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OFFENSIVE COLLATERAL ESTOPPEL AND THE LAW OF CONSPIRACY: A NEW APPLICATION FOR A NEW PRAGMATISM

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INTRODUCTION

The scope and application of the collateral estoppel doctrine[1] have expanded dramatically in the last ten years. With decisions in *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*[2] and *Parklane Hosiery Co. v. Shore*,[3] the United States Supreme Court has recognized that the traditional, rigid common law principles limiting the use of collateral estoppel, *e.g.*, mutuality of estoppel,[4] have no place in today's litigation-inundated judicial system.[5] In authorizing both the "offensive"

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1. Collateral estoppel is the legal doctrine which recognizes that once an *issue* has been litigated by certain parties, those parties cannot relitigate the same issue in a subsequent action between the same parties or parties in privity with them. As used in this article, collateral estoppel is synonymous with "issue preclusion," and is to be distinguished from res judicata, or "claim preclusion." *See, e.g.*, Carr v. United States, 507 F.2d 191, 193 n.5 (5th Cir. 1975), *cert. denied*, 422 U.S. 1043 (1975); United States v. Burch, 294 F.2d 1, 5 n.4 (5th Cir. 1961). *Compare* Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979) (res judicata or claim preclusion bars further claims based on the same cause of action), *with* Speaker Sortation Systems, Div. of A-T-O, Inc. v. United States Postal Serv., 568 F.2d 46, 48 (7th Cir. 1978) (collateral estoppel or issue preclusion is proper when the party had a full and fair opportunity to litigate the *issue* in the prior proceeding).

2. 402 U.S. 313 (1971). *See* notes 51-57 and accompanying text *infra*.

3. 439 U.S. 322 (1979). *See* notes 58-80 and accompanying text *infra*.

4. Mutuality of estoppel requires that unless a finding made in previous litigation is binding on both parties to a subsequent action, neither party can raise the finding to preclude relitigation of the issue. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979).

5. *See* Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 322 (1971); *accord*, Public Serv. Mutual Ins. Co. v. Cohen, 616 F.2d 704, 707 (3d Cir. 1980) (mutuality is no longer adhered to under the law of Pennsylvania); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 617 n.9 (S.D.N.Y. 1979) (mutuality of estoppel

and "defensive" use of collateral estoppel,[6] the Court recognizes that a more pragmatic approach to collateral estoppel is needed, an approach which allows the doctrine truly to serve its intended purpose: the avoidance of needless and costly relitigation of issues already decided after a full and fair opportunity to litigate those issues.

One area of substantive law in which collateral estoppel is particularly important to private litigants is antitrust law. Congress has recently amended the Clayton Antitrust Act[7] to mandate the use of collateral estoppel against a defendant in private civil antitrust litigation once the defendant has been convicted of a criminal antitrust violation.[8] Congress has, accordingly, rec-

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is a "dead letter" in New York); Hann v. Carson, 462 F. Supp. 854, 864 (M.D. Fla. 1978) (the mutuality requirement has been rejected as an essential element for the federal principles of collateral estoppel, especially in the Fifth Circuit); *In re* Anthracite Coal Antitrust Lit., 78 F.R.D. 709, 720 (M.D. Penn. 1978) (the requirement of mutuality is no longer the law of the federal courts).

That the Supreme Court has, in recent years, been quite conscious of the overcrowded dockets in the federal courts is evident from the Court's reference to this problem in numerous and diverse rulings. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (refused to grant broad interpretation of rule 10b-5 for fear of "vexatious litigation"); Stone v. Powell, 428 U.S. 465 (1976) (limiting the availability of habeas corpus remedies for violations of fourth amendment rights).

Congress has likewise addressed this problem by creating 111 additional district judgeships and 25 additional circuit judgeships in 1978. S. REP. NO. 95-117, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3569, 3570. In 1950 the volume of cases filed in the district courts was 92,000, compared with 171,600 filed in 1976. Although one might question the relevance of an overcrowded judicial system in determining the extent of substantive rights, one cannot dispute that the federal courts are significantly overwhelmed by a litigation "explosion," and the Supreme Court is sensitive to that fact.

6. The Supreme Court recognized defensive use of collateral estoppel in Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). Defensive use of collateral estoppel occurs when a *plaintiff* has already litigated and lost and is barred from relitigating facts against the new defendant being sued. Offensive use of collateral estoppel, recognized in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979), occurs when a *defendant* is barred from relitigating an issue decided against him in an action involving a different plaintiff. Thus, in the former case a prior finding is used by a defendant as a shield, while in the latter case the already litigated issue is used by the new plaintiff as a sword. In both cases the mutuality, or identity of parties, requirement is discarded.

7. 15 U.S.C. 16(a) (1980).

8. Congress's amendment to section 5(a) of the Clayton Act was in response to a decision that a criminal antitrust conviction against a defendant could *only* be used as a prima facie evidence of an antitrust violation by the defendant in subsequent private civil antitrust proceedings. Illinois v. General Paving Co., 590 F.2d 680, 681-82 (7th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979). *Contra*, Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176 (E.D. Penn. 1976), *appeal dismissed*, (3d Cir.), *cert. denied*, 435 U.S. 970 (1978); McCook v. Standard Oil Co. of Cal., 393 F. Supp. 256 (C.D. Cal. 1975).

Note that under the previous version of section 5(a) of the Clayton Act,

ognized the importance to the overall deterrence scheme of the antitrust laws of allowing private civil antitrust plaintiffs, armed with the treble damage device, to obtain the fruits of the government's litigation of a defendant's antitrust violation.[9]

An interesting issue concerning the applicability of offensive collateral estoppel in private civil antitrust suits now arises in the context of a criminal antitrust *acquittal*. This issue appears for the first time due to a change in an area of law far removed from substantive antitrust law: the admissibility requirements of the coconspirator exception to the rule against hearsay.[10] The juxtaposition of an expansive view of offensive collateral estoppel against the refinement in admissibility requirements for coconspirator statements creates a situation in which a defendant, even if acquitted of criminal antitrust charges by a jury, might still be precluded from denying liability in a subsequent private civil action.

COCONSPIRATOR STATEMENTS AND THE *JAMES* REQUIREMENTS

All jurisdictions recognize that an out-of-court statement made by a person involved in a conspiracy, during and in furtherance of the conspiracy, is admissible against all persons involved in the conspiracy. When criminal *A* tells undercover agent *B* that criminal *A* and criminal *C* will be glad to sell him a kilo of heroin, if it is shown that a conspiracy exists between *A* and *C*, *B* can testify to *A*'s out-of-court statement in the trial of *C*, even if *A* is not available or subject to cross-examination. While such testimony seems to be classic hearsay,[11] legal schol-

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and the current amended version, no court has considered the possible separation of powers objection to congressional interference in the judiciary's application of an essentially judicial matter, the evidentiary impact of a prior criminal conviction in a subsequent private action. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (Legislative enactment held to invade power of Judicial and Executive departments).

The purpose, effect and background of the Antitrust Procedural Improvement Act are set forth in H.R. REP. NO. 96-874, 96 Cong., 2d Sess. 2, *reprinted in* [1980] U.S. CONG. CODE & AD. NEWS 2752.

9. *Id.* at 2753. The report states:

> Section 5(a) of the Clayton Act currently provides that a final judgment or decree in a government action in which a defendant was found to have violated the antitrust laws can be given rebuttable prima facie effect in subsequent antitrust actions. H.R. 4046 amends that provision to provide that the statute shall not be construed to preclude the application of the common law doctrine of collateral estoppel in a subsequent proceeding.

10. *See* FED. R. EVID. 801(d)(2)(E). Although referred to as the coconspirator exception to the rule against hearsay, coconspirator statements are not hearsay statements at all, but rather party admissions.

11. Hearsay is any out-of-court statement offered to prove the truth of the matter asserted therein. *See* Wheaton, *What Is Hearsay?*, 46 IOWA L.

ars have determined that these coconspirator statements should be admissible against defendants.[12] Whether the basis for admissibility of coconspirator statements is agency theory or admission theory,[13] the fundamental rationale is the need to obtain convictions of those involved in conspiracies.[14] Since the nature of conspiracy is inherently secret, it is argued that unless such statements are admissible at trial conspirators will go free.

Although the need to obtain criminal conspiracy convictions may have led courts to ignore the rigorous requirements of the hearsay rule, the courts have recognized that some safeguards for defendants must be provided before out-of-court statements made by one defendant are admissible against other defendants. These safeguards traditionally have taken the form of admissibility requirements, preliminary findings by the court before out-of-court statements made by one defendant are admitted against others.[15] Thus, the coconspirator statements rule requires that before such a statement is admitted into evidence, it must be shown[16] that: (1) a conspiracy exists; (2) the defendant against whom the statement is offered was a member of the

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REV. 210-11 (1961). The statement by A to B was made out of court and was offered to prove C was involved in the sale of heroin. The function of the rule against hearsay has been referred to as a "testimonial triangle." *See generally* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

12. The defendant does not have to be charged with conspiracy for such statements to be admissible. United States v. Rinaldi, 393 F.2d 97 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968) (statements admissible against others, whether or not a conspiracy is charged); United States v. Messina, 388 F.2d 393 (2d Cir. 1968), *cert. denied*, 390 U.S. 1026 (1968) (statements admissible even though indictment did not charge defendants with conspiracy).

13. *See generally* Levie, *Hearsay and Conspiracy: A Reexamination of the Co-conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159 (1954); Comment, *The Coconspirator Exception to the Hearsay Rule: The Limits of Its Logic*, 37 LA. L. REV. 1101-09 (1977); Comment, *The Hearsay Exception for Co-conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958).

14. Not surprisingly, some authors have challenged the propriety of admission of coconspirator statements because of its pragmatic rationale as opposed to its validity under pure legal analysis. *See generally* Comment, *The Coconspirator Exception to the Hearsay Rule: The Limits of its Logic*, 37 LA. L. REV. 1101-09 (1977); J. WIGMORE, EVIDENCE § 1080 (3d ed. 1940).

The Supreme Court, however, has recognized the validity of admission of coconspirator statements in the face of confrontation clause challenges. California v. Green, 399 U.S. 149 (1970). *See also* Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

15. *See, e.g.*, FED. R. EVID. 104. *See also* United States v. De Lazo, 497 F.2d 1168, 1170 (3d Cir. 1974); United States v. Bey, 437 F.2d 188, 190 (3d Cir. 1971).

16. It is relatively well settled for those who accept the validity of the coconspirator statement rule that it is the court which makes the findings of admissibility. United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Hansen, 569 F.2d 406 (5th Cir. 1978); United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977). However, under prior law, the jury determined when coconspirator

conspiracy shown to exist; and (3) the statement made by the coconspirator was made in furtherance and during the existence of the conspiracy.[17] Moreover, only independent evidence of the defendant's own actions and statements can be used to make these preliminary findings; the coconspirator statements cannot be used to establish the basis of their own admissibility.[18]

Recently, the Fifth Circuit in *United States v. James*[19] considered the admissibility standards for coconspirator state-

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statements could be used against a defendant. Thus, the LaBuy jury instruction on conspiracy provided:

> To convict any defendant of this offense the Government must prove beyond a reasonable doubt the existence of a conspiracy to commit the offense . . . .
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> . . . .
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> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.
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> . . . .
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> If it is established beyond a reasonable doubt that a conspiracy existed, and that the defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of such defendant's presence, done in furtherance of the objects of the conspiracy, and during its existence, may be considered as evidence against such defendant.

LABUY, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, Seventh Circuit Judicial Conference Committee on Jury Instructions § 10.00 (1965).

Note that this instruction, which for years was accepted law, is totally irrational. By requiring the jury first to determine that a conspiracy existed and the defendant was a member of it *beyond a reasonable doubt*, the jury was being told to find the defendant guilty before it could find him "guiltier" by using coconspirator statements. *See* United States v. Santiago, 582 F.2d 1128, 1132 (7th Cir. 1978) ("[t]o expect such a precise untainted jury performance must strain the confidence of even the most ardent admirers of the jury system, and is unnecessary").

17. *See, e.g.*, FED. R. EVID. 801(d)(2)(E) which provides: "A statement is not hearsay if . . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." *See also* United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976) (discussing the necessary elements of a conspiracy indictment).

18. E. DEVITT & C. BLACKMAR, PATTERN JURY INSTRUCTIONS § 27.05 (3d ed. 1977) provides:

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants *until it is established that a conspiracy existed*, and that he was one of its members.

Id. (emphasis added).

19. 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1980).

ments and set forth guidelines trial courts must follow in determining whether such statements are admissible.[20] Because the situation in which a court must make preliminary findings of "guilt" before the jury decides identical issues is unique,[21] the court's coconspirator statement admissibility rules required *two* preliminary findings. When a statement is offered by the government, the *James* court requires that before allowing the jury to hear the evidence the trial court must find *substantial evidence* that a conspiracy exists, the defendant was a member of the conspiracy, and the statement was made in furtherance of the conspiracy.[22] While some courts have held these findings based on substantial evidence[23] to be sufficient to let coconspirator statements go to the jury for consideration as evidence in the case,[24] the court in *James* required the trial court to make further findings before submitting the statements to the jury as evidence. The Fifth Circuit held that before the coconspirator statements are admissible, *at the close of all the evidence in the case*, and after considering all the evidence, the court *must* determine by a *preponderance of the evidence* that: (1) a conspiracy exists; (2) the defendant against whom the coconspirator statements are offered is a member of the conspiracy; and (3) the statements were made in furtherance and during the course of the conspiracy.[25]

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20. Courts have been grappling with the admissibility requirements for years. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801-166 (1979). How this issue will finally be decided is not clear, and a discussion of such a resolution is outside the scope of this article.

21. It should be noted that the coconspirator statement rule is unique in the nature of its admissibility requirements. While the courts must make many preliminary findings of admissibility (*see* note 15 *supra*), only in conspiracy law is the court making a preliminary finding on the ultimate issue that the jury must resolve to convict or acquit. In fact, like the common law of treason where the substantive law itself contains an evidentiary component (the need for two witnesses of overt treasonous activity, Cramer v. United States, 325 U.S. 1 (1945)), the substantive law of conspiracy requires juries to consider only certain evidence, the acts of the defendant, before they can convict.

22. United States v. James, 590 F.2d 575, 581 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1980).

23. "Substantial evidence," although defined in some places as more than a scintilla and less than a preponderance of evidence, is not a precisely defined standard.

24. United States v. Peterson, 549 F.2d 654 (9th Cir. 1977) (requiring only slight evidence); United States v. Calaway, 524 F.2d 609 (9th Cir.), *cert. denied*, 424 U.S. 967 (1975) (slight evidence required).

25. United States v. James, 590 F.2d 575, 582-83 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1980). The Court stated:

> Regardless of whether the proof has been made in the preferred order, or the coconspirator's statement has been admitted subject to later connection, on appropriate motions at the conclusion of all the evidence the court must determine as a factual matter whether the prosecution

It should be remembered that a court making the required *James* findings does not find the defendant guilty. The jury in criminal cases is required to find the defendant guilty beyond a reasonable doubt.[26] But even if the defendant is acquitted, the trial court has been required to find, on the basis of all the evidence, that the defendant was a member of a conspiracy by a preponderance of the evidence, that is, by the *civil* standard of proof.[27] It is these findings which this article contends are available to private plaintiffs in civil antitrust actions to preclude defendants acquitted in criminal cases from relitigating their participation in a price-fixing conspiracy. Once these findings are made, defendants in criminal antitrust actions effectively have been found liable for damages to the plaintiffs they have injured by their antitrust conspiracies. That these judicial findings of conspiracy are binding against defendants in subsequent civil litigation is demonstrated by an analysis of *Parklane Hosiery Co. v. Shore*[28] and its applicability to such *James* findings.[29]

Parklane Hosiery Co. v. Shore and Offensive Collateral Estoppel

In *Parklane Hosiery Co. v. Shore*,[30] the United States Supreme Court affirmed the trend toward expanded use of collateral estoppel. After examining the pragmatic consideration of judicial economy, the Court rejected archaic and technical prerequisites which had hampered application of a doctrine meant

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has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.

If after allowing the jury to hear the evidence and then finding the evidence of conspiracy did not meet the admissibility requirement, the court must decide whether to declare a mistrial or instruct the jury to disregard the coconspirator's statements.

26. *In re* Winship, 397 U.S. 358 (1970) (the Court mandated all criminal convictions to be based on beyond a reasonable doubt standard).

27. *See, e.g.*, Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 47, 70 A.2d 854, 856 (1950).

28. 439 U.S. 322 (1979).

29. The situation hypothesized above, an acquittal in a criminal antitrust case after *James* findings were made, is not unrealistic. In fact, this situation arose in *In re* Corrugated Container Antitrust Lit., M.D.L. 310 [1981] Trade Cas. (CCH) ¶ 63,810 (S.D. Tex.). In *Corrugated* the trial court expressly made *James* findings and the defendant was acquitted. The collateral estoppel issues discussed herein were not raised during the civil antitrust actions which resulted in a judgment against the defendant after a jury trial.

30. 439 U.S. 322 (1979).

to deter needless relitigation of issues.[31] In an opinion delivered by Justice Stewart,[32] the Court ratified the nonmutual offensive use of collateral estoppel.[33]

The plaintiffs in *Parklane* brought a stockholder class action suit for violations of sections 14(a), 10(b), and 20(a) of the Securities Exchange Act of 1934,[34] as well as various rules and regulations promulgated thereunder by the Securities Exchange Commission (SEC).[35] The complaint alleged that defendants had issued a materially false and misleading proxy statement in connection with a merger. Before the jury trial in the private action for money damages began, the SEC initiated a separate enforcement action for declaratory and injunctive relief against the same defendants.[36] The SEC suit alleged that the proxy statement was materially false and misleading in essentially the same respects as had been alleged by plaintiffs in the private action. After a four day bench trial in the government action, the court found for the SEC and ruled that the proxy statement was false and misleading as alleged.[37]

The plaintiffs in the private class action then moved for summary judgment on the issue of whether the proxy statement was false and misleading. They contended that the issue already had been decided against the defendants in the prior SEC suit and should not be relitigated. The motion was denied by the trial court, but the Second Circuit Court of Appeals reversed.[38] The appellate court was not persuaded by defendant's

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31. *See, e.g.*, Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979). As a branch of the doctrine of res judicata, collateral estoppel serves both judicial and private interests in the final termination of litigation. In the context of the judicial system, collateral estoppel principles serve primarily to conserve time and resources; at the same time, the application of collateral estoppel is a means by which a litigant may avoid unnecessary expenses and potential harassment by lawsuit, and avoid conflicting rights and duties arising from inconsistent findings. *Id.* at 278.

32. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 323 (1979).

33. *Id.* at 331. The Court concluded that the preferable approach for dealing with offensive collateral estoppel was to grant trial courts broad discretion to apply the doctrine rather than absolutely to preclude its use.

34. 15 U.S.C. §§ 78n(a), 78j(b), and 78t(a).

35. 439 U.S. at 324.

36. *Id.* at 325. *See* SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

37. 439 U.S. at 325.

38. The trial court denied the motion because it reasoned that application of collateral estoppel would deny the defendants their seventh amendment right to a jury trial. The Second Circuit reversed, stating that a party who had factual issues determined against it after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent trial of the same issues. Once the issues have been fully and fairly litigated, nothing remains for trial, either with or without a jury. Shore v. Parklane Hosiery Co., 565 F.2d 815, 819 (2d Cir. 1977).

arguments that application of collateral estoppel in this situation would be unfair, or that it would deny defendants their seventh amendment right to a jury trial. An antithetical result in the Fifth Circuit prompted the Supreme Court to grant certiorari and address these issues.[39]

The Supreme Court focused on two matters. First, the Court considered whether to recognize offensive, nonmutual collateral estoppel.[40] Second, the Court addressed the issue of whether offensive use of collateral estoppel should be prohibited when it would apparently deny a party the right to a jury trial on the issues previously decided.[41] Recognizing the need to promote judicial efficiency, the Supreme Court affirmed the decision of the Second Circuit.[42]

A traditional requirement of common law collateral estoppel had been mutuality of estoppel.[43] Under the doctrine of mutuality, the party invoking the prior findings as a bar to relitigation must have been similarly bound as a party, or in privity with a party to the previous decision.[44] The requirement

39. The Fifth Circuit encountered a similar problem with respect to the jury question and had decided to deny collateral estoppel effect to certain prior findings. The Fifth Circuit decision is ambiguous as to whether the court felt that a jury trial was a constitutional requirement in these situations, or whether under collateral estoppel principles it was unfair to let prior judicial findings bind a party engaged in a subsequent jury trial. *See* Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448 (1971).

40. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). "Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding."

The issue of nonmutual, defensive collateral estoppel was considered by the Court in Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), where the Court rejected the archaic prerequisite of mutuality.

41. 439 U.S. at 333. "The question that remains is whether, notwithstanding the law of collateral estoppel, the use of offensive collateral estoppel in this case would violate the petitioners' Seventh Amendment right to a jury trial."

42. The underlying purpose of collateral estoppel has been to terminate litigation and conserve judicial resources. *See, e.g.*, Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 594 (7th Cir. 1979); Johnson v. United States, 576 F.2d 606, 609-10 (5th Cir. 1978); Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 94 (5th Cir. 1977); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). *See also* note 5 and accompanying text *supra*.

43. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912). *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1], at 1803-04 (2d ed. 1974).

44. 1B MOORE'S FEDERAL PRACTICE ¶ 0.441[3], at 3781 (2d ed. 1974). *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979); Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 320-21 (1971).

was based on the notion that it would be unfair to allow a party to use a prior finding as an estoppel when that party would not be bound by the same decision.[45] But courts and commentators began to question whether it was economically feasible to afford a litigant more than one fair opportunity to litigate a matter regardless of the mutuality of estoppel.[46] It served both judicial and private interests to preclude litigation of issues by a party to a subsequent action, regardless of whether the previously resolved action was binding on others.[47]

Courts began to limit their concern to whether the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the prior proceeding.[48] Attention was directed toward *actual fairness* to the litigant, not to whether there was mutuality. The court in *Bernhard v. Bank of America*[49] concluded:

> 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 [collateral estoppel] against a party who was bound by it is difficult to comprehend.
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> . . .
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> In determining the validity of a plea of [collateral estoppel] three questions are pertinent: Was the issue decided in the prior action identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?[50]

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45. 439 U.S. at 327. The concept of mutuality has been defended as a necessary element of collateral estoppel. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308-11 (1961). However, there were recognized exceptions to the mutuality requirement. *See, e.g.*, Portland Gold Mining Co. v. Stratton's Independence Ltd., 158 F. 63, 65-69 (8th Cir. 1907).

46. Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971).

47. *See, e.g.*, Cramer v. General Tel. & Elec. Corp., 582 F.2d 259, 267-68 (3d Cir. 1978); Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978); Speaker Sortation Sys., Div. of A-T-O, Inc. v. United States Postal Serv., 568 F.2d 46, 48-49 (7th Cir. 1978). *See also* RESTATEMENT (SECOND) OF JUDGMENTS Appendix 88, Comment b at 162-63 (Tent. Draft No. 3, 1976).

48. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *accord*, Red Lake Band v. United States, 607 F.2d 930 (Ct. Cl. 1979); Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590 (7th Cir. 1979) (collateral estoppel does not apply to issues that might have been litigated, but were not; nor does it apply to any matter not essential to the judgment in the prior adjudication); United States v. Jensen, 608 F.2d 1349, 1355 (10th Cir. 1979) (even though the present party was a nominal party in the prior case, the test to be used for purposes of collateral estoppel is whether the party had a full and fair opportunity to litigate the issue in the prior case).

49. 19 Cal. 2d 807, 122 P.2d 892 (1942).

50. *Id.* at 812-13, 122 P.2d at 895 (emphasis added).

The Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[51] finally abandoned the mutuality requirement,[52] but the Court in that case was not compelled to venture beyond the boundaries of defensive collateral estoppel.[53] Notwithstanding its limited scope, *Blonder-Tongue* strongly advocated consideration of actual fairness to the litigants and conservation of judicial resources.[54] The Court stated that "[i]n any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources."[55] Thus, the Court seemed content to conclude that "[a]lthough neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."[56]

The *Blonder-Tongue* decision, although limited to defensive collateral estoppel,[57] established the direction and attitude of the Supreme Court toward collateral estoppel and also ratified the removal of a needless barrier to effective use of the doctrine. While most courts eagerly accepted the *Blonder-Tongue* decision and abandoned mutuality as a prerequisite in defensive collateral estoppel situations,[58] the courts appeared hesitant to expand the trend to include offensive use circumstances. The courts considered two factors which warranted a refusal to allow

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51. 402 U.S. 313 (1971).

52. *Id.* at 327-29.

53. In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979). *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1], at 1807 (2d ed. 1974); RESTATEMENT (SECOND) OF JUDGMENTS § 88, Comment d (Tent. Draft No. 3, 1976).

54. Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971).

55. *Id.* at 329.

56. *Id.*

57. *Id.* The mutuality requirement and its evolution are discussed at length in Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel after Parklane Hosiery Co. v. Shore*, 31 HAST. L.J. 755 (1980).

58. Montana v. United States, 440 U.S. 147 (1979); Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313, 324-27 (1971). *Accord*, Griffin v. Burns, 570 F.2d 1065, 1072 (1st Cir. 1978); Windham v. American Brands, Inc., 565 F.2d 59, 69 n.30 (4th Cir. 1977); Gerrard v. Larsen, 517 F.2d 1127, 1131-32 (8th Cir. 1975). *See also* RESTATEMENT (SECOND) OF JUDGMENTS Appendix 88, Comment at 162-63 (Tent. Draft No. 3, 1976).

offensive use of collateral estoppel even when mutuality of estoppel was no longer an issue.

First, offensive collateral estoppel allowed plaintiffs to take advantage of another's victories without being bound by their losses.[59] This differed from defensive collateral estoppel, which prompted plaintiffs to join all possible defendants in one action. The Court stated that "[s]ince a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."[60] A second argument against recognition of offensive collateral estoppel was that it could be unfair to the defendants.[61] In instances where the defendant does not have a proper incentive to litigate,[62] or is forced to defend in an inconvenient forum or at an inconvenient time, application of collateral estoppel might be unjustified.[63]

Despite these problems, the Court in *Parklane* decided to sustain the expansive trend to include the offensive use situations.[64] The pragmatic concerns of avoiding wasteful and unnecessary relitigation enunciated in *Blonder-Tongue* resurfaced in *Parklane* and prompted the Court to conclude "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."[65] Giving the courts discretion would remedy the problems which distinguished defensive from offensive collateral estoppel. The Court emphasized actual fairness to the litigant while still striving toward judicial economy.

The Court in *Parklane* outlined four factors to be considered by courts in exercising this discretion. These guidelines were based on the need to assure that a defendant had a full and

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59. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-30 (1979).

60. *Id.* at 330. Because the courts were concerned with apparent unfairness in allowing a party to reap the benefits of another's victory, *see, e.g.*, Adamson v. Hill, 202 Kan. 482, 487, 449 P.2d 536, 541 (1969); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115, 135 Cal. Rptr. 862, 867-68 (1958), some courts adopted the requirement that the party asserting the collateral estoppel must have been unable to join the prior action. RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975).

61. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

62. Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532, 540 (2d Cir. 1965) (collateral estoppel denied where party did not foresee future lawsuit).

63. 439 U.S. at 331 n.15.

64. *Id.* at 331.

65. *Id.*

fair opportunity to litigate the matter in the prior proceeding. The parameters of discretion were defined by actual fairness to the litigants.[66] Once the party's interests were protected, the Court recognized that there was no valid reason to prevent application of offensive collateral estoppel.

First, the Court was confident that it was not rewarding a plaintiff who could have joined the previous action.[67] This consideration addressed the problem of a party's adopting a "wait and see" attitude.[68] The Court was not going to permit a party to take advantage of another's victory without being bound by his loss. Thus, whenever possible, the party seeking to use prior findings offensively must join the prior proceeding if possible, and failure to join when permitted will be fatal to an application of offensive collateral estoppel.

Second, the party against whom the estoppel is sought must have had every incentive to litigate the issue fully and vigorously in the prior proceeding.[69] If the subsequent litigation was not foreseeable it might be unfair to bind a party to a prior finding.[70] Again, the Court was cautious not to jeopardize actual fairness. Thus, it would be unfair to bind a party subsequently to a finding in a case in which the only risk to the party was payment of nominal damages. If there are any reasons which would lead the court to believe that the party was not motivated to litigate an issue actually and fully, then the offensive use of collateral estoppel should be denied because fairness to the party would be sacrificed improperly for judicial economy.

Third, the Court would not permit the application of offen-

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66. *Id.* at 331-32. The notion of actual fairness to the litigant has been important to the application of collateral estoppel. *See, e.g.*, Bank of Heflin v. Landmark Inns of America, Inc., 604 F.2d 354 (5th Cir. 1979) (the court must use special care so as not to render unjust results); Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 504 (3d Cir. 1979) (as a general rule, recognition of a judgment should be denied only upon a compelling showing of unfairness). *See also* Johnson v. United States, 576 F.2d 606 (5th Cir. 1978); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[12], at 791 (2d ed. 1974).

67. 439 U.S. at 331-32.

68. *See* notes 59-60 and accompanying text *supra*.

69. 439 U.S. at 332. That the matter or issue was "actually litigated" is vital to an application of collateral estoppel. United States v. Jensen, 608 F.2d 1349, 1355 (10th Cir. 1979) (even though the party was a nominal party, the test is whether the party had a full and fair opportunity to litigate); Red Lake Band v. United States, 607 F.2d 930 (Ct. Cl. 1979) (issues are not actually litigated unless parties manifest an intent to be bound); Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 595 (7th Cir. 1979) (the actually litigated requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it); *In re* Merrill, 594 F.2d 1064, 1067 (5th Cir. 1979) (the party asserting an estoppel must show that the issue was actually litigated).

70. 439 U.S. at 332.

sive collateral estoppel when the findings being given estoppel effect were inconsistent with previous findings or judgment.[71] Again, notions of fairness to the litigant were the concern of the Court. It would be unfair to bind a party by one judicial resolution of an issue while the court ignored a directly contrary judicial determination.[72]

Finally, the Court stated that if procedural opportunities were available in the second suit that were not available in the first suit, offensive collateral estoppel would be unfair.[73] This requirement addressed problems unique to offensive collateral estoppel. Since the party against whom the doctrine is invoked could not control the timing of the litigation or the forum, he might find himself at a disadvantage. In such a situation the Court felt that it would be unfair to bind him to the prior findings since relitigation would give him a better and fair opportunity to litigate the issues.[74]

The Court in *Parklane* found all these requirements satisfied in that case, and bound the defendants in the SEC action to the prior findings of falsity in connection with the issuance of proxy statements. There was no evidence of unfairness to the defendants, and relitigation of the issue would have been wasteful. Actual fairness was assured, and the doctrine was invoked to deny the defendants a second opportunity to litigate their defenses.

After sustaining the use of offensive, nonmutual collateral estoppel,[75] and establishing the guidelines for judicial discretion, the Court in *Parklane* faced one more obstacle. The final concern was whether to permit the application in instances that apparently would deprive a party of a jury trial.[76] The Court held that the presence or absence of a jury trial was basically a "neutral" factor which did not qualify as a procedural difference sufficient to bar application of offensive collateral estoppel.[77] Under the Court's guidelines the litigant is assured a full and fair opportunity to litigate an issue and receive a resolution of

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71. *Id.*

72. *See, e.g.*, Nickerson v. Pep Boys-Manny, Moe & Jack, 247 F. Supp. 221, 224 (D. Del. 1965); State Farm Fire & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976). *See generally* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 28-33 (1965).

73. 439 U.S. at 332.

74. *Id.* at 331 n.15. The Court in *Parklane* did not view the availability of a jury trial as a sufficient procedural difference to cause a different result. *Id.* at 332 n.19.

75. *Id.* at 331 n.16.

76. *Id.* at 333.

77. *Id.* at 337.

the dispute by a neutral and impartial trier of fact.[78] The Court found no compelling reason to grant a party a second opportunity to litigate the issue merely because the initial factual determination had been by a judge and the subsequent action may have allowed for a resolution by a jury.[79]

The result of the *Parklane* analysis is a workable and practical guide to the application of offensive collateral estoppel. The Court avoided archaic technicalities which had hampered the expansion of collateral estoppel, promoted greater judicial efficiency by conserving judicial time and resources, and maintained adequate safeguards to protect the litigants' interests. Actual fairness to the litigant became the touchstone for applicability of collateral estoppel principles.[80]

SYNTHESIZING *PARKLANE* AND *JAMES* IN THE REALM OF ANTITRUST LITIGATION

When the discretionary steps outlined in *Parklane* for the application of offensive collateral estoppel[81] are considered with the *James* procedures for dealing with the admissibility of coconspirator statements[82] in antitrust litigation, a unique and proper application of collateral estoppel surfaces. Where a criminal antitrust action results in an acquittal[83] after *James*-type findings that, by a preponderance of the evidence, there was a conspiracy to violate the antitrust laws and the defendant was a member of that conspiracy, the judge's findings are within the scope of the *Parklane* decision and should be given preclusive effect. Accordingly, though ultimately acquitted, a defendant against whom the *James* findings are made should be barred from denying his membership in a conspiracy to violate the antitrust laws in subsequent private civil actions.

James mandates that the judge make a preliminary determination as to the existence of the conspiracy, and the defend-

78. *Id.* at 332 n.19.

79. Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 595 (7th Cir. 1979) (the actually litigated requirement is generally satisfied if the parties to the original action disputed the issue and the trier of facts resolved it). Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel after Parklane Hosiery Co. v. Shore*, 31 HAST. L.J. 755, 766-67 (1980), states that because "a jury is not required to find absolute truth, and because repeated trials will not necessarily remedy the failings of prior trials, the question is, once the courts have done the best they can, why should they repeat the process when no subsequent litigation either will *or is intended to* determine the absolute truth?" (emphasis in original, footnotes omitted).

80. 439 U.S. at 336-37.

81. 439 U.S. at 329-31. *See also* notes 67-73 and accompanying text *supra*.

82. United States v. James, 590 F.2d 575, 582 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1980).

83. *See* note 29 and accompanying text *supra*.

ant's membership in the conspiracy.[84] *James* further dictates that determination be made by the civil standard of proof, *i.e.*, by a preponderance of the evidence.[85] If the judge decides to admit the evidence, the jury then is charged with a duty to convict using the beyond a reasonable doubt standard.[86] But it is the initial judicial resolution of disputed facts by the judge as trier of fact that can be invoked in subsequent private civil antitrust litigation. Application of offensive collateral estoppel to such findings violates none of the four requirements discussed in *Parklane*. The requirements would not bar an application of the doctrine in these circumstances and, in fact, support its application.[87]

First, it cannot be argued that in the circumstances where *James*-type findings were made in a criminal case application of offensive collateral estoppel would unjustly reward a party who intentionally avoided participating in the criminal proceeding.[88] In antitrust litigation in which the criminal action precedes the civil suit, the plaintiff simply cannot join the ongoing criminal litigation. There is no intentional avoidance, and the civil antitrust plaintiffs seeking to offensively use the *James* findings of conspiracy and membership cannot be suspected of waiting to acquire the rewards of a decision against the defendants while avoiding the preclusive effect of a victory by the defendants. Thus, in the situation presented in this article, the first prerequisite enunciated by the Court in *Parklane* as a safeguard to unjust results is not a bar to application of offensive collateral estoppel.

Second, the requirement outlined in *Parklane* that the party faced with an estoppel had every incentive to litigate the issue decided in the first litigation is also satisfied in this situation.[89] The issue of whether coconspirator statements are admissible, and concomitantly whether a defendant is a member of a price-

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84. United States v. James, 590 F.2d 575, 582 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1980).

> [A]t the conclusion of all the evidence the court *must* determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.

Id. (emphasis added).

85. *Id. See also* note 27 *supra*.

86. *Id.* at 581.

87. *See* notes 67-74 and accompanying text *supra*.

88. 439 U.S. at 331-32.

89. *Id.* at 332. *See* notes 69-70 and accompanying text *supra*.

fixing conspiracy, clearly would be litigated fully in the initial criminal action. Since as a practical matter the admission of coconspirator statements is vital to the prosecution's criminal antitrust price-fixing case, there can be no doubt that the defendant would have every incentive to litigate the issue fully and vehemently. Moreover, the Clayton Antitrust Act[90] has been modified to provide offensive collateral estoppel statutorily for a criminal conviction in an antitrust case.[91] The earlier notion that a conviction would be only prima facie evidence of an antitrust violation has been replaced by the more stringent, conclusive doctrine of collateral estoppel.[92] Knowledge of the possible effect of an application of collateral estoppel to issues litigated in the criminal action is strong incentive to litigate vigorously every issue in the initial criminal proceeding. It is also noteworthy that a criminal conviction in an antitrust case carries with it the possibility of fines up to one million dollars and possible three year prison sentences for individuals. These are both strong incentives to try to prevent admission of conconspirator statements vital to a conviction.[93]

The third consideration enunciated in *Parklane* prohibits application of offensive collateral estoppel when a finding being given collateral estoppel effect is inconsistent with a previous judicial determination.[94] While it is true that a judge finds that there was a conspiracy and defendant was a member of the conspiracy, and the jury acquits the defendant of the same charge, the two findings are based on different, consistent standards of proof. The judge, in accordance with *James*, uses the preponderance of the evidence test. It is this judgment which will be invoked in the subsequent proceeding. The jury's acquittal can be reconciled since it only found that the evidence was insufficient to meet the beyond a reasonable doubt standard. The

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90. 15 U.S.C. § 16(a).

91. 15 U.S.C. § 16(a) (1980).

92. The action of the legislators was taken in response to uncertainty as to the preclusive effect given a previous criminal antitrust conviction. *See* Illinois v. General Paving Co., 590 F.2d 680 (7th Cir.), *cert. denied*, 444 U.S. 879 (1979).

The legislative action is directly contrary to Justice Rehnquist's dissent in *Parklane*: "[T]he Court, for no compelling reason, will have simply added a powerful club to the administrative agencies' arsenals that even Congress was unwilling to provide them." 439 U.S. at 356.

The legislative history of the new act leaves no room for doubt that collateral estoppel, when available, should be given its full effect. The doctrine is far more effective a deterrent than the prima facie effect given to a criminal antitrust conviction by the prior section 5(a) of the Clayton Act. *See* notes 7-9 and accompanying text *supra*.

93. *See* 15 U.S.C. § 1 (1980).

94. 439 U.S. at 332. *See* notes 71-72 and accompanying text *supra*.

jury's acquittal is not an inconsistent judgment since it is based upon a higher standard of proof, and thus it is not a bar to application of collateral estoppel.

The final requirement to be considered is whether there would be any procedural opportunities available in the second suit that were not available in the first litigation.[95] The fact that a judge has made the determination and resolved the issue of a defendant's participation in a price-fixing conspiracy is no reason to bar application of the collateral estoppel doctrine. The *Parklane* Court specifically ruled on the lack of a jury trial in the prior proceeding and concluded that the presence or absence of a jury would neither render application of collateral estoppel unjust nor deprive the estopped party of any constitutional rights.[96] Moreover, the defendant in the criminal case is afforded an important procedural advantage in litigating the issue of conspiracy and membership in a prior criminal proceeding, since in making the findings the criminal trial court is not allowed to consider the statements themselves as evidence of the conspiracy or the defendant's participation therein.[97]

However, while there would be no relevant procedural advantages in a subsequent civil antitrust proceeding to a litigant who was found to be a member of a price-fixing conspiracy during the criminal trial court's coconspirator statement admissibility determination, there are two factors which might adversely affect the offensive use of those findings against the litigant. First, since the issue of the offensive collateral estoppel effect of *James* findings arises in the context of an acquittal, it might be unfair to a litigant who prevailed in the prior proceeding and, therefore, could not appeal any adverse findings made during the course of his acquittal, to be bound by essentially unreviewable decisions. Second, it might be contended that the finding that a defendant is a member of a price-fixing conspiracy by the trial court making *James* determinations is not part of a "final" judgment and, therefore, collateral estoppel cannot apply. However, neither consideration, when viewed in light of the more pragmatic approach to collateral estoppel outlined by the Supreme Court, should preclude allowing collateral estoppel effect to *James* findings.

Appealability

While some cases have held that collateral estoppel does not apply to findings adverse to a successful litigant in prior liti-

95. *Id. See* note 73 and accompanying text *supra*.
96. Parklane Hosiery Co. v. Shore, 439 U.S. at 333-37 (1979).
97. *See* note 18 *supra*.

gation because of the apparent lack of a right to appeal,[98] it has also been recognized that even if a decision or finding is not appealable, such a decision can have collateral estoppel effect in subsequent proceedings.[99] Thus, the Court in *Winters v. Lavine* pointed out:

> [E]ven if there were no opportunity whatsoever for Winters to appeal the Appellate Division's ruling, that decision would still retain its preclusive effect, for the extent of preclusion produced by a prior judicial determination of material and essential issues is not affected by the fact that the losing party could not appeal that determination to a higher court.[100]

Moreover, it has been generally recognized that collateral estoppel applies to prior findings once they are rendered and not until after all appellate review is completed.[101]

Although the *James* findings might not be appealable by an acquitted defendant, this does not mean that such findings cannot be given preclusive effect. To hold otherwise would be to ignore the Supreme Court's focus on fundamental fairness in the initial fact finding process in determining the propriety of allowing offensive collateral estoppel.[102] Moreover, it is not altogether clear that an acquitted defendant could not appeal *James* findings. The Supreme Court has recognized certain sui generis situations in which a prevailing party may appeal adverse findings, especially when such findings are given collateral estoppel effect.[103]

The lack of any right to appeal the *James* findings of conspiracy and membership, if it creates any concern about the ap-

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98. *See, e.g.*, Lindhiemer v. Illinois Bell Tel. Co., 292 U.S. 151 (1934); New York Tel. Co. v. Maltbie, 291 U.S. 645 (1934). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 3, 1976) (no preclusive effect to an unreviewable judgement).

99. Johnson Co. v. Wharton, 152 U.S. 252, 261 (1894); Winters v. Lavine, 574 F.2d 46, 62 (2d Cir. 1978); FTC v. Food Town Stores, Inc., 547 F.2d 247, 249 (4th Cir. 1977); Napper v. Anderson, Henly, Shields, Bradford & Pritchard, 500 F.2d 634, 636-37 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975); Sherman v. Jacobson, 247 F. Supp. 261, 268 (S.D.N.Y. 1965); William Whitman Co. v. Universal Oil Prod. Co., 92 F. Supp. 885, 890 (D. Del. 1950).

100. 574 F.2d 46, 62 (2d Cir. 1978).

101. *See, e.g.*, United States v. Abatti, 463 F. Supp. 596, 598-99 (S.D. Cal. 1978); Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859, 865 n.7 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979); Rodriguez v. Beame, 423 F. Supp. 906, 908 (S.D.N.Y. 1976).

102. It is also recognized that there is no constitutional right to an appeal even in a criminal case, and, accordingly, it would be difficult to contend that an appeal right is essential to the applicability of collateral estoppel. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956).

103. Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89 (1954). *See* Manis v. United States, 467 F. Supp. 828 (E.D. Tenn. 1979); United Aircraft Corp. v. NLRB, 440 F.2d 85, 99 (2d Cir. 1971). *See also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

plicability of collateral estoppel, can be resolved in the context of the subsequent civil proceeding in a manner consistent with the goals of judicial efficiency and economy underlying the Supreme Court's pragmatic approach to collateral estoppel. Since *James* findings are clearly findings of fact, even if reviewable they would be subject to reversal only if they were "clearly erroneous."[104] Rather than relitigate these issues, the court in the subsequent proceeding, consistent with the *Parklane* mandate of insuring fairness, can review the prior findings to determine whether they were clearly erroneous.[105] Such a "delayed" review of the *James* findings would be subject to further review if the subsequent proceeding were appealed.

The Supreme Court recently took note of a distinction between criminal and civil cases in the context of collateral estoppel. In *Standefer v. United States*,[106] petitioner sought to preclude relitigation in a subsequent criminal action of an issue on which he was earlier acquitted. The Court rejected the application of collateral estoppel based on the government's inability to appeal the earlier acquittal.[107] However, the Court noted that all applications of collateral estoppel did not require the right to appeal from the prior ruling. Rather, the Court stated:

> [T]his case involves an ingredient not present in either *Blonder-Tongue* or *Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.[108]

When a full and fair opportunity to litigate has been provided, as in the *James* situation where the court must consider all the evidence relevant to a defendant's participation in a price-fixing conspiracy and must base its decision on the pre-

104. *See, e.g.*, Sumrall v. Resolute Ins. Co., 377 F.2d 671, 672 (5th Cir. 1967).

105. In many antitrust cases, the same judge who presides over the criminal trial will hear the civil action. Accordingly, review of the prior record will create no significant burden on the court. *See* Oldham v. Prichett, 599 F.2d 274, 281 (8th Cir. 1979).

106. 447 U.S. 10 (1980).

107. *Id.* at 23-24.

108. *Id.* at 24. The Supreme Court stated, however, that the doctrine of collateral estoppel is premised upon an underlying confidence that the previous result was substantially correct, and in the absence of appellate review such confidence is unwarranted. *Id.* n.18. This statement is surprising in light of the Court's previous rulings that appeals are not required by due process, and collateral estoppel applies even in the absence of appellate review. *See* notes 99-102 and accompanying text *supra*. The Supreme Court ignored these doctrines in *Standefer*.

ponderance of the evidence, a litigant has been assured of a fair decision in court. Lack of an optional appellate review does not render the prior finding unreasonable, incorrect, or unfair, and should not preclude a court from exercising its discretion to grant collateral estoppel effect to *James* findings.

Finality

Like the mutuality requirement, traditional notions of collateral estoppel have required that before a finding can be used to preclude relitigation the finding must be part of a "final" judgment. This requirement of a final judgment was meant to assure fairness to the party against whom the preclusion was sought, and to insure that the findings were necessary to the rendition of a thoughtful and complete judicial determination.[109] However, in determining the existence of a final judgment the courts have looked to the record to determine whether the issue has been, in fact, actually litigated.[110] This requirement of final judgment is consistent with judicial intent to assure actual fairness to the litigant, while simultaneously promoting judicial efficiency through prevention of wasteful relitigation of issues previously resolved.[111]

Accordingly, even though the *James* findings are made as part of an "evidentiary" ruling and are not embodied in what one would traditionally consider a "final" judgment, the sui generis nature of these findings makes them sufficiently final to be given collateral estoppel effect.[112] Courts have recognized that "finality" for the applicability of collateral estoppel is not

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109. Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979); Laughlin v. United States, 344 F.2d 187, 189 (D.C. Cir. 1965); RESTATEMENT OF JUDGMENTS § 41 (1942).

110. *See* Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979); *In re* Merrill, 594 F.2d 1064, 1066 (5th Cir. 1979); Stevenson v. International Paper Co., 516 F.2d 103, 110 (5th Cir. 1975); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir.), *cert. denied sub nom.* City Trade & Industries, Ltd. v. Allahabad Bank, Ltd., 404 U.S. 940 (1971); Laughlin v. United States, 344 F.2d 187, 189-90 (D.C. Cir. 1965).

111. *See* Sherman v. Jacobson, 247 F. Supp. 261, 268 (S.D.N.Y. 1965), *quoting* Cobbledick v. United States, 309 U.S. 323, 325 (1940). The court stated: "The final judgment rule is designed to prevent 'enfeebling judicial administration' which would result from 'permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.' "

112. *But see* McDonnel v. United States, 455 F.2d 91 (8th Cir. 1972) (a mere interlocutory order does not afford a basis for a plea of res judicata); Murphy v. Andrews, 465 F. Supp. 511 (E.D. Penn. 1979) (motion to suppress cannot be given collateral estoppel effect). The different treatment accorded interlocutory orders or motions to suppress stems from the fact that there is not a full hearing on the merits. This is not the situation in *James*-type rulings, which are made after all relevant facts are considered and the central issue in dispute is fully and completely litigated.

equated with finality for purposes of appealability.[113] As stated in *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. *"Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.*[114]

And, as recognized by the Restatement (Second) of Judgments:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive effect.[115]

As stated previously, the finality requirement serves two basic purposes:[116] (1) To assure the finding was necessary to the

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113. Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). *See also* Zdanok v. Glidden Co., 327 F.2d 944, 955 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

114. 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) (emphasis added). *See also* Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); Aiello v. City of Wilmington, 470 F. Supp. 414 (D. Del. 1979); Autrey v. Chemtrust Indus. Corp., 362 F. Supp. 1085, 1091 (D. Del. 1973). *Cf.* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (federal appellate jurisdiction under 28 U.S.C. § 1291 generally depends on existence of decision by federal district court that ends litigation on merits and leaves nothing for the court to do but execute judgment).

For definitions of "final judgment" under 28 U.S.C. § 1291, *see also* Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978) (final judgment is defined as ending litigation on the merits); United States v. Mellow Bank, N.A., 545 F.2d 869 (3d Cir. 1976) (findings must not be merely a step toward disposition of the merits).

115. RESTATEMENT (SECOND) OF JUDGMENTS § 41 (Tent. Draft No. 1, 1973). *See also* Calvert Fire Ins. Co. v. American Mut. Reins. Co., 459 F. Supp. 859 (N.D. Ill. 1978), *aff'd*, 600 F.2d 1228 (7th Cir. 1979) (state court's final determination of one issue in a case was entitled to res judicata effect, although the determination was in the form of an interlocutory decision and not a final judgment disposing of all issues and appealable by right); Sherman v. Jacobson, 247 F. Supp. 261 (S.D.N.Y. 1965).

In *Sherman*, the court recognized and set forth the rationale behind a flexible "finality rule" for collateral estoppel:

> Effectuation of these policies would clearly be hampered if "final" were given the same meaning in each context. A consistently broad interpretation of the term would flood the appellate courts with piecemeal litigation, while a narrow interpretation would allow a litigant to bring an endless number of lawsuits. It follows, therefore, that "final" for collateral estoppel purposes must be construed in the light of the considerations of that doctrine, rather than be automatically equated with "final" in the final judgment rule.

247 F. Supp. at 268.

116. *See, e.g.*, Occidental of Umm All Qaywayn, Inc. v. Cities Serv. Oil

disposition of the case so as to demonstrate that the issue was "actually" litigated;[117] and (2) to insure the parties recognized the foreseeability that the finding would have a later preclusive effect.[118] In the case of *James* findings, both purposes are met and these findings should be considered final for collateral estoppel purposes. Thus, the decision in *James* mandates that the issue of a defendant's participation in a price-fixing conspiracy be determined by the trial court after all the evidence has been presented.[119] There can be no question that the issue was directly considered by the court, or that the findings of membership and conspiracy were mere asides. The issue of the admissibility of coconspirator statements is central to a price-fixing prosecution. Moreover, in most instances, all persons concerned are aware that civil actions will follow the criminal antitrust case,[120] and it is foreseeable, to say the least, that the *James* findings will have a significant impact on subsequent litigation. Clearly, *James* findings are sufficiently firm to be afforded preclusive effect.[121]

CONCLUSION

The freeing of collateral estoppel from its primitive base indicates that in the future traditional applications of the doctrine will be joined by new, innovative applications.[122] The focus will be on fairness and the need to reduce the load on an overburdened judiciary. Granting preclusive effect to the findings made in the course of a determination of whether to admit coconspirator statements merely recognizes the sui genius nature of these findings, and the fact that these findings carry with them all indicia of fairness and full litigation. Moreover, while it might appear that the suggestions in this article are "plaintiff oriented," the application of collateral estoppel to *James*-type findings will be useful to defendants in the criminal aspect of antitrust litigation. Trial courts would become even more careful in ruling on the admissibility of coconspirator statements if they knew their findings of membership and conspiracy would bind defendants in subsequent civil litigation. Accordingly,

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Co., 396 F. Supp. 461, 467 (W.D.L. 1975); *see also* Hyman v. Regenstein, 258 F.2d 502, 510 (5th Cir. 1958).

117. Peffer v. Bennet, 523 F.2d 1323, 1326 (10th Cir. 1975).

118. Johnson v. United States, 576 F.2d 606, 615 (5th Cir. 1978); Mosher Steel Co. v. NLRB, 568 F.2d 436, 440 (5th Cir. 1978).

119. *See* note 25 and accompanying text *supra*.

120. *See* notes 90-93 and accompanying text *supra*.

121. *See* notes 113-15 and accompanying text *supra*.

122. *See* Comment, *Non-mutual Collateral Estoppel in Federal Tax Litigation*, 33 VAND. L. REV. 953 (1980).

fewer coconspirator statements would be admitted, which potentially would lead to fewer convictions. However, it cannot be doubted that allowing offensive use of collateral estoppel to *James* findings would place a powerful tool in the hands of victims of antitrust violations for the vindication of their rights and the protection of the competitive market.