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Parklane Hoisery: Offensive Use of Nonmutual Collateral Estoppel in Federal Courts

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PARKLANE HOSIERY: OFFENSIVE USE OF NONMUTUAL COLLATERAL ESTOPPEL IN FEDERAL COURTS

Collateral estoppel (issue preclusion),¹ like the related doctrine of res judicata (claim preclusion),² is a common law rule limiting the relitigation of issues actually or necessarily determined by a judgment in a court of competent jurisdiction. Although distinct in operation, both doctrines have the common purpose of judicial finality.³ From a policy standpoint, the application of these doctrines protects individuals from vexatious litigation and promotes the efficient use of judicial resources.⁴

At common law, courts developed the mutuality rule as a corollary to these litigation preclusion doctrines.⁵ The rule restricts the use of collateral estoppel to cases in which the parties to the subsequent action were parties or privies in the prior action.⁶ Although due process forbids the use of estoppel against one who was not a party to the first action,⁷ mutuality

¹ For clarity, res judicata and collateral estoppel will be referred to as claim preclusion and issue preclusion respectively. See Restatement (Second) of Judgments §§ 61-68 (Tent. Draft No. 1, 1973). See also Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 27-28 (1964). For a discussion of the distinction between litigation preclusion by issue and by claim, see Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876).

Collateral estoppel forecloses relitigation even though the subsequent claim states a different cause of action. See 1B Moore's Federal Practice ¶ 0.405[1], at 621-22 (2d ed. 1974). See generally Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, 1977).

² Res judicata refers to the effect given a prior judgment on the merits in a second action between the same parties or their privies on the same cause of action. Thus, a final judgment on the merits is binding on parties or their privies to the extent that matters were, or could have been, adjudicated in a prior lawsuit on the same cause of action. See 1B Moore, supra note 1, ¶ 0.405[3], at 631-32. One who was "represented" in an action by a prior party of record, if such representation amounts to an opportunity to "actually participate" in the action, is generally a privy of the prior party and bound by the prior judgment. See 1B Moore, supra note 1, ¶ 0.411[6], at 1553.


⁵ Although courts refer to the mutuality rule as a corollary to both issue and claim preclusion, its application necessarily involves the effect of a prior judgment as collateral estoppel rather than res judicata since the latter involves, by definition, the same parties or their privies. See 1B Moore, supra note 1, ¶ 0.412[1], at 1803.


⁷ See also 1B Moore, supra note 1, ¶ 0.412[1], at 1808. The following illustration
further restricts its use by one who was not a party in the prior action against one who was a party.8 Thus, mutuality is based on the notion that it is unfair to allow subsequent parties to use adverse judgments against a prior party since the judgment could not be used against them.9 As a result, mutuality allows a party who has litigated and lost in a prior action to relitigate identical issues with new parties.10 Since the mutuality rule, unlike due process, fails to distinguish between a party who has never litigated and one who has fully litigated, it has provoked heavy criticism.11

Accordingly, several courts have renounced the mutuality rule when a defendant invokes collateral estoppel against a plaintiff who has previously litigated and lost.12 Courts have been reluctant, however, to abandon the rule when a plaintiff invokes collateral estoppel to prevent a defendant from relitigating issues decided against it in a prior action.13 These respective uses of collateral estoppel by plaintiffs and defendants are commonly referred to as offensive and defensive collateral estoppel.14 Recently, how-

should clarify how due process considerations affect collateral estoppel: Able and Baker are both injured in an accident allegedly caused by the negligence of Charles. Able sues Charles, and a verdict favorable to Charles is reached upon a finding that Charles was not negligent. Subsequently, Baker sues Charles alleging the same acts of negligence. Charles may not assert the prior judgment of no negligence to foreclose Baker from litigating the issue since Baker has never had an opportunity to prove the allegation in court.

8. The effect of the mutuality rule is quite different from that of due process. An illustration, employing the facts of the hypothetical negligence case in note 7 supra, should clarify the difference: Able sues Charles alleging negligence, and Able prevails on a finding that Charles was negligent. Subsequently, Baker sues Charles alleging the same acts of negligence. Even though due process considerations are satisfied since Charles has fully litigated the issue, Baker may not use the adverse judgment to collaterally estop Charles from relitigation since Baker was not a party to the prior action. Under the mutuality rule, therefore, Charles will have another opportunity to disprove negligence. Due process preserves the right to litigate an issue once; mutuality permits the same party to litigate an issue on as many occasions as there are new parties.

10. See id. at 649.
13. See generally 1B Moore, supra note 1, § 0.412[1], at 1807.
14. In both offensive and defensive use of collateral estoppel, the party against whom
ever, in *Parklane Hosiery Co. v. Shore*, the Supreme Court abandoned the application of the mutuality rule in an offensive context, thus permitting a plaintiff not a party to the prior action to raise collateral estoppel and preclude litigation of an issue previously contested and lost by the defendant.

Leo M. Shore, a shareholder of Parklane Hosiery, brought a stockholder's class action in federal district court against Parklane, alleging that the company and several of its officers, directors, and stockholders had issued a false and misleading proxy statement relating to a merger in violation of the Securities Exchange Act. The complaint sought damages, recission of the merger, and recovery of costs. Shortly thereafter but prior to trial in the Shore case, the Securities and Exchange Commission (SEC) sought to enjoin the merger in federal district court, substantially alleging the same misfeasance concerning the proxy statement. In the SEC action, the district court rendered a declaratory judgment against Parklane, finding the proxy statement to be materially false and misleading. The Second Circuit affirmed.

Shore subsequently moved for partial summary judgment seeking to collaterally estop the defendant Parklane from relitigating the proxy issue decided against it in the prior SEC action. The district court denied the motion on the ground that an application of collateral estoppel would violate Parklane's right to a jury trial. The Second Circuit reversed, finding that, since the defendant had a full and fair opportunity to litigate the issue decided in the SEC action, Shore’s partial summary judgment motion should be granted.

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20. Only partial summary judgment was sought since in an action to recover under the proxy rules, a plaintiff must prove that the proxy solicitation was false and misleading, that he was injured, and that he was damaged. Since the SEC action was limited to the proxy issue, Shore had to prove these other elements of his prima facie case in a stockholder's private action. *See Parklane Hosiery Co. v. Shore*, 99 S. Ct. at 648 n.2.
21. The grounds for denying the motion can only be inferred since the district court's opinion did not explain its reasoning. The court merely cited Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), a case denying the application of nonmutual offensive collateral estoppel.
proxy issue in the SEC action, collateral estoppel was appropriate. The court explained that the seventh amendment did not preclude the application of collateral estoppel since the issues of fact to be presented to the jury had already been fully litigated and decided in a nonjury trial.

The Supreme Court, faced with a conflict between the circuits in two cases with nearly identical facts, considered the appropriateness of non-mutual offensive collateral estoppel when its application deprives the defendant of a jury trial in a second action. The Court held that nonmutual offensive collateral estoppel should not be foreclosed automatically in the federal courts and that the seventh amendment right to a trial by jury does not bar the doctrine's application. In a vigorous dissent, Justice Rehnquist objected to this broader use of issue preclusion since it would prevent litigants such as Parklane from obtaining a jury trial.

The majority's decision, following the trend of recent case law and commentary, renounced blanket application of mutuality in an offensive context. While the majority failed to provide sufficient criteria to guide trial courts considering the application of offensive collateral estoppel, it afforded them broad discretion to deny its application when it would produce unfair results. Although this note will briefly discuss the seventh amendment issue, its scope is limited to the issue of offensive use of non-mutual collateral estoppel.

Because it would have deprived a defendant of a jury trial. See Shore v. Parklane Hosiery Co., 565 F.2d 815, 818 (2d Cir. 1977).

22. Shore v. Parklane Hosiery Co., 565 F.2d 815, 823-24 (2d Cir. 1977). The Second Circuit observed that it had dispensed with mutuality as a requirement in Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964). The court found that a complete identity of parties served no purpose when the judgment is used against a person or privy who has had a full and fair opportunity to litigate the identical issue in the prior action. Shore v. Parklane Hosiery Co., 565 F.2d 815, 818-19 (2d Cir. 1977). For a discussion of Zdanok, see notes 60-66 and accompanying text infra.

23. 565 F.2d at 819.

24. A result contrary to the holding of the Second Circuit in Parklane had been reached in Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970). For a discussion of Rachal, see notes 67-73 and accompanying text infra.

25. 99 S. Ct. at 651, 654-55.

26. Id. at 655 (Rehnquist, J., dissenting). Justice Rehnquist accused the majority of conducting an "antiseptic analysis" of the issues presented and of being unsympathetic to Parklane. He explained that "[outrage is an emotion all but impossible to generate with respect to a corporate defendant in a securities fraud action." Id.

27. See notes 30-73 and accompanying text infra.

28. 99 S. Ct. at 651-52.
I. THE DEMISE OF THE MUTUALITY RULE

A. Defensive Collateral Estoppel and Mutuality

In both state and federal courts, the first inroads toward rejecting the mutuality rule were made in cases involving the defensive use of non-mutual collateral estoppel. In *Bernhard v. Bank of America National Trust & Savings Association*, Justice Traynor initiated the reevaluation of the mutuality rule. Bernhard, one of the plaintiffs in the first action, was a beneficiary under a will who filed objections to an accounting, alleging that the executor had improperly withdrawn estate funds for his personal use. The state court found no impropriety, concluding that the funds were the property of the executor who had been the beneficiary of a valid gift from the decedent. Subsequently, Bernhard brought a second action against the bank holding the funds on the grounds that the money had been released to the executor without authorization. The bank then asserted the prior judgment in the action against the executor to estop the subsequent litigation. The trial court rendered judgment for the bank, and Bernhard appealed arguing that issue preclusion was improper under the mutuality rule.

On appeal, the California Supreme Court unanimously affirmed the decision of the trial court. The court observed that while due process considerations forbid the use of collateral estoppel against one who was not a party or in privity with a party in the first action, these considerations do not apply to a party who has already litigated. Acknowledging century-old criticisms of the mutuality rule, the court found no satisfactory rationale for foreclosing collateral estoppel asserted by a party stranger.

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31. Id. at 809, 122 P.2d at 893.
32. Id. at 810-11, 122 P.2d at 893-94. The estoppel in *Bernhard* was defensive, because a defendant, not a party to the prior action, raised the doctrine as a defense in litigation with a prior plaintiff.
33. Id. at 809, 122 P.2d at 894.
34. Id. at 809, 122 P.2d at 894-95. See also Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971). Litigants who have never appeared in a prior action, presented their evidence, or advanced arguments are entitled by due process to an opportunity to litigate an issue fully and fairly. See id. Thus, the issue preclusion doctrine cannot be invoked against a party stranger. See notes 7-8 supra.
35. 19 Cal. 2d at 812, 122 P.2d at 895. The Court cited Jeremy Bentham’s scathing indictment of the mutuality rule: Another curious rule is, that, as a judgment is not evidence against a stranger, the contrary shall not be evidence for him. If the rule itself is a curious one, the reason given for it is still more so: “Nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary:” a maxim which one would suppose to
against a prior party. The court delineated three criteria for determining when issue preclusion would be permitted: the issue in both actions must be identical; there must be a final judgment on the merits in the prior action; and the party against whom the judgment is asserted must be a prior party. Thus, the California Supreme Court became the first to reject the mutuality rule as an obstacle to the assertion of defensive estoppel. After Bernhard, federal courts gradually showed an equal willingness to discard the confines of the mutuality rule.

In 1950, the Third Circuit in Bruszewski v. United States, became the first United States Court of Appeals to repudiate openly the mutuality rule. Bruszewski, a longshoreman injured on a vessel, sued the company servicing the ship, alleging negligence and unseaworthiness but he failed to prevail on either issue. Subsequently, Bruszewski sued the United States, a defendant stranger, as owner of the ship, basing his claim for recovery on identical grounds. In precluding relitigation of the issues, the court explained that the application of nonmutual collateral estoppel was not unfair because Bruszewski had a full and fair opportunity to litigate the issues in the first action. The court established substantial justice and fairness as the broad, essential requirements to be satisfied in applying the

have found its way from the gaming table to the bench. . . . This rule of mutuality is destitute of even that semblance of reason.


Exceptions to the mutuality rule have been created in specific categories of cases to mitigate against the harshness of its unreasoned application. For example, if a creditor first sues a principal debtor who is exonerated, and subsequently sues a surety, the surety may assert the prior judgment. See Note, Collateral Estoppel: The Changing Role of the Rule of Mutuality, 41 Mo. L. Rev. 521, 522-24 (1976). A second exception permits an employer to assert a judgment exonerating a servant from liability in a prior action to bar an action against the employer based on a theory of vicarious liability. Id. at 523. See generally Restatement (First) of Judgments §§ 93-111 (1942); 1B Moore, supra note 1, ¶ 0.412[2-9], at 1812-34. When an exception is not applicable, courts sometimes find privity even though the relationship of the privy to the prior party may be somewhat attenuated. See Note, supra, at 523-24.

36. 19 Cal. 2d at 812, 122 P.2d at 895. For the purposes of this note, a party stranger is defined as one who was neither a party in the prior action, nor in privity with such a party, but is a party to the subsequent action. Thus, if the first action is Able v. Baker and the second action is Charles v. Baker, then Charles is a plaintiff stranger to the second action, and Baker is a prior party or prior defendant.

37. 19 Cal.2d at 813, 122 P.2d at 895.

38. 181 F.2d 419 (3d Cir. 1950).

39. Id. at 420-21. The court noted that the two cases differed only in the claimant's application of the doctrine of respondeat superior. In the first action, plaintiff made the Isthmian Steamship Company the responsible principal while the United States was charged in the second action. Id. at 421.

40. Id. at 421. The Court also explained that Bruszewski had the initiative in the first action since he was plaintiff. Id. See also note 55 and accompanying text infra.
issue preclusion doctrine. Shortly thereafter, the Second Circuit, in another admiralty case, followed *Bruszewski* and permitted the defensive use of nonmutual collateral estoppel.

The Supreme Court, however, did not explicitly approve the reasoning of *Bernhard* and its federal court counterparts until almost thirty years after Justice Traynor's persuasive opinion. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* the Court held that nonmutual estoppel would be available to a defendant stranger facing patent infringement litigation when the patent was declared invalid in a prior action. In the first action, the University of Illinois Foundation had sued another defendant for infringement of a patent on radio and television equipment. A federal district court declared the patent invalid and the Eighth Circuit affirmed. A subsequent action by the foundation against Blonder-Tongue alleged infringement of the same patent, but the district court considered the validity of the patent *de novo* and found it to be valid. This result, contrary to the prior action, was affirmed by the Seventh Circuit. The Supreme Court's review acknowledged that the decision below was properly based on existing case law foreclosing the use of collateral estoppel in patent infringement cases. The Court questioned, however,

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41. 181 F.2d at 421. The court considered justice and fairness as essential criteria, far outweighing the symmetry of the traditional mutuality rule. In dismissing the argument that one should not take advantage of a judgment unless he is bound by it, the Court stated little more than that form should not triumph over substance, thus ridiculing the mutuality rule as Bentham had done a century before. See note 35 supra.


43. The Court specifically referred to *Bernhard* and *Bruszewski* as well as *Zdanok v. Glidden Co.,* 327 F.2d 944 (2d Cir. 1964), a case permitting the offensive use of nonmutual collateral estoppel. *See Blonder-Tongue v. University of Ill. Foundation,* 402 U.S. 313, 322-25 (1971).

44. 402 U.S. 313 (1971).

45. *Id.* at 350.


47. 422 F.2d 769 (7th Cir. 1970).

48. *See Blonder-Tongue v. University of Ill. Foundation,* 402 U.S. at 317-20. Prior to *Blonder-Tongue,* application of the mutuality rule was mandated by *Triplett v. Lowell,* 297 U.S. 638 (1936). The *Triplett* Court stated the rule in the following terms:

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 res adjudicata and may not be pleaded as a defense. *Id.* at 642. Although the Court used the terminology of res judicata, it referred to an action involving different parties, thus compelling the conclusion that its rule applies to estoppel by issue preclusion. *See generally* note 1 supra.
the continued viability of the mutuality rule in patent litigation and partially overruled it to permit defensive collateral estoppel by a party facing litigation on a patent previously declared invalid.49 Thus, the decision in Blonder-Tongue represented the Supreme Court's first repudiation of the mutuality rule. Nevertheless, while Blonder-Tongue provided momentum for the continuing demise of the mutuality rule, its application to nonpatent litigation and to an offensive application of collateral estoppel remained undecided.50

B. Offensive Collateral Estoppel and Mutuality

Under what became the persuasive precedent of Bernhard,51 courts continued to reject the mutuality rule in defensive applications of collateral estoppel. In the offensive context, however, the Bernhard doctrine received only cautious acceptance.

One noted commentator, Brainerd Currie, argued that the Bernhard doctrine should be limited to factually similar cases, i.e., a “defensive use” of collateral estoppel.52 He cautioned courts to refrain from permitting a plaintiff stranger to assert a prior judgment if the defendant faces more

49. 402 U.S. at 349-50. The Court observed that several recommendations had been made by presidential and senate committees to eliminate by statute the mutuality requirement in patent litigation. Id. at 335-43. The recommendations of these committees may have encouraged the Court to overrule Triplett but limit its holding to patent litigation.

50. Professor Moore, for example, does not interpret Blonder-Tongue as limited to patent litigation. See 1B Moore, supra note 1, ¶ 0.412[1], at 109 (Supp. 1978-79).


52. See generally Currie I, supra note 51. Currie enumerated four situations in which nonmutual issue preclusion might be applied. He characterized two of them as “defensive” and two of them as “offensive” applications. Defensive applications occur when the judgment is asserted as a defense to a claim by a defendant stranger against a prior plaintiff or against a prior defendant. Offensive use occurs when the judgment is asserted by a plaintiff stranger to establish, without litigation, a claim against a prior defendant or against a prior plaintiff. Id. at 289-91. Currie described Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), as an example of the defensive use in its fullest sense: “[I]t was asserted by the defendant against one who was an aggressor in the prior action.” Currie I, supra note 51, at 292. Other commentators later joined Currie in making offensive/defensive distinctions and in expressing reservations about the offensive application of nonmutual collateral estoppel. See generally Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 COLUM. L. REV. 1457 (1968); Vestal, supra note 1; Comment, The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty, 35 GEO. WASH. L. REV. 1010 (1967).
than two successive actions on the same issue or if he has been prejudiced by a lack of control and initiative as a defendant in the previous action. The former concern was based upon a fear that broad application of the Bernhard doctrine would result in what Currie referred to as a "multiple claimant anomaly." This would occur when one decision, adverse to a prior party, is inconsistent with previous ones and when the so-called "anomalous finding" is perpetuated by subsequent application of collateral estoppel. Currie's second reservation was that the prior party, if a defendant in the first action, might have less than a full and fair opportunity to litigate the issue. Such a lack of "initiative" is significant to the extent that the prior party, having no control over where or when the action is brought, might have been handicapped in gathering evidence or witnesses in the presentation of its case.

Several years later, however, Currie retracted his recommendations and argued that imposition of a rule of thumb prohibiting nonmutual offensive estoppel against a prior defendant lacking initiative was unnecessary. In Currie's opinion, the preferable approach, endorsed by Justice Traynor in a post-Bernhard California case, is to evaluate the merits of estoppel on a case-by-case basis. A court should conduct a detailed inquiry into the prior judgment to determine whether it would be fair to allow a party

53. Currie I, supra note 51, at 308-09.
54. Id. at 285-87. The model for Currie's multiple claimant anomaly is a hypothetical negligence case against a railroad sued in 50 separate actions by passengers injured in a single accident. The railroad wins the first 25 cases but loses the twenty-sixth. In theory, offensive collateral estoppel principles can thereafter require judgments adverse to the railroad in the remaining 24 cases although the railroad could not assert the first 25 favorable judgments to estop subsequent plaintiff strangers from relitigating the issue of negligence. See notes 7-8 supra. Assuming the facts and issues in each claim are identical, the same conduct would, therefore, be both negligent and not negligent. If the questions of law and fact are identical, clearly one finding is in error, and the anomalous verdict may have been the first one as easily as the twenty-sixth.
55. Currie I, supra note 51, at 288. The initiative advantage is probably of little importance in federal courts applying the doctrine of forum non conveniens, whereby the defendant can exercise a right of transfer to a more convenient forum. The application of this doctrine would obviate the need for protection from the handicaps described by Currie. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). In Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950), the court considered the initiative issue and permitted the use of defensive nonmutual collateral estoppel since Bruszewski, the plaintiff in both actions, had sufficient control over the lawsuit. See note 40 and accompanying text supra.
56. See Currie II, supra note 51, at 29, 37.
57. Id. at 28-29. Justice Traynor applied this case-by-case approach in Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962). He concluded that despite lack of initiative in the prior action on criminal charges, the defendant had a "full opportunity to litigate the issue" and "every motive to make as vigorous and effective a defense as possible." Id. at 603, 375 P.2d at 441, 25 Cal. Rptr. at 561-62. Accordingly, collateral estoppel was applied in the subsequent action, and the finding that the Tei-
stranger to assert the judgment as collateral estoppel. As Currie recognized, the fair application of offensive issue preclusion in multiple claimant litigation is not only acceptable but also desirable absent evidence of a compromise verdict or other impropriety.

Finally, Currie noted with approval Zdanok v. Glidden Co., in which the Second Circuit led the way for a complete repudiation of the mutuality requirement by affirmatively declaring nonmutual offensive estoppel to be permissible. This decision was the first by a court of appeals to permit the use of nonmutual offensive collateral estoppel in the federal courts. Zdanok involved two consolidated cases in which plaintiffs were employees seeking to establish certain benefits under a single collective bargaining agreement. Zdanok and other employees brought one action, and Alexander and other employees brought a second action against the same employer, Glidden.

Prior to consolidation, the Zdanok action was litigated and appealed in federal courts while the Alexander action remained dormant in a state court. During this first round of litigation, the Second Circuit reached a conclusion favorable to Zdanok on the issue of contract interpretation and remanded the case for the sole purpose of ascertaining damages. The result reached by the court of appeals remained unchanged despite Supreme Court review of an unrelated issue. The day after Zdanok was decided in the Supreme Court, however, the Alexander employees filed a com-
plaint in federal court. Since the *Alexander* state court action was then discontinued by stipulation, the two cases were consolidated for trial. Although the district court judge took testimony pertinent to contract interpretation and concluded that the employee benefits were not inherent in the agreement, he found for plaintiffs on the basis that the interpretation of the court of appeals in the prior *Zdanok* decision should govern the contract construction.63

In affirming this result, the Second Circuit, in an opinion by Judge Friendly, held that collateral estoppel precluded Glidden from relitigating the issue of contract interpretation with the Alexander employees. Thus, even though the *Alexander* action involved new parties and new evidence, the judgment in the prior *Zdanok* action on the issue of contract interpretation was conclusive against Alexander.64

In so holding, the Second Circuit acknowledged the *Bernhard* decision with unqualified approval,65 confronted Currie's initial reservations, and rejected the rule of thumb approach prohibiting nonmutual offensive estoppel in favor of a case-by-case review. The court concluded that the defendant Glidden had a full and fair opportunity to litigate the issue in the prior action, that the prior *Zdanok* plaintiffs enjoyed no procedural advantage handicapping Glidden's defense, and that multiple claims were not a disadvantage to Glidden who, with knowledge of the pendency of an additional action, litigated vigorously in the first claim.66

Despite this endorsement of nonmutual offensive estoppel by the Second Circuit, the Fifth Circuit several years later reached a contrary conclusion. In *Rachal v. Hill*,67 plaintiffs sought to offensively estop defendants from relitigating the issue of their liability for engaging in practices violative of

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64. 327 F.2d at 954. The court applied the doctrine of the law of the case under which the contract construction established in the first *Zdanok* action controlled subsequent litigation in the same case. Law of the case differs from res judicata because it applies only to decisions of law made within the context of a single given case prior to a judgment. Such decisions are perpetuated throughout the course of that case as law of the case. This rule was not dispositive of *Alexander* since it was a different case. *Id.* at 953.
66. *Id.* at 956. The court prefaced its holding with a discussion of evidence presented during the trial of the consolidated claims, and it hypothesized that the proofs adduced might have "tipped the scales" in favor of Glidden. *Id.* at 954. Ironically, in becoming the first court of appeals to permit the application of nonmutual offensive estoppel, the Second Circuit admitted that the result might have differed had the doctrine been denied. *Id.*
67. 435 F.2d 59 (5th Cir. 1970). See note 24 supra.
the Securities Exchange Act. These same practices had been enjoined by a federal district court in a nonjury equitable action brought by the SEC. Since the second action involved legal damages, however, the defendants claimed they were entitled to a de novo trial by jury. The federal district court applied collateral estoppel to the second action, but the Fifth Circuit reversed, holding that application of the doctrine was impermissible because it would deny defendants their seventh amendment right to a jury trial. Although the court indicated in dicta that it would no longer adhere to the mutuality rule in applying estoppel, it emphasized that non-mutual collateral estoppel should not be applied if "some overriding consideration of fairness to a litigant dictates a different result in the circumstances of the case."

The Fifth Circuit's reasoning in Rachal v. Hill was examined seven years later by the Supreme Court in Parklane Hosiery after the Second Circuit, on almost identical facts, reached a contrary result. Thus, federal court abandonment of the mutuality rule in offensive estoppel cases, first initiated in Zdanok, was finally reviewed by the Supreme Court.

II. PARKLANE HOSIERY CO. v. SHORE: A QUALIFIED REJECTION OF THE MUTUALITY RULE

A. Mutuality Rule Abandonment

In Parklane, the Supreme Court addressed the issue of nonmutual offensive estoppel. Although it properly rejected rigid adherence to the mutuality rule, the Court failed to make clear the circumstances under which assertion of the doctrine would be permissible.

The Court articulated the mutuality and jury trial issues as distinct in-

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68. 435 F.2d at 60.
69. Id.
70. Id. at 63-64.
71. Id. at 64.
72. Id. at 62. Since it reversed the decision of the district court on other grounds, the court did not directly rule on the mutuality issue. Any remaining doubt about the law in the Fifth Circuit, however, was removed by the court's decision in Poster Exchange, Inc. v. National Screen Serv. Corp., 517 F.2d 117 (5th Cir. 1975), cert. denied, 423 U.S. 1054 (1976), that mutuality of estoppel was no longer necessary.
73. 435 F.2d at 64 (citing Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950)). Presumably, in the court's opinion, considerations of fairness would prevent the use of estoppel to foreclose the defendant from a jury trial. Such an interpretation is supported by the court's heavy reliance on Beacon Theatres v. Westover, 359 U.S. 500 (1959) (when legal and equitable issues are mixed in a single claim, legal issues should be tried first to preserve trial by jury). See notes 90-91 and accompanying text infra. See also Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 HARV. L. REV. 442 (1971).
Offensive Nonmutual Collateral Estoppel

It first considered whether collateral estoppel would preclude litigation of an issue previously decided in an equitable proceeding when estoppel was invoked by a plaintiff stranger. Second, assuming nonmutual offensive estoppel was permissible, the Court considered whether its application would violate Parklane's right to a jury trial.

Citing Blonder-Tongue with approval, the Court criticized the mutuality requirement, noting that the rule failed to distinguish between the rights of a party who had once fully and fairly litigated and one who had no opportunity to litigate at all. The Court acknowledged Blonder-Tongue's rejection of mutuality in patent litigation but indicated that the case was decisive of the broader issue of the continued vitality of mutuality, at least with regard to defensive applications of collateral estoppel. In contrast to Blonder-Tongue, the Court in Parklane focused its discussion on the offensive use of nonmutual collateral estoppel.

The Court concluded that offensive and defensive applications of nonmutual collateral estoppel must be treated differently and offered several reasons for this distinction. First, defensive use encourages judicial economy by inducing the plaintiffs to join all possible defendants lest other defendants take advantage of an adverse finding by virtue of estoppel. In offensive use, however, the Court reasoned that a contrary incentive exists. Potential plaintiffs can take advantage of a verdict adverse to the defendant after allowing another plaintiff to litigate but will not be bound by a contrary determination because of due process considerations. Second, the offensive use of collateral estoppel may be unfair to a defendant who fails to defend vigorously in a prior action due to a nominal claim and the unforeseeability of subsequent litigation. Moreover, offensive estoppel may be unfair if the judgment invoked to estop subsequent litigation is itself inconsistent with previous findings favorable to the defendant.

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74. 99 S. Ct. at 648-49.
75. Id. at 652.
76. Id. at 649. The Court acknowledged that due process requires that a litigant be given an opportunity to be heard before being bound by a judgment. Id. at n.7. See also note 7 supra.
77. Id. at 649.
78. Id. at 650. By quoting dicta in Blonder-Tongue critical of the mutuality rule in general, the Court implicitly extended Blonder-Tongue to nonmutual defensive estoppel outside of the patent litigation context.
79. Id. The Court referred to various commentators, including Currie, to support the distinction drawn between defensive and offensive applications of nonmutual estoppel. Id. at n.11.
80. Id. at 650-51. See notes 7-8 and accompanying text supra.
81. Id. at 651.
82. Id. The Court shared Professor Currie's fear of a "multiple claimant anomaly" and
nally, the possibility of unfairness inheres in other situations as well, par-

ticularly when different procedural opportunities are available in the

subsequent litigation which could produce a different result.83

Despite these reservations concerning the nonmutual offensive use of es-
toppel, the Court concluded that its application should not automatically

be foreclosed in federal courts.84 Rather, trial courts should use “broad
discretion” in determining the appropriateness of applying nonmutual of-
fensive estoppel.85 Such an application of issue preclusion should be de-
nied if the plaintiff invoking it could have easily joined in the first action or

if unfairness would result because of any of the reasons articulated by the
court or from “other reasons.”86

Applying its “broad discretion” model, the Court found no reason for
denying estoppel in Parklane since the plaintiff probably could not have

joined in the SEC action. Furthermore, because of the seriousness of the

allegations, Parklane had the incentive to litigate the prior action “fully

and vigorously.”87 There were no prior inconsistent judgments or addi-
tional procedural advantages available to Parklane in the subsequent liti-
gation that might have produced a different result.88 Although, in a

footnote, the Court conceded that Parklane would have been entitled to a

jury trial in the subsequent action, it described the presence of a jury as a

“neutral” factor rather than as an additional procedural opportunity.89

Under this analysis, Parklane, having had a full and fair opportunity to

litigate the proxy issue in the SEC action, was collaterally estopped from

relitigating it in the second action brought against it by stockholders.

The Court also examined whether the application of nonmutual offen-
sive collateral estoppel would violate Parklane's seventh amendment right

referred to Currie's hypothetical to demonstrate the potential for unfairness. Id. at n.14. See notes 54-59 and accompanying text supra.

83. 99 S. Ct. at 651. For example, an inconvenient forum could disadvantage a defend-
ant, possibly resulting in an unfair application of collateral estoppel. Id. at n.15. Although

no mention is made of Currie's initiative rule, see notes 52-55 and accompanying text supra,
the Court was expressing similar concerns. See note 55 and accompanying text supra.

84. 99 S. Ct. at 651.

85. Id. This “broad discretion” approach is, in many respects, identical to the case-by-
case review recommended by both Traynor and Currie. See note 57 and accompanying text supra.

86. 99 S. Ct. at 651-52. The Court did not explain what “other reasons” would be ap-
propriate to deny a plaintiff stranger the use of offensive estoppel. See notes 104-06 and
accompanying text infra.

87. 99 S. Ct. at 652.

88. Id. See note 54 and accompanying text supra.

89. 99 S. Ct. at 652 n.19. The Court described defending in an inconvenient forum as a
material difference unlike the presence or absence of a jury. Id. See also note 55 and
accompanying text supra.
to a jury trial. Finding historical support, the Court applied the principle that an equitable proceeding could be used to estop relitigation in a court of law. Accordingly, the Court concluded that a finding in a nonjury trial in a court of equity could be conclusive of further litigation to which the right to a jury trial has attached. 90

 Justice Rehnquist, the lone dissenter, declined to address the general issue of nonmutual offensive estoppel. 91 Rather, he argued that under the circumstances of the case, the doctrine's use would be impermissible because it violated Parklane's right to a jury trial. 92 Although Justice Rehnquist applied the "broad discretion" test employed by the majority, he reasoned that a jury trial, like other procedural opportunities, could lead to a different result. He observed that while the merits of civil juries have long been debated, they can hardly be accused of being "neutral factors." 93 Thus, contrary to the majority, he concluded that it would be unfair to

90. See 99 S. Ct. at 654-55. The Court found support for its conclusion in Beacon Theatres v. Westover, 359 U.S. 500 (1959), but as the Fifth Circuit noted in Rachal v. Hill, 435 F.2d 59, 64 (5th Cir. 1970), Beacon Theatres is most often cited as support for preservation of the right to a jury trial. See note 73 and accompanying text supra. See also Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 396 U.S. 469 (1962).

The majority's decision on the jury issue denied any relationship between the seventh amendment and the mutuality rule. The Court reasoned that a party estopped from relitigating an issue before a jury with a party stranger would no more suffer a constitutional violation than he would if the claimant had been a party to the prior action. 99 S. Ct. at 654. In either case, the party estopped would have had an opportunity to litigate the issue once, and a finding of fact would have been made. Id. In the majority's view, the evolution of the doctrine of nonmutual estoppel was not repugnant to the Constitution, even though it did not exist under the common law at the time of the drafting of the seventh amendment. Id. at 654-55.

91. Id. at 655 n.1.

92. Id. at 658-61. Justice Rehnquist accepted Parklane's contention that the scope of the seventh amendment right to trial by jury should be determined by reference to the common law as it existed in 1791. After engaging in a lengthy historical analysis, he concluded that Parklane would have been entitled to a jury trial in 1791 and argued this right should be preserved. Id. at 659-60. Justice Rehnquist also explained that even if there were no constitutional prohibition, application of nonmutual estoppel to Parklane was inappropriate because of "the strong federal policy favoring jury trials." Id. at 661-62. Not surprisingly, Justice Rehnquist cited Beacon Theatres v. Westover, 359 U.S. 500 (1959), as authority for his position. Id. But see note 90 and accompanying text supra.

93. See 99 S. Ct. at 663 (Rehnquist, J., dissenting). Justice Rehnquist was not reluctant to criticize the majority's premise that a jury trial would have no effect on the outcome of the litigation: "[T]hose who drafted the Declaration of Independence and debated so passionately the proposed Constitution during the ratification period, [sic] would indeed be astounded to learn that the presence or absence of a jury is merely 'neutral,' whereas the availability of discovery ... may be controlling ... ." Id. at 655 (Rehnquist, J., dissenting). See generally James, Trial by Jury and the New Federal Rules of Civil Procedure, 45 Yale L.J. 1022 (1936); O'Connell, Jury Trials in Civil Cases, 58 Ill. Bar. J. 796 (1970); Paul, Jerome Frank's Views on Trial by Jury, 22 Mo. L. Rev. 28 (1977).
B. Reliability Testing Under Parklane

If the mere possibility of a different result were the Court’s only criteria for determining whether or not nonmutual estoppel should apply, Justice Rehnquist’s argument that a jury might reach a different result should have controlled. However, the majority’s explanation of the criteria by which trial courts should apply their “broad discretion” was not so simplistic. At the outset, the majority recognized, as did Currie, the need for distinguishing between nonmutual offensive and defensive collateral estoppel because of the potential for abuse of the former.95 The Court feared that a plaintiff stranger might take unfair advantage of a judgment against a prior defendant and attempted to describe circumstances in which this might occur. This potential unfairness arises from several factors affecting the quality of litigation and ultimately the reliability of the prior judgment. Since applications of nonmutual offensive estoppel do involve a higher risk of perpetuating an unreliable verdict, the Court’s offensive/defensive distinction will provide needed protection for defendants facing sequential actions.96

The Court recognized that such protection was necessary for a prior defendant strategically disadvantaged in the first action. For example, nonmutual offensive estoppel should be denied if the defendant, lacking initiative and choice of forum in the prior action, was handicapped in discovery or the presentation of witnesses.97 Factors such as a defendant’s incentive to litigate and procedural advantages may not only affect the judgment and require denial of estoppel, but they may also affect the quality of litigation and the completeness of the case presented to the factfinder.

Thus, the Court recognized that unfairness to a defendant results from the perpetuation of a judgment based on a less than reasoned review of the factual foundation of the issues. The potential for unfairness arises in such cases since reliability is subject to attack when the factfinder’s determination is based on incomplete information. The unarticulated rule of the case, therefore, is that nonmutual offensive estoppel should not be permit-

94. 99 S. Ct. at 658-59 (Rehnquist, J., dissenting). A similar position was taken in Rachal v. Hill, 435 F.2d 59, 64 (5th Cir. 1970). See note 73 and accompanying text supra.
95. See notes 52-55 and accompanying text supra.
96. These concerns arise only when estoppel is asserted against a defendant in the second action who was also a defendant in the first action. See generally note 54 and accompanying text supra.
97. 99 S. Ct. at 651 n.15. See notes 55, 83 and accompanying text supra.
ted if for some reason the prior judgment is potentially or actually unreliable.\(^9\)

In this light, it is not difficult to understand the Court’s proposition that the presence or absence of a jury is “neutral.” A finding may be unreliable if the factfinder does not have a complete case before it, regardless of whether the factfinder is a judge or jury. On the other hand, if the factfinder has a complete case before it, there is no reason to suspect error. Unless it is otherwise shown, the factfinder will be deemed to have reached the correct result. Neutrality is a function of whether the factfinder reached a reliable result rather than whether judges and juries may differ.\(^9\)

Moreover, the reliability test employed by the Court is responsive to both of Currie’s initial reservations concerning the offensive use of non-mutual estoppel.\(^10\) Although the absence of initiative alone is not fatal to an assertion of estoppel when it is coupled with disadvantages of inconvenience or procedural handicaps, it so affects reliability as to permit relitigation. In addition, the Court’s reliability test is responsive to the fear of perpetuation of an anomalous verdict. The Court cautioned trial courts to avoid unfairness by refusing estoppel when the judgment asserted as conclusive of subsequent proceedings is inconsistent with previous ones.\(^101\) Rather than perpetuate the anomaly, the Court would permit a defendant to litigate subsequent claims with the same chance of success or failure in each.

The Court’s decision, however, failed to provide guidance when the first judgment is the anomaly. In such cases there are no inconsistent verdicts, and *Parklane* provides no directive to deny estoppel.\(^102\) Arguably then, *Parklane* may not preclude an anomalous judgment from being perpetuated. If the first verdict is of questionable reliability, however, the *Parklane* test would be responsive. The defendant could assert numerous reasons why the first litigation was so unreliable that its result should not

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98. The potential for unreliability was discussed by Professor Currie: “Courts can only do their best to determine the truth on the basis of the evidence, and the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth.” Currie I, supra note 51, at 315.

99. *But see* 99 S. Ct. at 658 (Rehnquist, J., dissenting) (juries might reach a result that a judge either could not or would not reach).

100. *See* notes 54, 59 and accompanying text supra.

101. 99 S. Ct. at 651. When prior inconsistent verdicts exist, two factfinders, presented with nearly identical issues, have reached opposite results. Contrary results on similar issues obviously increase the probability that one of the former findings is unreliable. *See* note 54 supra.

102. The Court did advise, however, that nonmutual offensive estoppel could be denied for “other reasons.” 99 S. Ct. at 651. *See* note 86 and accompanying text supra.
be perpetuated.\textsuperscript{103}

The majority's test is, therefore, designed to avoid the potential abuses of nonmutual offensive collateral estoppel. However, by declining to prescribe the "other reasons" for which its application should be denied, the Court may have defeated the articulated policies behind the estoppel doctrine. Such a broadly worded directive may serve only to increase litigation, thus defeating the doctrine's purpose of promoting judicial economy and avoiding inconsistent results.\textsuperscript{104} A defendant may now assert any number of reasons why it would be unfair to permit estoppel by a plaintiff in a second action. These reasons could range from the incompetency of counsel in the prior action\textsuperscript{105} to the discovery of new evidence in a subsequent one.\textsuperscript{106} In addition, a court could consider the availability of a previously unavailable witness, impeachment of evidence in a subsequent collateral proceeding, or a change in the rules of evidence or civil procedure. Insofar as these factors have a bearing on reliability, they should be considered by trial courts. On the other hand, if the asserted "other reasons" are unrelated to reliability, they should not be permitted to frustrate the policy considerations underlying the issue preclusion doctrine. Nevertheless, without clear evidence that the asserted reasons had a strong bearing on the outcome of the prior litigation, it is unlikely that the "broad discretion" afforded trial courts will be significantly curtailed.

Future litigation under Parklane's unarticulated reliability test will probably produce divergent definitions of the contours of variations in judicial discretion. If trial courts recognize, however, that the Parklane criteria for denying or applying collateral estoppel are motivated by the Supreme Court's reluctance to perpetuate an unreliable verdict, they will exercise caution in permitting the use of nonmutual offensive estoppel.\textsuperscript{107} Practitioners may be able to preserve a defendant's right to litigate by appealing to the caution incumbent upon the trial court through the presentation of reasons why the prior judgment is so unreliable as to permit a

\textsuperscript{103} See notes 104-06 and accompanying text infra.
\textsuperscript{104} See note 4 and accompanying text supra.
\textsuperscript{105} But see Graves v. Associated Transp., Inc., 344 F.2d 894, 901 (4th Cir. 1965).
\textsuperscript{107} See 99 S. Ct. at 650-51. Parklane set the tone for conservatism in this area by emphasizing that nonmutual offensive estoppel deserved special consideration and by engaging in a lengthy discussion of its potential abuses. See id.; notes 95-98 and accompanying text supra.
different result if the issues were relitigated. Nevertheless, while the effectiveness of *Parklane* as a litigation tool by which a plaintiff stranger may invoke offensive collateral estoppel remains to be seen, the wise practitioner will raise and preserve the claim.

## III. CONCLUSION

Although the use of nonmutual offensive estoppel is no longer foreclosed in the federal courts, every case in which the claim is asserted will be subjected to a demanding and cautious review. The Court furnished trial courts with criteria limiting the use of estoppel in an offensive context and afforded them broad latitude to reject the doctrine if for any "other reasons" its application would be unfair.

*Parklane* properly repudiates a dogmatic and unreasoned application of the mutuality rule while striving to address the concerns responsible for the rule. The Court, however, failed to articulate how unfair results might occur from an application of nonmutual offensive estoppel, and it left to the trial courts the task of formulating the reliability test implicit in its holding. Failure to adhere to the policies underlying the reliability test may result in the denial of estoppel when it is appropriate or in its wrongful application. Nevertheless, a careful reading of *Parklane* and a cautious approach by trial courts may salvage an otherwise progressive change in the tenets of civil procedure.

*Linda J. Soldo*