more just result.