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Steven C. Malin

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## COLLATERAL ESTOPPEL: THE FAIRNESS EXCEPTION

STEVEN C. MALIN

**P**ICTURE THIS: a Los Angeles-bound jumbo jet airliner begins its approach for landing. The fog is thick and visibility almost zero. Suddenly, a burst of wind shakes the plane and the craft dives downward, crashing just short of the runway. All passengers are lost and the cause of the accident is unknown. Soon after, wheels in the legal engine begin to move as plaintiffs in various jurisdictions seek recovery. The first case is tried, the airline held negligent, and judgment rendered for the plaintiff. The attorneys for the airline, having lost this first case, then look out the courthouse window to see hundreds of plaintiffs waiting in line at the courthouse door, carrying empty bushel baskets and waiving copies of the first judgment.

Such is an airline-defense attorney's collateral estoppel nightmare, and it is more realistic than it may seem.<sup>1</sup> Simply put, collateral estoppel prevents a party from litigating an issue that he has already litigated and lost.<sup>2</sup> Traditionally, under the doctrine of mutuality, only parties to an action or their privies could be bound by or take advantage of a judgment arising from that action.<sup>3</sup> In the above

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<sup>1</sup> See, e.g., *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 497 F. Supp. 313 (D.D.C. 1980), *rev'd on other grounds*, *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981) (defendant aircraft manufacturer estopped from relitigating issues decided in earlier action brought by different plaintiffs).

<sup>2</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

<sup>3</sup> *Id.* at 326-27; see *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that estop-

air crash situation, the mutuality doctrine would limit the availability of any estoppel based on the first judgment to only those parties bound thereto.<sup>4</sup> As a result, the airline would be free to litigate the issue of liability in all cases.<sup>5</sup>

This doctrine of mutuality was uniformly accepted until the 1942 case of *Bernhard v. Bank of America National Trust & Savings Association*,<sup>6</sup> in which the California Supreme Court branded the doctrine as having "[n]o satisfactory rationalization."<sup>7</sup> According to the *Bernhard* court, the main inquiry in deciding the propriety of an estoppel should not be whether all parties in the subsequent action were parties to the initial action (as is required by mutuality); rather, the essential question should be: was the party *against whom* collateral estoppel is now asserted a party to the initial action?<sup>8</sup> If so, then collateral estoppel should be available to the nonparty.<sup>9</sup> Applying *Bernhard* to the scenario mentioned above, the success of the initial plaintiff would conclusively establish the airline's liability in all remaining actions.

Since *Bernhard* there has been a steady movement by state,<sup>10</sup> and now recently federal,<sup>11</sup> courts to allow non-

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pel of a judgment must be mutual."); RESTATEMENT (FIRST) OF JUDGMENTS § 93 (1942). Privity concerns the relationship between a party to an action and a person not a party, but whose interest in the action is such that he will be bound by the final judgment as if he were a party. BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

<sup>4</sup> See *Parklane*, 439 U.S. at 327.

<sup>5</sup> *Id.*

<sup>6</sup> 19 Cal. 2d 807, 122 P.2d 892 (1942). For a discussion of *Bernhard*, see *infra* notes 59-66 and accompanying text.

<sup>7</sup> *Id.* at 812, 122 P.2d at 894.

<sup>8</sup> *Id.* at 812, 122 P.2d at 894-95.

<sup>9</sup> See *id.*

<sup>10</sup> See *Pennington v. Snow*, 471 P.2d 370 (Alaska 1970); *DiOrto v. City of Scottsdale*, 2 Ariz. App. 329, 408 P.2d 849 (1965); *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973); *Ellis v. Crockett*, 51 Haw. 45, 451 P.2d 814 (1969); *Tezak v. Cooper*, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); *Goolsby v. Derby*, 189 N.W.2d 909 (Iowa 1971); *Pat Perusse Realty Co. v. Lingo*, 249 Md. 33, 238 A.2d 100 (1968); *Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co.*, 354 Mass. 448, 238 N.E.2d 55 (1968); *Peterson v. Nebraska Natural Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979); *Paradise Palms Community Ass'n v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973); *Sanderson v. Balfour*, 109 N.H. 213, 247 A.2d 185 (1968); *Desmond v. Kramer*, 96

mutual preclusion. Some states, however, remain steadfast in imposing the traditional requirement of mutuality.<sup>12</sup> The two Supreme Court opinions on the matter illustrate a distinction often made between "offensive" and "defensive" collateral estoppel.<sup>13</sup> To define the terms simply, when a plaintiff asserts the estoppel, it is offensive, and when a defendant asserts the estoppel, it is defensive.<sup>14</sup> In the scenario of the first paragraph above, the estoppel would be offensive because it would be asserted by the plaintiffs. Many courts have recognized different effects resulting from the two types of estoppel<sup>15</sup> and have been wary of allowing its offensive use.<sup>16</sup> In the seminal federal case,<sup>17</sup> the Supreme Court listed a four-factor test for lower courts to utilize when deciding whether to grant offensive collateral estoppel; the ultimate decision, however, still lies within the trial court's

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N.J. Super. 96, 232 A.2d 470 (Law Div. 1967); *Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 304 N.Y.S.2d 810 (N.Y. Sup. Ct. 1969); *Hicks v. De La Cruz*, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977); *Anco Mfg. & Supply Co. v. Swank*, 524 P.2d 7 (Okla. 1974); *Bahler v. Fletcher*, 257 Or. 1, 474 P.2d 329 (1970); *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044 (1971); *Simpson Timber Co. v. Aetna Casualty & Sur. Co.*, 19 Wash. App. 535, 576 P.2d 437 (1978); *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

<sup>11</sup> For a discussion of mutuality in federal courts, see *infra* notes 91-138 and accompanying text.

<sup>12</sup> See *Fisher v. Space of Pennsacola, Inc.*, 461 So. 2d 790 (Ala. 1984); *Davidson v. Lonoke Prod. Credit Ass'n*, 695 F.2d 1115 (8th Cir. 1982) (applying law of Arkansas); *Daigneau v. National Cash Register Co.*, 247 So. 2d 465 (Fla. Dist. Ct. App. 1971); *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975); *State v. Speidel*, 181 Ind. App. 448, 392 N.E.2d 1172 (1979); *Keith v. Schiefen-Stockham Ins. Agency, Inc.*, 209 Kan. 537, 498 P.2d 265 (1972); *Barnett v. Commonwealth*, 348 S.W.2d 834 (Ky. 1961); *Duncan v. State Highway Comm'n*, 147 Mich. App. 267, 382 N.W.2d 762 (1985); *Pace v. Barrett*, 205 So. 2d. 647 (Miss. 1968); *Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 102 N.M. 396, 696 P.2d 484 (1985); *Sullivan v. Beasley*, 59 N.C. App. 735, 298 S.E.2d 62, *rev'd on other grounds*, 309 N.C. 616, 308 S.E.2d 288 (1982); *Armstrong v. Miller*, 200 N.W.2d 282 (N.D. 1972).

<sup>13</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329-30 (1971).

<sup>14</sup> See *Parklane*, 439 U.S. at 326 n.4.

<sup>15</sup> See *id.* at 329-30.

<sup>16</sup> See, e.g., *Johnson v. United States*, 576 F.2d 606, 614-15 (5th Cir. 1978).

<sup>17</sup> *Parklane*, 439 U.S. at 322.

discretion.<sup>18</sup>

This comment will (1) consider the background, history, and rationale behind the doctrine of mutuality, along with the justifications that have been offered for its demise; (2) discuss collateral estoppel as applied in air crash cases; (3) discuss the merits and costs of offensive collateral estoppel; and (4) propose a new rule for trial court use.

## I. BACKGROUND

### A. *Collateral Estoppel*

The doctrine of collateral estoppel, or issue preclusion, prevents a party from contesting an *issue* that he has previously litigated and lost.<sup>19</sup> The related doctrine of res judicata, or claim preclusion, on the other hand, precludes a party from asserting or contesting a *claim* that he has previously litigated and lost.<sup>20</sup> To illustrate, assume A, a patent holder, sues B, a competitor, claiming that one of B's products is an infringement of A's patent. Upon trial, the court finds the patent invalid and holds for B, the competitor. If A again sues B claiming that B's same product is an infringement, A would be barred by res judicata, because the suit is upon the same claim. If, instead, A sues B claiming that a different product of B is an infringement of A's patent, B would plead collateral estoppel since A's patent had been conclusively determined invalid in the first action.

The two doctrines differ in other ways.<sup>21</sup> As a rule, res judicata applies regardless of whether there has been an adversarial contest on the matter; conversely, collateral estoppel operates only when the parties actually have liti-

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<sup>18</sup> *Id.* at 331-32. For a discussion of *Parklane*, see *infra* notes 110-138 and accompanying text.

<sup>19</sup> See *Parklane*, 439 U.S. at 326 n.5.

<sup>20</sup> See *id.*; *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). The term *res judicata*, however, is sometimes intended to include both claim and issue preclusion. *White v. World Fin. of Meridian, Inc.*, 653 F.2d 147, 150 n.5 (5th Cir. 1981).

<sup>21</sup> See generally J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 613 (1985) [hereinafter *CIVIL PROCEDURE*].

gated the issue.<sup>22</sup> Further, *res judicata* precludes only subsequent suits on the same cause of action;<sup>23</sup> collateral estoppel, on the other hand, may preclude relitigation of issues in later suits on any cause of action.<sup>24</sup> Finally, while *res judicata* is mandatory in nature,<sup>25</sup> collateral estoppel is within the trial court's discretion.<sup>26</sup>

To successfully assert collateral estoppel a party must show that the issue in question (1) is identical in both actions;<sup>27</sup> (2) was litigated and decided in the prior action;<sup>28</sup> and (3) was necessary to the prior court's judgment.<sup>29</sup> Since the use of collateral estoppel in subsequent actions is not always foreseeable,<sup>30</sup> these requirements ensure that only those issues which were fully and fairly decided will bind the parties in subsequent litigation.<sup>31</sup>

Generally, default judgments,<sup>32</sup> admissions during discovery,<sup>33</sup> and stipulations prior to trial<sup>34</sup> have no collateral

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<sup>22</sup> *Cromwell*, 94 U.S. at 353; *Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978).

<sup>23</sup> *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926).

<sup>24</sup> *Id.*

<sup>25</sup> *Cromwell*, 94 U.S. at 352.

<sup>26</sup> *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

<sup>27</sup> *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892, 895 (1942).

<sup>28</sup> *Cromwell*, 94 U.S. at 353 ("In all cases . . . where it is sought to apply the estoppel of a judgment . . . the 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."). The party asserting collateral estoppel bears the burden of showing what issues actually were decided. *Spilman v. Harley*, 656 F.2d 224, 227, 229 (6th Cir. 1981).

<sup>29</sup> *Cromwell*, 94 U.S. at 353; *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

<sup>30</sup> *Cf. Evergreens*, 141 F.2d at 929 (holding that only those facts which would be "ultimate" in a subsequent suit merit collateral estoppel effect).

<sup>31</sup> *Cf. Standefer v. United States*, 447 U.S. 10 (1977) (holding that offensive collateral estoppel is not appropriate against the government in criminal cases because the government frequently does not have the opportunity to fully litigate the issues).

<sup>32</sup> *See In re McMillan*, 579 F.2d 289 (3d Cir. 1978). *See generally* CIVIL PROCEDURE, *supra* note 21, at 672. The initial rule was that a default judgment would preclude litigation of each issue that would have to be resolved to support the judgment after a trial on the merits; some jurisdictions still follow this rule. *See Kapp v. Naturelle, Inc.*, 611 F.2d 703 (8th Cir. 1979).

<sup>33</sup> *FED. R. CIV. P.* 36(b). Any admission by a party pursuant to a request under Rule 36 "is for the purpose of the pending action only and is not an admission by

estoppel effect because in none of these instances do the parties actually litigate the issue.<sup>35</sup> The crucial factor is an adversarial presentation.<sup>36</sup> Thus, settlement<sup>37</sup> and consent judgments<sup>38</sup> are also not bases for issue preclusion. On the other hand, summary judgments and directed verdicts<sup>39</sup> can have preclusive effect because a judgment in either instance is on the merits and not a product of the parties' consent.<sup>40</sup> Further, the party asserting collateral estoppel has the burden of showing which issues actually were litigated in the first action.<sup>41</sup> She can do this by reference to the trial record, by logical inference, or by extrinsic evidence.<sup>42</sup>

Issues incidental to major matters of a suit, although actually litigated, have no estoppel effect if not necessary to the judgment.<sup>43</sup> Thus, minor matters which may have received only passing attention from the parties will not unfairly prejudice them in later actions.<sup>44</sup> This necessity requirement rests on the notion that it is unfair to bind a party to the adjudication of a particular issue unless he had a fair chance fully to litigate and defend his rights.<sup>45</sup> Presumably issues that were necessary to the judgment will have had the parties' complete attention.<sup>46</sup> The proscription against affording estoppel effect to incidental

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him for any other purpose nor may it be used against him in any other proceeding." *Id.*

<sup>34</sup> *Sekaquaptewa v. McDonald*, 575 F.2d 239 (9th Cir. 1978); *Seay v. International Ass'n of Machinists*, 360 F. Supp. 123 (C.D. Cal. 1973).

<sup>35</sup> See *CIVIL PROCEDURE*, *supra* note 21, at 672.

<sup>36</sup> See *id.*

<sup>37</sup> *Standard Oil of Ky. v. Illinois Cent. R.R. Co.*, 421 F.2d 201 (5th Cir. 1969).

<sup>38</sup> *United States v. International Bldg. Co.*, 345 U.S. 502 (1953).

<sup>39</sup> *Simon v. M/V Hialeah*, 431 F.2d 867 (5th Cir. 1970).

<sup>40</sup> *CIVIL PROCEDURE*, *supra* note 21, at 673.

<sup>41</sup> *Spilman*, 656 F.2d at 229; *Gulf Tampa Drydock Co. v. Germanischer Lloyd*, 634 F.2d 874 (5th Cir. 1981).

<sup>42</sup> *CIVIL PROCEDURE*, *supra* note 21, at 674; see also *Russel v. Place*, 94 U.S. 606, 608 (1876) (collateral estoppel will fail if the matters actually litigated are not clear and extrinsic evidence cannot remove the uncertainty).

<sup>43</sup> See *Wilson v. Wilson*, 186 Mont. 290, 607 P.2d 539 (1980).

<sup>44</sup> *CIVIL PROCEDURE*, *supra* note 21, at 675.

<sup>45</sup> *Id.*

<sup>46</sup> *Evergreens*, 141 F.2d at 929.

findings is further justified by the fact that such findings seldom are reviewable by an appellate court, especially if decided in favor of the winning party.<sup>47</sup>

The justification for allowing collateral estoppel is four-fold: (1) it protects parties from the expense and vexation attending multiple lawsuits;<sup>48</sup> (2) it promotes judicial economy;<sup>49</sup> (3) it fosters reliance on judicial action by minimizing the possibility of inconsistent decisions;<sup>50</sup> and (4) it is fair, because due process entitles a party to only one full and fair opportunity to litigate any particular issue.<sup>51</sup> In a more general sense, when parties have litigated an issue fully, spending additional time and money repeating the process wastes judicial resources.<sup>52</sup> Although collateral estoppel has been the point of rigorous debate,<sup>53</sup> its basic workings and objectives are seldom questioned; it is only the related doctrine of mutuality which draws fire.

### B. *Mutuality, and its Demise*

The doctrine of mutuality of estoppel prevents a person from taking advantage of a judgment to which he was not bound.<sup>54</sup> The doctrine rests upon the concept of reciprocal fairness; that is, it would be inequitable to allow a party to take advantage of a judgment by which he had

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<sup>47</sup> See *New York Tel. Co. v. Maltbie*, 291 U.S. 645 (1934); *Burchanowski v. County of Lycoming*, 32 Pa. Commw. 207, 378 A.2d 1025, 1027 (1977).

<sup>48</sup> *Montana v. United States*, 440 U.S. 147, 153 (1979).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 153-54.

<sup>51</sup> See *Blonder-Tongue*, 402 U.S. at 328-29 ("The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.").

<sup>52</sup> See *id.* at 348.

<sup>53</sup> Compare *Currie, Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 32 (1965) and *Vestal, Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 53 (1964) (supporting offensive collateral estoppel) with *Moore & Currier, Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 330 (1961) and *von Moschzisker, Res Judicata*, 38 YALE L.J. 299, 334 (1928) (attacking offensive collateral estoppel).

<sup>54</sup> See *Parklane*, 439 U.S. at 326-27 ("Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." (footnote omitted)).



nothing to lose.<sup>55</sup> Although it received early and continuing criticism<sup>56</sup> and is of dwindling significance,<sup>57</sup> mutuality has survived to the present day.<sup>58</sup>

### 1. California

The first major defector from the rule of strict mutuality was the California Supreme Court in *Bernhard v. Bank of America National Trust & Savings Association*.<sup>59</sup> In that case, the plaintiff Bernhard sued Bank of America alleging that the bank had transferred certain funds without proper authority.<sup>60</sup> The defendant bank moved to estop Bernhard because, in a prior action against a different defendant, Bernhard had asserted the identical claim and had lost.<sup>61</sup> Justice Roger Traynor, in considering the justifications offered for mutuality, opined that "[t]he criteria for determining who may assert a plea of [collateral estoppel] differ fundamentally from the criteria for determining against whom a plea of [collateral estoppel] may be asserted."<sup>62</sup> He stated further that while due process prevents one from being *bound* by a judgment to which he was not a party, no reason exists for extending this same requirement to one seeking to *take advantage* of a judgment.<sup>63</sup> The opinion noted that many jurisdictions had already made exceptions to the rule in cases of derivative liability "on the ground that it would be unjust to permit

<sup>55</sup> See *Bigelow*, 225 U.S. at 127; see also *Ralph Wolff & Sons v. New Zealand Ins. Co.*, 348 Ky. 304, 58 S.W.2d 623 (1933). The mutuality rule may be explained historically by the fact that originally it evolved from a practice which limited estoppel to the parties on record. See Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940).

<sup>56</sup> See 3 J. BENTHAM, *Rationale of Judicial Evidence*, 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843); Cox, *Res Adjudicata: Who Entitled to Plead*, 9 VA. L. REG. 241, 245-47 (1923); Note, *Res Judicata*, 18 N.Y.U.L.Q. REV. 565, 570-73 (1941).

<sup>57</sup> See *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967) ("[T]he 'doctrine of mutuality' is a dead letter.").

<sup>58</sup> See, e.g., *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360, 364 (1977) (refusing to apply offensive collateral estoppel).

<sup>59</sup> 19 Cal. 2d 806, 122 P.2d 892 (1942).

<sup>60</sup> *Id.* at 893.

<sup>61</sup> *Id.* at 893-94.

<sup>62</sup> *Id.* at 894.

<sup>63</sup> *Id.*

one who has had his day in court to reopen identical issues by merely switching adversaries.”<sup>64</sup> The court listed as pertinent only three questions in deciding whether to allow issue preclusion: (1) was the issue decided in the prior adjudication identical with the one presented in the action at hand?; (2) was there a final judgment on the merits?; and (3) was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?<sup>65</sup> Applying this test to the matter before him, Justice Traynor found collateral estoppel appropriate.<sup>66</sup>

The landmark *Bernhard* decision remained somewhat unnoticed until 1957 when Brainierd Currie expressed his now famous train anomaly.<sup>67</sup> Professor Currie proposed the situation of a train wreck wherein fifty people are injured and all subsequently bring suit.<sup>68</sup> Assuming that the first twenty-five are unsuccessful, but the twenty-sixth succeeds in proving liability of the defendant train, the issue is this: based on the twenty-sixth judgment, would the remaining twenty-four plaintiffs be able to estop the defendant from litigating its liability?<sup>69</sup> Currie asserted that even under the *Bernhard* doctrine no court would allow such an anomalous situation.<sup>70</sup> He argued further that because

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<sup>64</sup> *Id.* at 895.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 895-96.

<sup>67</sup> See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281 (1957).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 286. Professor Currie commented:

If we are unwilling to treat the judgment against the railroad as [having collateral estoppel effect] when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as [having collateral estoppel effect] even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series. Indeed, on the basis of the considerations noted [previously], the judgment first rendered will be the one least likely to represent an unprejudiced finding after a full and fair hearing.

any aberrational judgment is as likely to occur in the first suit as it is in the twenty-sixth, issue preclusion should be denied in even the first action.<sup>71</sup>

Professor Currie distinguished between the two "types" of collateral estoppel: offensive and defensive.<sup>72</sup> Offensive use occurs when a *plaintiff* seeks to estop a defendant from contesting an issue that the defendant has previously lost.<sup>73</sup> Defensive use, on the other hand, occurs when a *defendant* seeks to estop a plaintiff from contesting an issue that the plaintiff has previously lost.<sup>74</sup> In his article, Currie espoused the opinion that courts should view *Bernhard* narrowly and allow nonmutual estoppel only in defensive contexts — to preclude a plaintiff from merely switching defendants after losing an initial suit.<sup>75</sup> Furthermore, Currie suggested that the parties' posture in the prior suit should play a role in the court's decision. More specifically, Currie thought collateral estoppel should not be available against someone who was a defendant in the first action and subject to multiple claims.<sup>76</sup> This refusal to allow estoppel reflects a presumption that the defendant frequently is disadvantaged by not being able to choose the time or place of trial.<sup>77</sup> Because this inherent disadvantage might have prevented a full defense, Currie argued that a judgment should bind the defendant only in subsequent actions between the same parties.<sup>78</sup> More-

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*Id.* at 289.

<sup>71</sup> *Id.* at 289.

<sup>72</sup> *See id.* at 289-94.

<sup>73</sup> *Parklane*, 439 U.S. at 326 n.4.

<sup>74</sup> *Id.*

<sup>75</sup> Currie, *supra* note 67, at 300 ("In the *Bernhard* case, the California Supreme Court stated that 'it would be unjust to permit one who has had his day in court to reopen identical issues by merely *switching adversaries*.' This language and this idea are inappropriate to [a mass disaster] case.").

<sup>76</sup> *Id.* at 308; *see also* *Reardon v. Allen*, 88 N.J. Super. 560, 213 A.2d 26 (Law Div. 1965); *Nevarov v. Caldwell*, 161 Cal. App. 3d 762, 327 P.2d 111 (1958).

<sup>77</sup> Currie, *supra* note 67, at 303 ("In general, there is a significant difference between the situation of a party who has lost a case after choosing the time and place for action, and that of a party who has lost a case in which he had no control over such factors.").

<sup>78</sup> *Id.* at 308.

over, in Currie's opinion, offensive collateral estoppel encourages potential plaintiffs to sit by the sidelines and wait until a favorable judgment. Currie reasoned that this treats the defendant unfairly because, after a successful suit, any remaining plaintiffs may take advantage of a judgment to which they were not bound.<sup>79</sup> Many jurisdictions, however, have rejected Currie's reasoning.<sup>80</sup>

The *Bernhard* decision started a trend of abandoning mutuality.<sup>81</sup> Although numerous jurisdictions<sup>82</sup> and commentators<sup>83</sup> still cling to the doctrine, many now permit estoppel in its absence.<sup>84</sup> Those courts allowing non-mutual estoppel generally require that the defendant have had a full and fair opportunity to litigate in the previous suit.<sup>85</sup> Further, some courts have limited nonmutuality to defensive use only.<sup>86</sup> Hesitancy to apply collateral estoppel offensively derives from judicial fear that such use will delay trials and cause unfairness to defendants.<sup>87</sup> Both those accepting<sup>88</sup> and those rejecting<sup>89</sup> offensive non-

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<sup>79</sup> *Id.* at 287.

<sup>80</sup> See *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *Bahler v. Fletcher*, 257 Or. 1, 474 P.2d 329, 337 (1970) (discussing and rejecting Currie's reasoning that a nonparty to the initial action should not be allowed to preclude one who did not possess the initiative in the first proceeding); *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962). *But see* *Nevarov v. Caldwell*, 161 Cal. App. 3d 762, 327 P.2d 111 (1958) (following Currie's multiple claimant analysis in refusing offensive collateral estoppel).

<sup>81</sup> See generally *CORR, Supreme Court Doctrine In The Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35 (1985).

<sup>82</sup> See cases cited *supra* note 12; see also Annotation, *Comment Note — Mutuality of Estoppel As Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R. 3d 1044, 1084 (1970).

<sup>83</sup> See *Moore & Currier, Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); *von Moschzisker, supra* note 53, at 299 (attacking offensive collateral estoppel).

<sup>84</sup> See cases cited *supra* note 10.

<sup>85</sup> See *Blonder-Tongue*, 402 U.S. at 326; Note, *Nonmutuality: Taking the Fairness Out of Collateral Estoppel*, 13 IND. L. REV. 563, 567 (1980).

<sup>86</sup> See *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977); *Tezak v. Cooper*, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); *Albernaz v. City of Fall River*, 346 Mass. 336, 191 N.E.2d 771 (1963).

<sup>87</sup> See *Parklane*, 439 U.S. at 329-30.

<sup>88</sup> See, e.g., *Zdanok*, 327 F.2d at 944 (allowing offensive collateral estoppel).

<sup>89</sup> See *Currie, supra* note 67, at 285.

mutual preclusion have found support in the ambiguity of *Bernhard* which, by its holding, addressed only defensive estoppel.<sup>90</sup>

## 2. Federal Courts

The first significant federal case to abandon the mutuality requirement was the 1971 decision of *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.<sup>91</sup> In *Blonder-Tongue*, the respondent University of Illinois owned a patent for a radio and TV antenna.<sup>92</sup> In an infringement action against an antenna manufacturer, a federal district court had previously held the Foundation's patent invalid.<sup>93</sup> In this subsequent action, the validity of the patent was once again at issue. Although the patent had been held invalid in the first action, under the established rule of mutuality<sup>94</sup> a change in defendants meant that the Foundation was free again to assert the patent's validity.<sup>95</sup> Even though both parties to the suit argued in favor of mutuality,<sup>96</sup> the Court decided nonetheless that

<sup>90</sup> *Id.* at 300-301.

<sup>91</sup> 402 U.S. 313 (1971). Justice White delivered the opinion for a unanimous Court. *Id.*

<sup>92</sup> *Id.* at 314.

<sup>93</sup> *Id.* at 314-315.

<sup>94</sup> See *Triplett v. Lowell*, 297 U.S. 638 (1936). The Court stated:

Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not [collateral estoppel] and may not be pleaded as a defense.

*Id.* at 642.

<sup>95</sup> *Id.* Interestingly, the mutuality doctrine was so generally accepted that the defendant in *Blonder-Tongue* did not even raise the collateral estoppel defense until the Supreme Court asked the parties to argue the issue. *Blonder-Tongue*, 402 U.S. at 317-20.

<sup>96</sup> *Blonder-Tongue*, 402 U.S. at 317. "Though petitioners stand to gain by any such result, we cannot urge the destruction of a long accepted safeguard for patentees merely for the expediency of victory." Brief for Petitioner at 12, *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971). The government as *amicus curiae*, however, urged modification of the *Triplett* rule. Brief for United States at 7, *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971).

considerations of judicial efficiency must prevail over abstract concepts of fairness<sup>97</sup> and abandoned the mutuality rule in patent validity cases.<sup>98</sup> To buttress its decision, the Court observed that where the patentee was a plaintiff in the prior suit and, therefore, chose the time and place of trial, he presumably prepared to litigate the issue fully.<sup>99</sup> This justification, one should note, applies solely in the context of defensive estoppel.<sup>100</sup>

The Court also observed that the patentee's statutory presumption of validity would obtain in each successive infringement action.<sup>101</sup> As a result, prospective defendants often decide that paying royalties under a license or other settlement is preferable to the costly burden of contesting the patent.<sup>102</sup> Again, however, this reasoning is valid only in a defensive context. In an offensive situation, the plaintiff is not forced into any litigation and is not, by definition, the subject of vexatious suits.<sup>103</sup> Thus, the Court's justification for abandoning mutuality, that a plaintiff "should not be allowed to harass others on the basis of an invalid claim,"<sup>104</sup> is inapposite when a non-party plaintiff seeks to offensively estop a party defendant.

*Blonder-Tongue* did represent a departure from the strict

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<sup>97</sup> *Blonder-Tongue*, 402 U.S. at 329.

<sup>98</sup> *Id.* at 350.

<sup>99</sup> *Id.* at 332. The Court stated:

[W]e are considering the situation where the patentee was plaintiff in the prior suit and chose to litigate at that time and place. Presumably he was prepared to litigate and to litigate to the finish against the defendant there involved. . . . [T]here is no reason to suppose that plaintiff patentees would face either surprise or unusual difficulties in getting all relevant and probative evidence before the court in the first litigation.

*Id.*

<sup>100</sup> See *id.* Since, at least initially, the plaintiff gets to choose the forum of suit, he cannot realistically be heard to complain about it. See *id.*

<sup>101</sup> *Id.* at 335-38.

<sup>102</sup> *Id.*

<sup>103</sup> Cf. *Montana*, 440 U.S. at 147 (stating one result of collateral estoppel to be the avoidance of "the expense and vexation of multiple lawsuits").

<sup>104</sup> *Blonder-Tongue*, 402 U.S. at 339-40 ("[A] patentee, having been afforded the opportunity to exhaust his remedy of appeal from a holding of invalidity, has had his day in court and should not be allowed to harass others on the basis of an invalid claim.").

rule of mutuality;<sup>105</sup> the opinion, however, was narrow in scope<sup>106</sup> and expressly refused to pass upon the desirability of offensive preclusion.<sup>107</sup> While some lower courts extended *Blonder-Tongue's* reasoning beyond its strict terms,<sup>108</sup> others construed it narrowly to apply only to defensive cases.<sup>109</sup> With the changing legal environment and ever-increasing congestion in the federal court system, the time was ripe in 1978 for the Court to rule upon the merits of offensive collateral estoppel; this it did in *Parklane Hosiery Co. v. Shore*.<sup>110</sup>

In *Parklane*, respondent Shore brought a shareholders' class action in federal district court for damages and other relief against the Parklane Hosiery Company (the "Corporation") alleging that it had issued a materially false and misleading proxy statement.<sup>111</sup> But before the action came to trial, the Securities and Exchange Commission sued the same defendant on essentially the same grounds<sup>112</sup> and won.<sup>113</sup> Subsequently, Shore asserted that the Corporation was collaterally estopped from relitigating the issues which it had lost in the SEC suit.<sup>114</sup> Such use of offensive estoppel, however, had to that time not received official Supreme Court approval.

The *Parklane* Court began its analysis by restating two of the justifications for the doctrine of collateral estoppel:

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<sup>105</sup> *Id.* at 350 ("[W]e conclude that [the mutuality doctrine] should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid.").

<sup>106</sup> *Id.*; see also *id.* at 327 (stating issue to be "whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid.").

<sup>107</sup> *Id.* at 330.

<sup>108</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 298-299 (1982).

<sup>109</sup> *Parklane*, 439 U.S. at 329-31.

<sup>110</sup> 439 U.S. 322 (1979).

<sup>111</sup> *Id.* at 324.

<sup>112</sup> SEC v. *Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D.N.Y. 1976).

<sup>113</sup> *Id.* at 487.

<sup>114</sup> *Parklane*, 439 U.S. at 325. Also at issue in *Parklane* was whether "a party who has had issues of fact determined against him after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact." See *id.*

(1) it protects litigants from the burden of relitigating an identical issue with the same party or his privy; and (2) it promotes judicial economy by preventing "needless" litigation.<sup>115</sup> Although the Court interpreted its *Blonder-Tongue* holding as having addressed the "broader question" of whether a party should be allowed more than one full and fair opportunity to litigate,<sup>116</sup> the Court recognized several reasons why courts should distinguish between offensive and defensive use.<sup>117</sup> First, the Court offered, offensive preclusion does not promote judicial efficiency as defensive use does.<sup>118</sup> Defensive estoppel prevents a plaintiff from relitigating identical issues by merely switching defendants. As a result, defensive preclusion gives a plaintiff strong reason to join all possible defendants in the first action.<sup>119</sup> On the other hand, offensive estoppel creates precisely the opposite effect. Since in this context a plaintiff benefits from a previous judgment without being bound by it,<sup>120</sup> he has every incentive to delay his litigation in the hope that the first action will produce a favorable judgment.<sup>121</sup> Permitting offensive collateral estoppel, then, would likely increase rather than decrease the total amount of litigation because potential plaintiffs will have nothing to lose and everything to gain by not joining the initial suit.<sup>122</sup>

The Court offered a second reason for disallowing offensive issue preclusion: unfairness to the defendant.<sup>123</sup> Although not discussing the basic inequity of allowing a

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<sup>115</sup> *Id.* at 326. Interestingly, although not mentioned by the Court, the first-cited justification is not valid in the offensive context since the only party who would relitigate the issue (i.e., the defendant) would do so by choice. *See id.*

<sup>116</sup> *Id.* at 327-28.

<sup>117</sup> *Id.* at 329-31 (stating that the application of offensive collateral estoppel may result in inefficiency and unfairness).

<sup>118</sup> *Id.* at 329.

<sup>119</sup> *Id.* at 329-30.

<sup>120</sup> *Id.* at 327 n.7. "It is a violation of due process for a judgment to be binding on a litigant who was not a party or privy and therefore has never had an opportunity to be heard." *Id.*; *see Blonder-Tongue*, 402 U.S. at 329.

<sup>121</sup> *Parklane*, 439 U.S. at 330.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 330-31.



plaintiff to take advantage of a judgment in which he had nothing at risk,<sup>124</sup> Justice Stewart listed three instances in which allowing such estoppel would be unfair to the defendant. First, in situations where the amount in controversy in the original action is small or subsequent suits are not foreseeable, the defendant will have little incentive to litigate the specific issue fully.<sup>125</sup> Second, collateral estoppel may be unfair to a defendant if there exist prior inconsistent judgments.<sup>126</sup> Finally, a court should refuse preclusion if the second action affords the defendant procedural opportunities unavailable in the first suit that could readily cause a different outcome.<sup>127</sup>

Notwithstanding these arguments, the Court decided "not to preclude" the use of offensive collateral estoppel, but rather to allow it at the discretion of the district courts.<sup>128</sup> As a general rule, the Court opined, trial courts should not allow offensive estoppel in cases where the plaintiff could easily have joined in the first action or where its application would, for the reasons previously discussed, be unfair to the defendant.<sup>129</sup> Applying this test, the Court permitted estoppel in the case before it. First, respondent Shore could not have joined in the initial action because it was injunctive in nature and brought by the SEC.<sup>130</sup> Furthermore, allowing issue preclusion

<sup>124</sup> See Note, *supra* note 85, at 593-94.

<sup>125</sup> *Parklane*, 439 U.S. at 330; see *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1969); *Evergreens*, 141 F.2d at 927.

<sup>126</sup> *Parklane*, 439 U.S. at 330; Currie, *supra* note 67, at 304; RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) (1982).

<sup>127</sup> *Parklane*, 439 U.S. at 331. "The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action." *Id.* at 331 n.15.

<sup>128</sup> *Id.* at 331.

[T]he distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter.

RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299-300 (1982).

<sup>129</sup> *Parklane*, 439 U.S. at 331.

<sup>130</sup> *Id.* at 331-32. The Court cited 15 U.S.C. § 78u (g), which prohibits consoli-

was not unfair to the defendant because the seriousness of the allegations made in the SEC's complaint and the foreseeability of private suits which routinely follow SEC actions gave the Corporation every incentive to litigate fully.<sup>131</sup> Moreover, the remaining two elements in the Court's fairness test were satisfied: the judgment in the initial action was not inconsistent with any prior judgments and the defendant had no procedural opportunities in the subsequent action unavailable in the first suit that were likely to have caused a different result.<sup>132</sup> The Court concluded by stating that because the Corporation had a full and fair opportunity to litigate in the prior action, the "contemporary law of collateral estoppel" demanded that it be estopped from relitigating the previously decided issue.<sup>133</sup>

The *Parklane* Court, by espousing a separate test for offensive collateral estoppel situations, implicitly refused to extend *Blonder-Tongue's* analysis beyond the defensive context.<sup>134</sup> Thus, merely a showing that a party had a full and fair opportunity to litigate, which is sufficient to permit estoppel against a *plaintiff*,<sup>135</sup> is insufficient, by itself, to estop a *defendant* in a subsequent action.<sup>136</sup> The Court thus

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duction of a private action with an SEC action without SEC consent. *Id.* at 332 n.17.

<sup>131</sup> *Id.* at 332.

After a 4-day trial in which the petitioners had every opportunity to present evidence and call witnesses, the District Court held for the SEC. The petitioners then appealed to the Court of Appeals for the Second Circuit, which affirmed the judgment against them. Moreover, the petitioners were already aware of the action brought by the respondent since it had commenced before the filing of the SEC action.

*Id.* at 332 n.18.

<sup>132</sup> *Id.* at 332.

<sup>133</sup> *Id.* at 332-33. The Court did not cite any examples of the "contemporary law of collateral estoppel." See *id.*

<sup>134</sup> See *Parklane*, 439 U.S. at 329; see also Gershonowitz, *Issue Preclusion: The Return of the Multiple Claimant Anomaly*, 14 UNIV. BALT. L. REV. 227 (1985); *supra* notes 72-79 and accompanying text.

<sup>135</sup> See *Blonder-Tongue*, 402 U.S. 313.

<sup>136</sup> Gershonowitz, *supra* note 134, at 239 ("Under *Parklane*, although a full and fair opportunity to litigate is necessary, it is never a sufficient justification for offensive use of collateral estoppel.").

expressly recognized the difference between the two types of preclusion and created a stricter rule for offensive cases to curb possible abuse.

The rationale of *Parklane* can be stated as follows: (1) judicial economy requires that any particular issue be litigated only once;<sup>137</sup> and (2) "fairness" commands only that a party be given one chance to litigate fully any particular matter.<sup>138</sup> As discussed below,<sup>139</sup> these justifications are not based in sound judicial objectives, and further, are outweighed by competing considerations.

### 3. *The Restatement*

The Restatement (Second) of Judgments, although similar in many respects to *Parklane*,<sup>140</sup> declines to distinguish among the different uses of collateral estoppel.<sup>141</sup> Section 29, following *Bernhard* and *Blonder-Tongue*, would disallow preclusion if the party to be estopped lacked a full and fair opportunity to litigate in the first action.<sup>142</sup> This section also separately recognizes "other circumstances" that justify an opportunity to relitigate an issue.<sup>143</sup> Among these factors are those espoused in *Parklane*: (1) whether the precluding party could have joined in the prior suit; (2) whether the subsequent action was not foreseeable or the original party did not have a full incentive to litigate; (3) the existence of prior, inconsistent determinations; and (4) procedural opportunities available in the subsequent

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<sup>137</sup> 439 U.S. at 326; see *Blonder-Tongue*, 402 U.S. at 328-29 ("In 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.").

<sup>138</sup> *Parklane*, 439 U.S. at 326; see *Blonder-Tongue*, 402 U.S. at 328.

<sup>139</sup> See *infra* text accompanying notes 183-209, 216-227.

<sup>140</sup> See generally Gershonowitz, *supra* note 134, at 238. Both authorities require that the prerequisites of mutual collateral estoppel be satisfied before nonmutual estoppel is granted, grant discretion to trial courts, and consider potential unfairness to defendants and negative effects on judicial economy. *Id.*

<sup>141</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982).

<sup>142</sup> *Id.* at 291.

<sup>143</sup> *Id.* (offensive collateral estoppel will not obtain if "other circumstances justify affording [the party] an opportunity to relitigate the issue").

action unavailable in the initial action.<sup>144</sup> These factors are considered regardless of the posture of the parties.<sup>145</sup> Thus, under the Restatement rule, a person seeking to invoke defensive collateral estoppel would have a more difficult time than under the *Blonder-Tongue* test because the only showing required there is a full and fair opportunity to litigate.

Section 29 also lists other factors which militate against estopping a party: (1) if allowing the preclusion would be incompatible with the remedy scheme involved;<sup>146</sup> (2) if the relationship of the parties changed or the initial verdict was based upon a compromise;<sup>147</sup> (3) if allowing the estoppel would complicate matters or would prejudice the interests of another party;<sup>148</sup> or (4) if the issue is one of law.<sup>149</sup> These factors, like those above, apply equally to

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<sup>144</sup> *Parklane*, 439 U.S. at 329-30, 331. The Court viewed the sufficient incentive, inconsistent judgments, and procedural opportunities factors as elements in an ultimate question of fairness to the defendant. *Id.* at 331. Thus:

The general rule [is] that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed . . . or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

*Id.*

<sup>145</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982); see also *id.* reporter's note at 299 (stating that the "full and fair opportunity to litigate" rule has gained general acceptance).

<sup>146</sup> *Id.* § 29(1). "[I]f a statute provides that a determination is limited to the action in which it is made, or that it is to be treated in subsequent actions as only prima facie evidence of the facts involved, the determination should not be given preclusive effect." *Id.* § 29(1) comment c.

<sup>147</sup> *Id.* § 29(5). "Particularly where the issues have been tried to a jury, the circumstances may suggest that the issue was resolved by compromise or with more or less conscious reference to such matters as insurance coverage or the litigants' relative financial position." *Id.* § 29(5) comment g.

<sup>148</sup> *Id.* § 29(6). "[S]ince the primary consideration in administering the rule of preclusion is fairness rather than consistency, it is inappropriate to invoke preclusion where it will embarrass or hinder a party who has not yet had his day in court." *Id.* § 29(6) comment h.

<sup>149</sup> *Id.* § 29(7). A court should not allow preclusion if "[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." *Id.* For a discussion of the difference between issue preclusion and stare decisis, see CIVIL PROCEDURE, *supra* note 21, at 609-610.

defensive and offensive assertions.<sup>150</sup> Generally, Section 29 closely resembles the *Parklane* test: like *Parklane*, it requires that the terms of mutual collateral estoppel be satisfied before considering nonmutuality, grants discretion to trial judges, and considers potential unfairness to defendants and effects on judicial efficiency.<sup>151</sup>

The major distinction between *Parklane* and the Restatement is upon whom the burden falls to show the presence or absence of any circumstances requiring relitigation. Although it is not clear from either *Parklane* or the Restatement, one commentator has suggested that the Restatement requires the defendant to show the particular circumstances requiring relitigation, while *Parklane* requires the plaintiff to show that granting the estoppel would not be unfair to the defendant.<sup>152</sup> As mentioned above, while the Supreme Court has a separate rule for each type of estoppel<sup>153</sup> the Restatement makes no such distinction.<sup>154</sup> *Parklane* justifies its special rule for offen-

<sup>150</sup> See *supra* note 145.

<sup>151</sup> Gershonowitz, *supra* note 134, at 238.

<sup>152</sup> *Id.* at 240-41. "Under the Restatement . . . the defendant must show the existence of some circumstance requiring relitigation. . . . [T]he Court [in *Parklane*, however,] showed that along with the opponent's previous full and fair opportunity to litigate, a party seeking estoppel must demonstrate the nonexistence of circumstances which might require relitigation." *Id.* RESTATEMENT (SECOND) OF JUDGMENTS § 29 requires: (1) the existence of the conditions for mutual estoppel; (2) that the defendant have had a full and fair opportunity to litigate in the initial action; and (3) a lack of showing by the defendant of circumstances that justify relitigation. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). *Parklane*, in contrast, places the burden on the plaintiff to prove that offensive issue preclusion would not be unfair to the defendant. *Parklane*, 439 U.S. at 331-32; see Gershonowitz, *supra* note 134, at 241 n.83. According to one commentator:

The difference between *Parklane* and the RESTATEMENT (SECOND) OF JUDGMENTS is best illustrated by what happens when a court senses some general, unarticulated unfairness. If the Restatement rule applied, estoppel would be granted because the defendant must show a good reason to relitigate. Under *Parklane*, however, where the plaintiff must show the absence of reasons to relitigate, estoppel would probably be an abuse of discretion.

Gershonowitz, *supra* note 134, at 241 n.83; see 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE ¶ 4465 (1961).

<sup>153</sup> *Parklane*, 439 U.S. at 329.

<sup>154</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982).

sive use by the judicial inefficiency and "unfairness to defendants" rationale.<sup>155</sup> The Restatement, although it makes no distinction, concedes that unfairness is more likely with offensive use, and thus, courts may require a greater showing that the defendant's opportunity to litigate in the prior action was adequate.<sup>156</sup>

## II. COLLATERAL ESTOPPEL IN AIR CRASH CASES

In *Georgakis v. Eastern Air Lines, Inc.*<sup>157</sup> the United States District Court for the Eastern District of New York utilized the New York rule, similar to *Bernhard*, which required for the granting of offensive collateral estoppel (1) an identity of issues and (2) that the defendant have had a full and fair opportunity to litigate the first action.<sup>158</sup> The plaintiff in *Georgakis* sued for personal injuries arising out of the June 24, 1975 crash of Eastern's Flight 66 at John F. Kennedy Airport.<sup>159</sup> Eastern asserted that the flight in question was the U.S. leg of an international journey and it therefore fell within the liability limits of the Warsaw Convention.<sup>160</sup> The plaintiff moved for summary judgment on the ground that a previous action by another plaintiff involved in the crash had conclusively determined this issue against the airline.<sup>161</sup> The court held that (1) because the plaintiffs in both actions had similar itineraries, the issues in each action were identical, and (2) Eastern had fully and fairly litigated its defense.<sup>162</sup> As a result, offensive preclusion was permitted.<sup>163</sup>

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<sup>155</sup> 439 U.S. at 329-30.

<sup>156</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299-300 (1982).

<sup>157</sup> 512 F. Supp. 330 (E.D.N.Y. 1981).

<sup>158</sup> For a discussion of the *Bernhard* rule, see *supra* notes 59-66 and accompanying text.

<sup>159</sup> *Georgakis*, 512 F. Supp. at 330.

<sup>160</sup> *Id.* at 330-31.

<sup>161</sup> *Id.* at 330, 333. Interestingly, the case used for estoppel by the plaintiff was reversed on the ground, *inter alia*, that the Warsaw limits did apply. See *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406, 409-14 (2d Cir. 1982).

<sup>162</sup> *Georgakis*, 512 F. Supp. at 334.

<sup>163</sup> *Id.* at 335.

The case of *Stoddard v. Ling-Temco-Vought, Inc.*<sup>164</sup> arose from the June 13, 1971 crash of a U.S. Air Force C-135B aircraft which killed all twenty-four persons on board.<sup>165</sup> Various plaintiffs brought actions against the United States and LTV, which the court consolidated for trial on liability.<sup>166</sup> The court later severed two of the actions and found the defendants liable on the remaining claims.<sup>167</sup> The two plaintiffs severed from the suit subsequently intervened and, based on the first consolidated suit, moved to collaterally estop the defendants from contesting their liability.<sup>168</sup> The court applied the *Parklane* analysis<sup>169</sup> and allowed the preclusion since: (1) the plaintiffs could not have joined the first action and, in fact, were severed by the court *sua sponte*; (2) the defendants had every incentive to litigate in the first action; (3) there were no inconsistent prior judgments; and (4) there were no procedural differences between the two actions.<sup>170</sup>

In *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*<sup>171</sup> the United States District Court for the District of Columbia applied the *Parklane* offensive collateral estoppel analysis to the question of whether the forces and conditions associated with the air crash of a Lockheed C5-A were sufficient to cause injury to an infant passenger.<sup>172</sup> A single jury in two earlier cases had decided this issue in the affirmative.<sup>173</sup> The court found that: (1) the plaintiff could not have joined the prior action due to Lockheed's consistent opposition; (2) because all of the plaintiffs' claims were filed simultaneously and Lockheed was aware of the possible collateral estoppel effect of the first action, it had fully litigated its defense; (3) there were no inconsistent

<sup>164</sup> 513 F. Supp. 335 (C.D. Cal. 1981).

<sup>165</sup> *Id.* at 336.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> For a discussion of *Parklane*, see *supra* notes 110-138 and accompanying text.

<sup>170</sup> *Stoddard*, 513 F. Supp. at 337-38.

<sup>171</sup> 497 F. Supp. 313 (D.D.C. 1980).

<sup>172</sup> *Id.* at 315-16.

<sup>173</sup> *Id.* at 316.

prior judgments; and (4) there were no procedural advantages in the subsequent case.<sup>174</sup> The court, therefore, ordered the defendant not to reargue the issue in any of the remaining suits.<sup>175</sup> Upon appeal, however, the District of Columbia Circuit vacated the pretrial order<sup>176</sup> on the grounds that (1) there was not a sufficient identity of issues,<sup>177</sup> and (2) the lower court's order was not accurately tailored to the issue actually decided in the first suit.<sup>178</sup>

The above cases indicate that the mutuality doctrine no longer serves as an absolute bar to offensive issue preclusion. While lower courts strictly apply the *Parklane* criteria in air crash cases, the ultimate decision is still within their discretion.<sup>179</sup> And, as with any other discretionary tool, such decision is subject to abuse. A further discussion of the rationale behind offensive collateral estoppel will provide insight into the desirability and equity of its existence.

### III. OFFENSIVE COLLATERAL ESTOPPEL — AN ANALYSIS

Courts have recited the following justifications when allowing estoppel in the absence of mutuality: (1) the protection of parties from the expense and vexation that inevitably attend multiple lawsuits; (2) the conservation of scarce judicial resources; and (3) the encouragement of confidence in judicial finality by the avoidance of inconsistent judgments.<sup>180</sup> A fourth reason often espoused by courts that allow offensive estoppel is the notion that "fairness" affords a party only one chance fully to litigate any particular matter.<sup>181</sup> Each of these bases merits indi-

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<sup>174</sup> *Id.* at 317-18.

<sup>175</sup> *Id.* at 319.

<sup>176</sup> *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 853 (D.C. Cir. 1981).

<sup>177</sup> *Id.* at 852.

<sup>178</sup> *Id.*

<sup>179</sup> *See Parklane*, 439 U.S. at 331.

<sup>180</sup> *See Montana*, 440 U.S. at 153-54; *see also* CIVIL PROCEDURE, *supra* note 21, at 678.

<sup>181</sup> *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950) ("[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of



vidual scrutiny.

### A. *Vexation of Multiple Suits*

An oft-cited justification for the doctrine of collateral estoppel is the protection of parties from the "expense and vexation attending multiple lawsuits."<sup>182</sup> When a particular fact is determined in an action, it is considered unfair to the prevailing party to allow the losing party to again contest that issue in a subsequent suit between them. Thus, the focus is upon unfairness to the prevailing party. In the scheme of nonmutual preclusion, however, the prevailing party is not involved in the second action; rather, it is a nonparty who seeks to estop the losing party from the prior action. Thus, because the estoppel does not involve the earlier prevailing party, the "multiple suit" justification is inapposite. Clearly, because this is his first contact with the suit, the nonparty is not burdened by having to litigate the particular issue. Moreover, neither is the party to be estopped burdened since he freely chooses the relitigation.

### B. *Conservation of Judicial Resources*

Another frequently cited reason for allowing non-mutual collateral estoppel is the conservation of judicial resources.<sup>183</sup> Justice White, in discussing defensive estoppel in *Blonder-Tongue*, argued that there is an arguable misallocation of resources whenever a defendant, because of the mutuality principle, is forced to present a full defense on the merits to a claim that the plaintiff has already litigated and lost in a prior action.<sup>184</sup> He argued further that any additional time spent by a defendant that could have been avoided through preclusion diverts the defendant's

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that claim a second time . . . unless some overriding consideration of fairness . . . dictates a different result. . . .").

<sup>182</sup> See, e.g., *Montana*, 440 U.S. at 153-54.

<sup>183</sup> See *Blonder-Tongue*, 402 U.S. at 348 ("Even accepting respondents' characterization of [the time saved by allowing collateral estoppel] as *de minimis*, it is clear that abrogation of [the mutuality rule] will save *some* judicial time . . .").

<sup>184</sup> *Id.* at 329.

time and money from alternative uses.<sup>185</sup>

This reasoning, however, was not carried forward to the Court's analysis of offensive estoppel in *Parklane*.<sup>186</sup> The *Parklane* Court initially distinguished *Blonder-Tongue* because of its defensive posture,<sup>187</sup> and then expressly recognized the inefficiencies inherent in allowing offensive preclusion.<sup>188</sup> *Parklane* raised the concern that because a plaintiff will have "everything to gain and nothing to lose" by waiting for a favorable judgment, the inevitable result will be delay and judicial waste.<sup>189</sup> In contrast, defensive use promotes efficiency because a plaintiff, knowing he will be estopped in future actions, has a strong incentive to join all potential defendants.<sup>190</sup> Thus, the difference between the two applications lies in whether the party asserting the estoppel has the power to join other parties related to the suit.<sup>191</sup>

Because a plaintiff has control over whom he sues,<sup>192</sup> he will likely join all parties who could possibly take advantage of his judgment. A defendant, on the other hand, has little chance of adding potential plaintiffs to the action.<sup>193</sup> Further, a court will join a plaintiff *sua sponte* only if (1) in his absence complete relief cannot be afforded among those already parties or (2) the plaintiff has an in-

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<sup>185</sup> *Id.*

<sup>186</sup> *Parklane*, 439 U.S. at 329 ("In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action. Nevertheless, several reasons have been advanced why the two situations should be treated differently.").

<sup>187</sup> *Id.* ("The *Blonder-Tongue* case involved defensive use of collateral estoppel . . . . The present case, by contrast, involves offensive use. . . .").

<sup>188</sup> *Id.* at 329-30.

<sup>189</sup> *Id.* at 330; *cf. id.* at 331 ("The general rule should be that in cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use of offensive collateral estoppel.").

<sup>190</sup> *Id.* at 329-30; Gershonowitz, *supra* note 134, at 234.

<sup>191</sup> See Note, *supra* note 85, at 584-87.

<sup>192</sup> See FED. R. CIV. P. 20.

<sup>193</sup> See FED. R. CIV. P. 42(a). Although it is within a district court's discretion to consolidate actions against a common defendant, *id.*; see, e.g., *Arnold v. Eastern Airlines Inc.*, 681 F.2d 186, 192 (4th Cir. 1982), such power is limited to only those actions being prosecuted within a common district. *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267, 273 (3d Cir. 1962).

terest in the suit such that disposition of the matter in his absence may prejudice that interest or subject present parties to multiple liability.<sup>194</sup> In the air crash situation, a court would seldom forcibly join a plaintiff since (1) relief can be granted adequately through separate trials, and (2) one plaintiff's victory would not prejudice the interests of the remaining plaintiffs.<sup>195</sup> The defendant, because he has no real control over the parties to the action,<sup>196</sup> thus cannot substantially affect "judicial economy."<sup>197</sup>

Furthermore, if a defendant knows that a judgment in a particular action might be used conclusively to prove his liability in subsequent actions, the defendant will assert his defense with this potential liability in mind.<sup>198</sup> Thus, the defendant may put on a much greater defense in the initial action than he otherwise would have.<sup>199</sup> The result is twofold: First, a plaintiff expecting merely a small defense may lose an action unfairly because of the great economic resources used by the apprehensive defendant.<sup>200</sup> Second, there is also an "arguable misallocation of resources" in the first suit because the fear of subsequent estoppel effect will artificially inflate the amount of work put forth by the defendant.<sup>201</sup> The inefficiencies of this scenario would not apply in the defensive context, how-

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<sup>194</sup> FED. R. CIV. P. 19.

<sup>195</sup> Cf. FED. R. CIV. P. 23, Notes of Advisory Committee on 1966 Amendment to Rules (commenting that ordinarily a mass disaster is not appropriate for a class action).

<sup>196</sup> See Currie, *supra* note 67, at 287 ("In the relatively rare instances in which it is possible for the defendant to force consolidation of all claims arising from a single occurrence in one proceeding, he normally fights for the right to do so."). See generally Note, *supra* note 85, at 575 n. 79. A defendant cannot join plaintiffs in federal courts except by necessary joinder if the court rules that the plaintiff is a "party to be joined if feasible," FED. R. CIV. P. 19; by interpleader in situations involving exposure to double liability, FED. R. CIV. P. 22; by consolidation of claims in the same jurisdiction, FED. R. CIV. P. 42(a); or by declaratory judgment, if permitted, FED. R. CIV. P. 57.

<sup>197</sup> Note, *supra* note 85, at 575.

<sup>198</sup> See Moore & Currier, *supra* note 83, at 310; Note, *supra* note 85, at 572.

<sup>199</sup> R. FIELD AND B. KAPLAN, CIVIL PROCEDURE 859 (3d ed. 1973).

<sup>200</sup> See Note, *supra* note 85, at 572-73.

<sup>201</sup> See *id.* at 583 ("Litigants who anticipate future suits tend to litigate more vigorously to avoid losing an issue which they may later be precluded from relitigating.").

ever, because the plaintiff, instead of prosecuting his claim with inflated vigor, would simply join all possible future defendants.<sup>202</sup>

The efficiency argument in favor of offensive non-mutual estoppel is further undermined by the fact that defendants against whom the estoppel is asserted will "waste judicial resources" in fighting application of the estoppel.<sup>203</sup> Under the *Parklane* test, for example, the defendant will contend that the plaintiff could easily have joined in the initial action.<sup>204</sup> And, this "easily have joined" question would occur in each subsequent action in which the defendant has a judgment at stake.<sup>205</sup> As a result, the court must take time to consider affidavits, depositions, and other evidence relating to the first judgment merely to rule on the estoppel issue.<sup>206</sup> The defendant, in addition, will attempt to prove that to preclude him would be unfair under one or more of the *Parklane* factors.<sup>207</sup>

Obviously, the amount of procedural litigation a party will engage in to avoid estoppel will vary with the parties and circumstances. It would be somewhat naive, however, to assume that a defendant with many subsequent judgments at risk will simply accept his loss in the first suit and submit to estoppel in each future suit.<sup>208</sup> The defendant, in actuality, will likely defend against the estoppel with ex-

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<sup>202</sup> *Parklane*, 439 U.S. at 329-30.

<sup>203</sup> Note, *supra* note 85, at 573 ("Rather than engage in relitigation of issues, parties will contest the application of nonmutual collateral estoppel . . . . The focus of litigation thus shifts from the merits to procedural opportunity when nonmutual collateral estoppel is asserted . . . .").

<sup>204</sup> See *Parklane*, 439 U.S. at 331 (ruling that where plaintiff could easily have joined the initial action offensive collateral estoppel should be denied); cf. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) (denying collateral estoppel if plaintiff "could have effected joinder in first action"); RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment e (1982) (collateral estoppel should be denied where the party asserting it "might ordinarily have been expected to join" or "could reasonably have been expected to intervene" in the prior action).

<sup>205</sup> Note, *supra* note 85, at 573-74.

<sup>206</sup> *Id.*

<sup>207</sup> *Parklane*, 439 U.S. at 330-31; see *supra* notes 124-127 and accompanying text.

<sup>208</sup> See Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 730 (1967) ("It is arguable . . . that because there is no certainty in the application of the full-and-fair-opportunity test nearly every litigant against whom collateral es-

actly the amount of economic resources that he otherwise would have allocated to contesting the estopped issue. As above, this third countervailing consideration would not exist in a defensive context because a plaintiff, sensing subsequent collateral estoppel battles that even if won would only give him the right to relitigate an issue, would join all potential parties who could take advantage of a judgment decided adversely to him.<sup>209</sup>

### C. *Inconsistent Judgments*

A third justification for collateral estoppel is that it encourages confidence in the finality of judicial decisions by avoiding inconsistent judgments.<sup>210</sup> If courts prohibit parties from relitigating identical issues in different suits, there will exist only one finding on any particular point. Because specific findings will never be contradicted, the argument goes, the court system will appear effective as a "truth finder." Other considerations, however, are readily apparent.

First, the primary purpose of our judiciary is not to engender the public's confidence but rather to resolve disputes between parties.<sup>211</sup> Second, the rendering of multiple judgments inherently exposes any aberrational findings.<sup>212</sup> For example, if a defendant won ninety-five out of one hundred suits arising from a common set of facts (such as an air crash), one could reasonably assume that the defense was the "better" position and that "jus-

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toppel is asserted will seek to show that he would be prejudiced by a preclusion of his claim.").

<sup>209</sup> *Parklane*, 439 U.S. at 329-30.

<sup>210</sup> See *Montana*, 440 U.S. at 153-54 ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate . . . fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

<sup>211</sup> See *Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F.2d 143, 145 (3d Cir. 1943) ("A lawsuit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants."); Note, *supra* note 85, at 593.

<sup>212</sup> Cf. *Currie*, *supra* note 67, at 289 ("Our aversion to the twenty-sixth judgment as a conclusive adjudication [after twenty-five opposite judgments] stems largely from the feeling that such a judgment in such a series must be an aberration.").

tice" had been done in the vast majority of cases. On the other hand, if one of the five aberrational judgments had occurred in the first action and the remaining courts barred the defendant from relitigating his liability, then all subsequent cases would be controlled by, perhaps, an idiosyncratic judge or jury.<sup>213</sup> Moreover, such an idiosyncratic decision for the plaintiff is most likely to occur in the first action since, knowing of potential estoppel effect, the most sympathetic plaintiff is often put forth first.

Admittedly, trying multiple cases consumes valuable judicial resources; but, one must consider whether (as in the present system) the possibility of ninety-five unfair, unjust judgments is an acceptable cost therefor.<sup>214</sup> Viewing this situation as parties with disputes to settle, no reason stands out why a defendant should be denied access to the courts merely because he is the target of multiple claims. Further, with the asymmetry of allowing different plaintiffs to estop a common defendant without risk to themselves, it is unclear whether the natural consequence of transferring money from defendants to plaintiffs is sound judicial policy.<sup>215</sup>

#### D. "Full and Fair Chance to Litigate"

The fourth conceptual underpinning of collateral estoppel is the notion that a party should not be allowed more than one full and fair chance to litigate any particular issue.<sup>216</sup> Mutual collateral estoppel comports with due process in that the estopped party has received notice and a hearing before being brought to judgment in the first

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<sup>213</sup> Cf. *id.* "[W]e have no warrant for assuming that the aberrational judgment will not come as the first in the series. Indeed, [since plaintiffs possess the strategic initiative], the judgment first rendered will be the one least likely to represent an unprejudiced finding after a full and fair hearing." *Id.* Currie further observed: "A case in which the factors exciting sympathy for the plaintiff are very strong may be brought in a very inconvenient forum, where the opportunity to present an effective defense is subject to maximum handicaps." *Id.* at 288.

<sup>214</sup> See *supra* note 211 and accompanying text.

<sup>215</sup> See *Hornstein*, 133 F.2d at 145.

<sup>216</sup> See *Maryland v. Capital Airlines, Inc.*, 267 F. Supp. 298, 304 (D. Md. 1967); *Bruszewski*, 181 F.2d at 421.

action.<sup>217</sup> However, whether due process entitles a party to relitigate an issue against one not a party to the previous action raises new problems.<sup>218</sup> Collateral estoppel's seal of due process approval clearly obtained when the mutuality rule was in vogue; that is, when the parties in the subsequent action were identical to the parties in the original action.<sup>219</sup> In such a situation, fairness permits only one decision on any particular matter because the prevailing party merits protection from vexatious and harassing claims.<sup>220</sup> When viewed in the light of nonmutuality, however, this reasoning loses some of its luster.<sup>221</sup>

Even though a party has received his minimum due process protections, it does not follow *ipso facto* that he has been treated "fairly."<sup>222</sup> A fundamental flaw in the offensive collateral estoppel doctrine is the glaring fact that the defendant has everything at risk in the first action while nonparty plaintiffs risk nothing.<sup>223</sup> Because due process requires that all persons have an opportunity to be heard before their legal claims are extinguished, a defendant who wins against one plaintiff must still defend all remaining actions.<sup>224</sup> Thus, nonparty plaintiffs can sit on the sidelines and watch the initial action without fear of prejudice to their positions.<sup>225</sup> If, on the other hand, the first

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<sup>217</sup> *Bernhard*, 19 Cal. 2d at 811-12, 122 P.2d at 894. "The requirements of due process of law forbid the assertion of [collateral estoppel] against a party unless he was bound by the earlier litigation . . . ." *Id.* Justice Traynor then limited the due process protection: "There is no compelling reason, however, for requiring that the party asserting the plea of [collateral estoppel] must have been a party, or in privity with a party, to the earlier litigation." *Id.*

<sup>218</sup> See 1B J. MOORE, W. TAGGERT & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.412 (2d ed. 1985); J. FRANK, *COURTS ON TRIAL* 5-9 (1949).

<sup>219</sup> See *Bigelow*, 225 U.S. at 127.

<sup>220</sup> See *Montana*, 440 U.S. at 153-54.

<sup>221</sup> See Note, *supra* note 85, at 593.

<sup>222</sup> See *Parklane*, 439 U.S. at 330-31 (stating that "unfairness" to the defendant may be a sufficient ground upon which to deny offensive collateral estoppel).

<sup>223</sup> See Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws*, 44 TENN. L. REV. 927 (1977).

<sup>224</sup> *Blonder-Tongue*, 402 U.S. at 320-28; *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

<sup>225</sup> See Currie, *supra* note 67, at 287. Professor Currie commented: [T]he defendant . . . is required to defend every suit to the utmost, risking everything against the chance of winning as to a single claim.

plaintiff wins, the defendant has, in effect, lost all subsequent cases on that issue because he was accorded his one "full and fair" chance to litigate the matter.<sup>226</sup> The remaining plaintiffs can then prosecute their actions without the expense or risk of litigating the estopped issue.<sup>227</sup>

### E. Summary

Considering these arguments *in toto*, justifications exist for<sup>228</sup> and against<sup>229</sup> allowing offensive issue preclusion. The *Parklane* analysis essentially contains an all-or-nothing presumption for the multiple claimant situation: if the first plaintiff to judgment wins, all remaining plaintiffs can utilize the judgment to estop the common defendant, unless the court finds either (1) that the remaining plaintiffs could easily have joined the first action, or (2) that appli-

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And how is he to be compensated for the imposition of this perilous disadvantage? Forsooth, by the *experience* he gains if he wins the first suit — an experience which is his under the established rule whether he wins or loses; an experience which is valueless to him if he loses the first suit; an experience which is offset, to say the least, by the "experience" which accrues to the remaining . . . plaintiffs as they hold back, without risk, and make notes while the case is defended "to the utmost"; an experience which, at best, is scant protection against the probability that, sooner or later, some jury in one of the remaining . . . cases will exercise its prerogative to view the evidence in the light most favorable to the plaintiff, no matter how ably experienced counsel conducts the defense.

*Id.*

<sup>226</sup> See *Parklane*, 439 U.S. at 322.

<sup>227</sup> Note, *supra* note 85, at 593. The author noted:

The lawsuit evolved to protect society from the dangers of unrestricted disputes and still remains a kind of "sublimated, regulated brawl, a private battle conducted in a court-house." [See J. FRANK, COURTS ON TRIAL 5-9 (1949).] The present adversary system is designed to allow opponents to meet in battle; nonmutuality conflicts with this system by allowing a competitor to be declared the loser to one he has never met on the field of contest. [Spettigue v. Mahoney, 8 Ariz. App. 281, 286, 445 P.2d 557, 562 (1968).]

Note, *supra* note 85, at 593 (citations added).

<sup>228</sup> J. BENTHAM, *supra* note 56; Cox, *supra* note 56, at 245-47; Comment, *Privacy and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 610 (1926).

<sup>229</sup> Overton, *supra* note 223, at 935; Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 18-19 (1969); Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612, 679 (1978); Moore & Currier, *supra* note 53, at 301.



cation of the estoppel would be "unfair."<sup>230</sup> Conversely, if the defendant wins the first action, no subsequent judgment will have an estoppel effect.<sup>231</sup> The first case, then, is important indeed.<sup>232</sup> Perhaps a rule can be fashioned that would embrace the best rationale of the mutuality rule<sup>233</sup> while still allowing offensive preclusion. This rule should be fashioned to serve the following recognized goals: (1) fairness to all parties involved;<sup>234</sup> (2) judicial efficiency, encouraging fewer trials rather than more;<sup>235</sup> (3) the discouragement of any "wait and see" attitude;<sup>236</sup> and (4) the appearance of judicial finality to breed confidence in our court system.<sup>237</sup>

#### IV. PROPOSAL

I propose this rule:

"A defendant in an action may not be collaterally estopped by an adversary upon an issue decided in a prior action to which the adversary was not a party unless the adversary had agreed to be bound thereby."

Under the rule, potential plaintiffs will have the opportunity to decide their own fate. If they wish to rest their fortunes on another plaintiff's case, they may stipulate as such. If they wish to prosecute their own claim, they need

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<sup>230</sup> See *Parklane*, 439 U.S. at 331. Granting collateral estoppel is within the trial judge's discretion; he is to consider, *inter alia*, whether the plaintiff could "easily have joined" the first action. *Id.*

<sup>231</sup> *Id.* at 330.

<sup>232</sup> See Note, *supra* note 85, at 589. "A judgment for the defendant in the first suit will prevent subsequent plaintiffs from using a later favorable judgment; . . . [o]n the other hand, a judgment for the original plaintiff will preclude the defendant on the issue of liability in all subsequent suits. . . ." *Id.*

<sup>233</sup> See *supra* note 55 and accompanying text.

<sup>234</sup> See *supra* notes 216-227 and accompanying text; cf. *Parklane*, 439 U.S. at 330-31 (defining as "unfair" application of collateral estoppel in situations: (1) where subsequent actions were not foreseeable at the time of the first action; (2) where there is a possibility of inconsistent judgments; or (3) where the defendant has procedural advantages in the subsequent action).

<sup>235</sup> See *supra* notes 183-209 and accompanying text; see also *Bruszewski*, 181 F.2d at 421 ("Both orderliness and reasonable time saving in judicial administration require that [parties be allowed only one full and fair opportunity to litigate].").

<sup>236</sup> See *supra* note 189 and accompanying text.

<sup>237</sup> See *supra* notes 210-215 and accompanying text.

not do anything. The plaintiffs, then, will control the litigation and any possible use of estoppel. An analysis of the already mentioned objectives and justifications for collateral estoppel will lend support to this proposal.

The proposed rule's most fundamental improvement over, for example, the *Parklane* criteria<sup>238</sup> is its recognition of the unfairness suffered by a defendant who has everything at stake while his opponents risk nothing.<sup>239</sup> Even though *Parklane*, by its terms, instructs courts to refuse to apply offensive collateral estoppel if such application would result in unfairness to the defendant,<sup>240</sup> the *Parklane* test does not address the basic asymmetry of risk; rather, it lists only specific items which may have prejudiced the defendant in the earlier suit.<sup>241</sup> Forcing potential plaintiffs to decide whether to be bound by the initial judgment merely places them on an equal footing with the defendant.<sup>242</sup> They are not in any way treated unfairly; in fact, it is a purely optional decision. Furthermore, plaintiffs will still have an advantage over the common defendant because they may bind themselves to the case of a more "attractive" plaintiff, while the defendant must rely on his own merits in each action. Moreover, the subsequent plaintiffs are not limited to accepting only the first action; they may choose any prior plaintiff's case. Of course, plaintiffs would not applaud this rule since under the present law they can truly "have their cake and eat it too."<sup>243</sup> However, requiring a party to submit to fundamental notions of fairness should survive criticism.<sup>244</sup>

Although the proposed rule may still result in inconsistent judgments, the public eye should perceive it as fair.

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<sup>238</sup> For a discussion of *Parklane*, see *supra* notes 111-138 and accompanying text.

<sup>239</sup> See Currie, *supra* note 67, at 287. For a discussion of the *Parklane* "fairness" test, see *supra* notes 123-127 and accompanying text.

<sup>240</sup> *Parklane*, 439 U.S. at 331.

<sup>241</sup> *Id.* at 330-31.

<sup>242</sup> Cf. *Bigelow*, 225 U.S. at 127 (premising mutuality doctrine on notion that all litigants should be treated equally).

<sup>243</sup> See *supra* notes 222-227 and accompanying text.

<sup>244</sup> But see Cox, *supra* note 56.

The most egregious burden placed upon plaintiffs would be the prosecution of their individual actions, perhaps the paradigm of due process *rights*. With regard to conserving scarce judicial resources, this rule lies somewhere between the "inefficiency" of the mutuality rule and the "efficiency" of freely allowing offensive collateral estoppel. Thus, while application of the rule would increase docket size over a system which follows, for example, the *Bernhard*<sup>245</sup> rule, it would do so while achieving basic judicial equity.<sup>246</sup> Also, one can presume that at least *some* of the plaintiffs will prefer to take advantage of another's superior strategic position, thus reducing dockets as compared to a jurisdiction that still follows strict mutuality.<sup>247</sup> This rule, like that of mutuality, would also remove the incentive for plaintiffs merely to sit by the sidelines and wait for a favorable judgment, a major criticism voiced by the Court in *Parklane*.<sup>248</sup> Aware that he will gain nothing by waiting, a plaintiff will decide whether or not to prosecute his own action. If his decision is not to prosecute such an action, he will then stipulate to another action more favorable to his position. Thus, rather than dragging out suits with numerous similarly situated plaintiffs, this rule may even shorten the length of the entire trial process. Further, the rule would not cause any administrative burden, requiring only an agreement filed with the common defendant.<sup>249</sup>

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<sup>245</sup> *Bernhard*, 19 Cal. 2d at 811-12, 122 P.2d at 895 (stating the relevant considerations in a nonmutual estoppel decision to be: "Was the issue decided in the prior adjudication 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?").

<sup>246</sup> See Note, *supra* note 85, at 593; Currie, *supra* note 67, at 287-88.

<sup>247</sup> See Currie, *supra* note 67, at 288. Presumably, a plaintiff would want to take advantage of "[a] case in which the factors exciting sympathy for the plaintiff are very strong [and which is] . . . brought in a very inconvenient forum, where the opportunity to present an effective defense is subject to maximum handicaps." See *id.*

<sup>248</sup> *Parklane*, 439 U.S. at 330.

<sup>249</sup> Cf. Semmell, *Collateral Estoppel, Mutuality & Joinder of Parties*, 68 COLUM. L. REV. 1457, 1475 (1968) (proposal of rule for nonmutual collateral estoppel analysis). The agreement would essentially comprise (1) a covenant not to sue executed by the plaintiff and (2) a confession of judgment by the defendant. The final

As a final criticism, one could argue that a party deserves only one "full and fair" chance to litigate any particular issue.<sup>250</sup> The validity of this criticism, however, has drawn differing views.<sup>251</sup> The fact that the defendants in these cases are frequently large institutional entities which fail to evoke much public sympathy seems to color the entire estoppel question.<sup>252</sup>

## V. CONCLUSION

The doctrine of mutuality states that one cannot take advantage of a judgment by which he had nothing to lose.<sup>253</sup> Adherence to this rule, however, has been steadily eroding.<sup>254</sup> The controversy surrounding mutuality can be reduced to the simple question of whether denying defendants access to the courts is too high a price to pay for saving judicial resources.<sup>255</sup> The Supreme Court has fashioned a rule which bars offensive nonmutual estoppel against a defendant if either the plaintiff could easily have joined in the prior suit or if allowance of the estoppel would be in a narrow sense "unfair."<sup>256</sup> The fact that a plaintiff may take advantage of a judgment in which he

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outcome of the matter upon appeal would determine which element of the agreement is activated. If, due to a lack of resources, the actual plaintiff in a suit were unable to appeal, the remaining nonparty plaintiffs bound to that suit would likely prosecute the action to its completion.

<sup>250</sup> See *supra* notes 216-227 and accompanying text.

<sup>251</sup> Compare *Bruszewski*, 181 F.2d at 421 ("[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time.") with Note, *supra* note 85, at 593 ("A losing party has not had a day in court *against* the nonparty who estops him; thus, nonmutuality may inherently violate due process if 'day in court' is defined as a private contest between parties.").

<sup>252</sup> See, e.g., *In re Northern Dist. Of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1970). See generally Gunn, *The Offensive Use of Collateral Estoppel In Mass Tort Cases*, 52 Miss. L.J. 765 (1982).

<sup>253</sup> For a discussion of the doctrine of mutuality, see *supra* notes 54-138 and accompanying text.

<sup>254</sup> See *supra* note 10.

<sup>255</sup> For a discussion of the rationale for discarding the mutuality rule, see *supra* notes 182-227 and accompanying text.

<sup>256</sup> *Parklane*, 439 U.S. at 329-31; see *supra* notes 123-127 and accompanying text.

had nothing at risk is not considered "unfair."<sup>257</sup> Allowing collateral estoppel generally saves scarce judicial resources;<sup>258</sup> however, in certain instances the amount of litigation may actually increase due to a vigorous contest over the *Parklane* factors.<sup>259</sup> On the other hand, a strict rule of mutuality, which disallows offensive applications, discourages plaintiffs from waiting by the sidelines until a favorable judgment.<sup>260</sup> Mutuality as a requirement of collateral estoppel creates a greater chance of achieving a "just" result in the majority of cases because an idiosyncratic decision has no effect beyond the particular case in which the decision was rendered.<sup>261</sup> Most fundamentally, the mutuality rule places plaintiffs and defendants on an equal footing, since they risk only one unfavorable judgment in each suit.<sup>262</sup>

The proposed rule would allow offensive collateral estoppel upon an issue from a prior judgment only if the plaintiff had agreed to be bound thereby. This rule does not address situations of defensive issue preclusion because such preclusion encourages judicial efficiency by removing the incentive to wait.<sup>263</sup> Further, defensive use is fair to plaintiffs because they have the power to join all related defendants.<sup>264</sup> In the offensive context, the rule would remove the plaintiff's reason to wait for a favorable judgment and, further, would eliminate at least some potential trials. More particularly, in air crash situations the

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<sup>257</sup> See *Parklane*, 439 U.S. at 327, 330-31. The Court recognized that avoidance of this asymmetry was the premise of mutuality, but failed to include it in the Court's proffered rule. See *id.*

<sup>258</sup> See *supra* notes 183-209 and accompanying text.

<sup>259</sup> See *supra* notes 203-207 and accompanying text.

<sup>260</sup> See *supra* notes 188-189 and accompanying text.

<sup>261</sup> Note, *supra* note 85, at 594. "Each trial represents a mathematical probability of an accurate and fair judgment; nonmutual estoppel after the first trial diminishes the probability of a fair judgment that a party would have been afforded had he been allowed to relitigate with each adversary." *Id.*; accord Note, *supra* note 229, at 612.

<sup>262</sup> Cf. *Bigelow*, 225 U.S. at 127 (espousing notion that all litigants should be treated equally).

<sup>263</sup> *Parklane*, 439 U.S. at 329-30.

<sup>264</sup> See FED. R. CIV. P. 20.

new rule would displace the trial court's *Parklane* analysis, the availability of estoppel being determined by the injured plaintiffs themselves.<sup>265</sup> Most importantly, the proposal would avoid much of the unfairness inherent in offensive collateral estoppel because a plaintiff would not be able to take advantage of a judgment by which he risked nothing, and a defendant would have the luxury of the plaintiff being precluded should the defendant win.<sup>266</sup> Lastly, the public should perceive the rule as fair because plaintiffs would still have the right to prosecute their own actions individually, a right fully comporting with due process.

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<sup>265</sup> For a discussion of the proposed rule, see *supra* notes 238-252 and accompanying text.

<sup>266</sup> See *supra* notes 239-249 and accompanying text.



# **Casenotes and Statute Notes**



