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Collision Course: Collateral Estoppel and the Seventh Amendment: Parklane Hosiery Co. v. Shore

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COLLISION COURSE: COLLATERAL ESTOPPEL AND THE SEVENTH AMENDMENT: *PARKLANE HOSIERY CO. V. SHORE*

INTRODUCTION

In *Parklane Hosiery Co. v. Shore*,[1] the Supreme Court held that a prior equitable determination can estop a defendant from relitigating issues before a jury in a subsequent damages action. Leo M. Shore brought a shareholders' class action in federal district court against Parklane Hosiery Co. (Parklane) alleging the defendant had issued a materially misleading proxy statement in violation of common law and various sections of the Securities Exchange Act of 1934 (Act). Prior to trial, the Securities and Exchange Commission (SEC) instituted a separate lawsuit in federal district court against Parklane based on similar allegations. While the fact finder in the private class action was to be a jury, in the SEC action (one seeking an injunction based entirely on violations of the Act) it was a judge.

When the private action was still in the pretrial stage, Judge Duffy rendered a declaratory judgment in favor of the SEC, finding the proxy statement materially misleading as alleged.[2] Thereafter, in an effort to preclude Parklane from raising the issue of whether the proxy was materially misleading, Shore moved for a partial summary judgment[3] asserting offensive collateral estoppel.[4]

The district court denied the motion, but the court of appeals reversed.[5] After granting certiorari,[6] Justice Stewart, speaking for the majority, affirmed the court of appeals and allowed Shore to invoke collateral estoppel.

This comment examines the general conflict between collateral estoppel and the seventh amendment right to jury trial.

I. COLLATERAL ESTOPPEL AND MUTUALITY

A. *The Collateral Estoppel Doctrine*

Once an issue essential to the judgment is actually litigated and determined by a valid and final judgment, relitigation of the issue in a subsequent

1. 99 S. Ct. 645 (1979).

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

3. In addition to proving the proxy statement was materially misleading, Shore, a private plaintiff, must prove his injury and damages to a jury. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-90 (1970).

4. Offensive estoppel occurs when the plaintiff attempts to preclude the defendant from relitigating an issue decided in an earlier action. Defensive use occurs when the defendant attempts to estop the plaintiff. Some refer to this distinction by the more descriptive sword/shield dichotomy.

5. Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977).

6. 435 U.S. 1006 (1978).

action between the parties[7] is generally precluded. When the second action is based on a different cause of action than the first, a litigant may invoke the collateral estoppel doctrine to foreclose a party from retrying the identical issue.[8]

Closely related to collateral estoppel (issue preclusion) is res judicata (claim preclusion). Both doctrines involve the conclusive effect of judgments in subsequent actions.[9] Res judicata, however, is limited to a subsequent action involving the same cause of action as the initial suit. At the same time, res judicata has a broader scope than collateral estoppel; conclusive effect is given not only to issues actually litigated, but to all matters which could have been litigated.[10]

B. *Mutuality and Its Erosion*

The judge-made rule[11] of mutuality prohibits a stranger (non-party) to the first action from taking advantage of the judgment. Therefore, only if the litigant asserting collateral estoppel was a party to and bound by the first action can he take advantage of the judgment in a subsequent suit.[12] The rationale of mutuality is that it would be unfair for a stranger to claim the benefits of a judgment when he cannot be bound by that same judgment. This unfairness is assumed but not explained.[13]

As the scope of estoppel was narrowed by mutuality, the very purpose of issue preclusion[14] frequently became frustrated. For example, an unsuccessful plaintiff in one action could sue an unrelated defendant in yet another action. With mutuality, the second defendant could not assert either claim or issue preclusion because he was not a party to the first action. With the

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7. For purposes of this comment, the definition of a party will be broadened to include the privies. For general illustrations of privity relationships, *see* RESTATEMENT OF JUDGMENTS § 83-92 (1942).

8. Southern Pac. R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); RESTATMENT OF JUDGMENTS § 68 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 4-5 (1942).

9. Tait v. Western Md. Ry. Co., 289 U.S. 620, 623 (1933); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 28 (1964). *See generally* Vestal, *Extent of Claim Preclusion*, 54 IOWA L. REV. 1 (1968).

10. Runyan v. Great Lakes Dredge & Dock Co., 141 F.2d 396, 397 (6th Cir. 1944); Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926).

11. Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 320 (1971).

12. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); RESTATEMENT OF JUDGMENTS § 93 (1942) *See generally* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

13. Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965); 1 FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 428 (5th ed. 1925); RESTATEMENT OF JUDGMENTS § 96, Comment a (1942). For a criticism, see Note, *The Mutuality Requirement of Res Judicata in Virginia*, 41 VA. L. REV. 404, 418 (1955).

14. Res judicata has a dual purpose of promoting judicial economy and providing the private litigant with repose from repetitious litigation. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). As an offshoot of claim preclusion, collateral estoppel is grounded upon the desire "to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation." Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1457 n.2 (1968).

hope of eventually winning, a plaintiff could relitigate the same issue so long as there is a supply of new defendants.

As rising caseloads have virtually submerged some urban courts, pressures have increased to expand the reach of collateral estoppel and thus prevent the retrial of issues fully tried in a prior suit.[15] Moreover, while the basis of mutuality is fairness,[16] if its application would result in an injustice, courts have not been reluctant to carve out an exception.[17] Consequently, the focus has shifted away from mutuality[18] and to a case-by-case examination[19] of whether the party against whom estoppel is being asserted was accorded a full and fair opportunity to litigate in the prior action.[20] And now, in the wake of *Parklane*, the doctrine of mutuality appears to be completely abrogated[21] in the federal courts.[22]

II. OFFENSIVE COLLATERAL ESTOPPEL: FRAMEWORK FOR APPLICATION

A. *The Full-and-Fair-Opportunity Test*

The *Parklane* Court enunciated a two-prong test to be used when the plaintiff is a stranger to the judgment he seeks to assert as conclusive against the defendant. First, the plaintiff must be unable to join in the earlier action; second, invoking collateral estoppel offensively must not result in an

15. Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 328 (1971); Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1724 (1968).

16. *See* text accompanying note 13 *supra*.

17. *E.g.*, Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 128 (6th Cir. 1971); 1 FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 429 (5th ed. 1925) ("mutuality is itself based upon policy and practical necessity and justice . . . and on the same grounds of policy and justice there would seem to be no objection to departing from it where the party affected has been given one adequate opportunity to be heard . . . .") *Id.* § 1929 at 935-36. For a description of these exceptions, see Moore & Currier, *supra* note 12, at 311-29.

18. During the past 45 years, the strict rule of mutuality has been steadily eroded by expanding the boundaries of privity and creating numerous exceptions. Some courts have explicitly abandoned it. *E.g.*, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). Unless a court allows offensive estoppel by a stranger, however, one cannot safely say mutuality has been entirely abrogated in that jurisdiction.

The leading federal case departing from mutuality is Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

19. "[T]he mutuality rule is deservedly dead, and . . . any reservations about the totality of its demise should rest on particularized inquiry . . . ." Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 31 (1965).

20. *See, e.g.*, Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971); Popp v. Eberlein, 409 F.2d 309, 310-11 (7th Cir.), *cert. denied*, 396 U.S. 909 (1969); United States v. Webber, 396 F.2d 381, 389-90 (3d Cir. 1968); Graves v. Associated Transp., Inc., 344 F.2d 894, 897 (4th Cir. 1965); Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967) ("the philosophical basis for the doctrine of collateral estoppel is that a party should have a full and fair day in court to be heard on the issue but should not be able to litigate that issue ad nauseam." *Id.* at 303-04).

21. Shore, a stranger to the SEC judgment, was allowed to assert offensive estoppel.

22. In non-diversity controversies, "the federal courts will apply their own rule of *res judicata*." Heiser v. Woodruff, 327 U.S. 726, 733 (1946). In most state courts, however, mutuality is still required. Comment, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 521-22 (1976).

injustice to the defendant.[23]

B. *Plaintiff's Ability to Join*

As a general rule, a prior judgment's preclusive effect will be denied a stranger if he could have effected joinder in the first action against his present adversary.[24] The trouble has been that, contrary to the very design of estoppel, offensive use by a stranger may actually promote repetitious litigation.[25] By waiting for other plaintiffs to litigate their actions first, a potential plaintiff can assert estoppel and reap the fruits of another's victory without incurring the costs of trial or any consequences of another's defeat.[26] In recognition of this, *Parklane* would have denied Shore the benefits of the SEC judgment if he "could have easily joined in the earlier action . . . ."[27] This prerequisite should prod a potential plaintiff into joinder and will tend to remove any reward for intentionally sitting on the sidelines. Both case [28] and statutory[29] law operated to deny Shore of the opportunity to join in the SEC action.

C. *Fairness of Offensive Estoppel*

1. Striking the Proper Balance

In essence, *Parklane* attempted to reconcile two competing policies: the desire for judical economy with the corollary of avoiding inconsistent factual determinations, and the need to ensure practical fairness to the defendant.[30]

When concerned with the fairness of issue preclusion, it is important to note the offensive-defensive distinction.[31] Offensive estoppel involves a trade off between judicial economy and fairness to the party against whom the issue preclusion is being invoked. The Supreme Court is more inclined to allow a stranger the use of a prior judgment as a shield rather than a

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23. 99 S. Ct. at 651.

24. *E.g.*, Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965); RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975) [hereinafter cited as RESTATEMENT (SECOND) (1975)].

25. *See generally* Semmel, *supra* note 14, at 1471-79.

26. Note that when asserted by a stranger, one of collateral estoppel's goals is rendered irrelevant: a stranger does not need the protection of repose. The only applicable policies are judicial economy and the prevention of possible inconsistent results.

27. 99 S. Ct. at 651.

28. SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (2d Cir. 1972).

29. 15 U.S.C. § 78u(g) (1976) (a private party can consolidate his action with an SEC action only if the SEC consents).

30. *See* Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 328 (1971); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); "Such a rule of public policy [collateral estoppel] must be watched in its application lest a blind adherence to it tend [sic] to defeat the even firmer established policy of giving every litigant a full and fair day in court." United States v. Silliman, 167 F.2d 607, 614 (3d Cir.), *cert. denied*, 335 U.S. 825 (1948). *But see* Reed v. Allen, 286 U.S. 191, 199 (1932) ("the mischief which would follow the establishment of a precedent for so disregarding . . . [res judicata] would be greater than the benefit which would result from relieving some cases of individual hardship.").

31. *See generally* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

sword.[32] Indeed, defensive estoppel offers the plaintiff a strong incentive to join all potential defendants as soon as possible, while offensive application has the opposite effect.[33] More importantly, courts carefully avoid awarding issue preclusion to a stranger if it would perpetrate an injustice on the defendant.[34]

Parklane and the federal courts in general have recognized many factors as possible justifications for refusing to bind a party to a particular judgment.[35] Given the wide variety of recognized factors and the very nature of a case-by-case inquiry, the following discussion is not meant as an exhaustive list of considerations when applying the full-and-fair-opportunity test. Indeed, the *Parklane* Court appreciated the futility of attempting to draw inflexible boundaries when determining if offensive estoppel would be unjust to a defendant. The *Parklane* rule reads: In the trial judge's discretion, offensive estoppel should be disallowed for the reasons discussed in the opinion "or for other reasons . . . ."[36]

2. Appellate Review

The *Parklane* Court intimated that the unavailability of appellate review may have been fatal to Shore's plea of issue preclusion.[37] Indeed, it is clearly unfair if a defendant is precluded by an erroneous factual finding he is unable to redress through appellate channels.[38] Parklane was unsuccessful in appealing the judgment of the SEC action.[39] It is not surprising Parklane was unsuccessful in arguing that the court erred in finding that the proxy statement was materially misleading given the appellate courts' reluctance to disturb a trial judge's factual findings.[40] In addition, the appeals court is to accord to the SEC all favorable inferences.[41] Justice Stewart did acknowledge that Parklane had exercised its right to appeal in the SEC action.

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32. Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402. U.S. 313, 329-30 (1971).

The leading federal case permitting offensive estoppel was Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). The *Zdanok* court took pains to articulate the hazards of using estoppel as a sword and then proceeded to demonstrate those dangers would not manifest. 327 F.2d at 955-56.

33. *See* accompanying text to notes 25-26 *supra*.

34. In view of the problems with offensive estoppel, *Parklane* established some rather detailed safeguards. 99 S. Ct. at 650-51. *See also* Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968) ("We should guard against allowing procedural novelties, conceived as shortcut ways of handling litigation, to lead to unjust results." *Id.* at 81).

35. For a listing of recognized considerations, *see* Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1043-44 (1971).

36. 99 S. Ct. at 651. *Cf.* Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 333-34 (1971) ("no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas.").

37. 99 S. Ct. at 652 n.18.

38. RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(a) (Tent. Draft No. 1, 1973) [hereinafter cited as RESTATEMENT (SECOND) (1973)].

39. *See* note 2 *supra*.

40. The standard of review for factual findings of a nonjury trial is that they "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a). Parklane, the party attacking the findings, therefore shouldered the heavy burden of attempting to prove the findings are clearly erroneous. Hedger v. Reynolds, 216 F.2d 202, 203 (2d Cir. 1954).

41. Stacher v. United States, 258 F.2d 112, 116 (9th Cir.), *cert. denied*, 358 U.S. 907 (1958).

However, the Court did not consider the nature of a defendant's right to review and its impact on the full-and-fair-opportunity test.[42]

3. A Defendant's Incentive to Defend

Unlike Shore who had every motive to fully litigate and decided when, whom, and where to sue, a defendant may lack a motive to thoroughly defend for various reasons.[43] Consequently, litigation of an issue generally will not be precluded by a judgment if the defendant did not have an adequate incentive to fully and vigorously defend in the initial action.[44]

It is generally recognized that the stake in the first suit may be too small and the trouble and expense too great to justify a vigorous defense.[45] The unfairness of offensive estoppel is evident where a less than exhaustive defense of a small property damage claim resulted in defendant's liability—only to have the same judgment later haunt the unsuspecting defendant in a large personal injury action springing from the same circumstances.[46] The Court in *Parklane* concluded that in light of the gravity of the charges levied by the SEC, Parklane did not lack the incentive to vigorously defend.[47]

Closely related to the stake a defendant had in the earlier action is the foreseeability of future suits in which the identical issue would again arise. If it is unforeseeable (at the time of the first action) that the same issue would again surface in the context of a second suit, and if as a result the defendant conducts a perfunctory defense, collateral estoppel should be inoperative.[48] In light of the factor of foreseeability, *Parklane* noted that not only could Parklane anticipate a shareholder's action following a successful SEC action, but that the class action had been filed before the commencement of the SEC action.[49]

As a general guideline for determining whether one defended with the utmost vigor, it is submitted that it would be useful for courts to ascertain whether the defendant would have been more diligent if the two separate actions had been merged into one. An affirmative answer would suggest the defendant did not receive a complete prior adjudication.

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42. In the context of patent litigation, one court did recognize the difficulty of correcting erroneous findings by judicial review and noted its impact on the "full and fair criteria." Blumcraft of Pittsburgh v. Kawneer Co., Inc., 482 F.2d 542, 548-49 (5th Cir. 1973).

43. *E.g.*, James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461-62 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971).

44. RESTATEMENT (SECOND) (1973), *supra* note 38, at § 68.1(e)(iii).

45. Brightheart v. McKay, 420 F.2d 242, 245 n.4 (D.C. Cir. 1969) (dictum); Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); Fink v. Coates, 323 F. Supp. 988, 990 (S.D.N.Y. 1971).

46. One could argue that because the defendant could anticipate a future lawsuit coupled with a plea of issue preclusion, he did indeed have an incentive to defend fully. For a discussion of the foreseeability factor, *see* text accompanying note 48 *infra*.

47. 99 S. Ct. at 652.

48. *See* Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); RESTATEMENT (SECOND) (1973), *supra* note 38, at § 68.1(e)(ii).

49. 99 S. Ct. at 652.

4. Multiple-Claimant Anomaly

When a single mishap results in multiple tort actions against a common tortfeasor, the potential for unfairness to the defendant is readily apparent:[50] If twenty successive actions are filed and the defendant successfully defends the first fifteen, the defendant cannot use collateral estoppel as a shield against the remaining five actions.[51] However, if the defendant is found liable in the sixteenth action, can the remaining four plaintiffs successfully plead the aberrational sixteenth judgment as conclusive against the common defendant? Like other federal courts,[52] *Parklane* answered in the negative.[53]

The question *Parklane* left unanswered is: What if in the inconsistent sixteenth judgment, the defendant was afforded a full and fair opportunity to litigate, but the jury simply decided the defendant was liable?[54] Under these circumstances, would it be "tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue"?[55] In sum, *Parklane* asserted it may be unfair if the plaintiff invoking estoppel relies on a judgment that is inconsistent with previous judgments in favor of the defendant.[56] In the same breath, the Court declared that if the defendant received one full and fair opportunity to litigate, the defendant shall be estopped from relitigating his liability.[57] If these two propositions are found in the same action, which one must yield?[58]

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50. *See generally* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 285-89 (1957).

51. Issue preclusion cannot be asserted *against* a stranger to the judgment. The stranger is entitled to his day in court. Makariw v. Rinard, 336 F.2d 333, 334 (3d Cir. 1964); RESTATEMENT OF JUDGMENTS § 96, Comment j (1942).

52. *E.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 955-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). *Contra*, Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

53. 99 S. Ct. at 651.

54. According to one court, an aberrational judgment is not uncommon. The court noted that when the subject of the action is a factual issue of negligence, it would be "subject to the varying appraisals of the facts by different juries . . . ." Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). As a further source of inconsistent judgments, it may be uneconomical for the defendant to vigorously defend a relatively small claim; however, the potential of issue preclusion lurking in the wings virtually compels a fullfledged defense, regardless of the amount of damages sought.

The defendant, faced with a relatively small claim, is offered a strong incentive to settle out of court—thus avoiding the expense of full litigation and the risk of an adverse judgment. Ironically, the threat of collateral estoppel, not the doctrine itself, serves the policy of judicial economy.

55. Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 650 (1979) (quoting Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 328 (1971)).

Of course the Court's failure to address this subject can be explained by the absence of any clearly inconsistent judgment in *Parklane* similar to the inconsistent sixteenth judgment described in the text (although the SEC judgment might have been an aberration had further litigation of the issue been allowed).

56. 99 S. Ct. at 651.

57. *Id.* at 652.

58. One commentator argues that a full and fair adjudication would prevail regardless of any inconsistency. Comment , *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338, 351-52 (1976).

III. THE TENSION BETWEEN COLLATERAL ESTOPPEL AND RIGHT TO JURY TRIAL

A. *Defendant's Procedural Opportunities*

1. In General

The *Parklane* Court discussed one last situation where it might be unfair for a stranger to invoke a prior judgment as conclusive against a defendant. Namely, where the defendant can avail himself of procedural opportunities in the present action which were unavailable in the first action and these opportunities "could readily cause a different result."[59]

By way of illustration, the Court noted that issue preclusion may have been denied had Parklane been forced to defend the SEC action in an inconvenient forum.[60] A defendant does not receive a full and fair opportunity if, because of the forum, he is forced to significantly compromise his discovery or access to witnesses.[61] The convenience of the earlier forum is especially relevant with offensive estoppel. Unlike defensive use where the party against whom the judgment is being asserted could decide where to sue, a defendant generally is not afforded the luxury of forum choice.[62]

The Court, of course, also ruled that to justify denying estoppel, the procedural opportunity must be sufficient to have an impact on the judgment.[63] Accordingly, if the location of forum is of little consequence, this alone should not impede the application of offensive estoppel.[64]

The Court conceded Parklane would be entitled to a jury fact finder in the private action were it not for the SEC action.[65] Thus, there was a procedural opportunity unavailable in the equitable SEC action that was available in the private action. Specifically, Parklane did not have the right to a trial by jury in the former but did in the latter. The Court, however, held that the mode of a trial (judge or jury) is "basically neutral" and it is unlikely that a jury trial would engender a different judgment.[66] The question then becomes whether the right to a jury trial is of enough significance that without it Parklane was not afforded a full and fair prior adjudication.

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59. 99 S. Ct. at 651 (footnote omitted). *See also* RESTATEMENT (SECOND) (1975), *supra* note 24, at § 88(2).

60. 99 S. Ct. at 651 n.15.

61. *See* Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313, 333 (1971) (considered choice of forum to determine if patentee had a full and fair oportunity); Fink v. Coates, 323 F. Supp. 988, 990 (S.D.N.Y. 1971)(denied estoppel where defendant unsuccessfully opposed the forum of the first action and defended against relatively small claim).

62. *See also* RESTATEMENT (SECOND) (1975), *supra* note 24, at § 88, Comment d.

63. 99 S. Ct. at 652.

64. *E.g.*, Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973).

65. 99 S. Ct. at 652 n.19.

The seventh amendment to the Federal Constitution preserves the right of trial by jury in suits at common law. Therefore, a party to a common law action (*e.g.*, for damages) has a right to jury trial. The common law action is in contradistinction to equity, admiralty, and administrative proceedings where a party generally cannot demand a jury trial. *See generally* Pernell v. Southall Realty, 416 U.S. 363 (1974); Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).

66. 99 S. Ct. at 652 n.19. Amazingly, the Court neither explains why nor cites any authority for this conclusion.

2. A Trial's Mode: Is It Neutral?

The impact of jury trials has been written about at length.[67] It is beyond the scope of this paper to discuss the merits of juries.[68] However, whether one views a jury as too fickle or as fundamental to our system of justice, the fact remains that a jury fact finder does seem to influence a decision—either for the better or worse. If the jury mode is truly insignificant, why would so many commentators devote their energies to this subject? Why have a Constitutional amendment preserve a right unless that right could affect the outcome of the trial? Moreover, Justice Stewart's assertion that juries are "basically neutral" is a departure from the importance the Supreme Court traditionally has accorded the jury mode.[69]

Aside from these troubling questions, *Parklane* did not reconcile a previous decision where the Supreme Court ruled that a trial by jury could cause a different outcome: Speaking for the Court in *Guaranty Trust Co. v. York*,[70] Justice Frankfurter ruled that in a diversity action when state and federal procedures clash and the choice of one may determine the outcome of the case, the federal courts are to apply the state's rules of procedure.

As part of the evolution of *Guaranty Trust, Byrd v. Blue Ridge Electric Cooperative, Inc.*[71] recognized that a trial's mode could indeed determine a case's outcome. In *Byrd*, South Carolina law required the factual issues be decided before a judge, and federal law allowed the right to a jury—hence, the conflict of procedure. Admitting a jury fact finder could substantially affect the judgment of the trial and therefore state law should govern,[72] Justice Brennen cited "countervailing considerations"[73] and upheld the right to the jury mode.[74]

B. *The Seventh Amendment and Its Preservation*

When determining whether a litigant is entitled to the seventh amendment right to jury trial, the Court traditionally employs an historical approach.[75] That is, if a party was entitled to a jury under the common law of 1791 (when the amendment was adopted), then he could similarly demand a jury trial today.[76]

While rarely departing from the historical test when denying a jury

67. *E.g.*, H. KALVEN & H. ZEISEL, THE AMERICAN JURY 4 n.2 (1966)(bibliography).

68. For such a discussion, see Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 502-08 (1975).

69. *E.g.*, Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. (17 Wall.)657 (1873)("twelve men know more of the common affairs of life than does one man . . . they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Id.* at 664.)

70. 326 U.S. 99 (1945).

71. 356 U.S. 525 (1958).

72. *Id.* at 537.

73. Namely, federal policies favoring the jury mode and not permitting state statutes to disrupt the federal judge-jury relationship. *Id.* at 537-38.

74. Contrary to *Parklane*, the Restatement (Second) of Judgments notes that the jury mode may be "significantly influential in the determination of the issue." RESTATEMENT (SECOND) (1975), *supra* note 24, at § 88, Comment d.

75. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

76. *See generally* Redish, *supra* note 68.

trial,[77] the Supreme Court has not been reluctant to expand the right beyond the 1971 common law.[78] This can be explained, in part, by the federal favoritism towards the jury mode[79] and the difficulty experienced with the historical approach.[80]

An historical analysis to determine if Parklane would be entitled to a jury trial is beyond the scope of this comment.[81] However, in addition to a historical search, Justice Stewart also relied on the recent cases of *Beacon Theatres, Inc. v. Westover*[82] and *Katchen v. Landy*[83] to buttress his proposition that an equitable determination may operate conclusively as to a defendant in a subsequent legal action and thus deny a jury trial.[84] Justice Stewart's reading of *Beacon* is novel and seems to subvert its very thrust.

The plaintiff in *Beacon* sought equitable relief and the defendant answered with a legal counterclaim.[85] The trial judge tried the equitable issues in the complaint before any jury trial of the counterclaim. After recognizing that this equitable determination by the judge might preclude a jury trial of subsequent legal issues,[86] Justice Black for the majority in *Beacon* reversed and held the seventh amendment cannot be impaired in such a manner.[87] *Parklane*, however, cited an assumption in *Beacon* of possible effects of collateral estoppel, notwithstanding *Beacon's* earnest attempt to preserve jury trials. By requiring the resolution of legal claims before a jury first, *Beacon* sought to insulate a defendant from estoppel when its application would deny him of a jury trial of his legal claims. Justice Black went on to declare that, when there are legal issues involved, only under the most compelling circumstances can a prior equitable determination deny a litigant a jury trial.[88]

Justice Stewart then cited *Katchen* as confirming his interpretation of *Beacon* and notes that *Katchen* allowed an equitable determination to estop

77. *See* Colgrove v. Battin, 413 U.S. 149 (1973); Galloway v. United States, 319 U.S. 372 (1943). The extent of the departure was to matters of form, and the right was preserved as to its substance.

78. *E.g.*, Curtis v. Loether, 415 U.S. 189 (1974); Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959). *Beacon* represents the leading case in the extension of the seventh amendment beyond the historical standard. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 687 (1963).

79. *E.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). "This Court has long emphasized the importance of the jury trial." *Id.* at 510 n.18).

80. *See* Ross v. Bernhard, 396 U.S. 531 (1970). The *Ross* Court viewed the historical test as an "abstruse historical inquiry . . . most difficult to apply." *Id.* at 538 n.10.

81. For an able historical examination, see Note, Shore v. Parklane Hosiery Co.: *The Seventh Amendment and Collateral Estoppel*, 66 CAL. L. REV. 861 (1978). The Note concludes that contrary to the result reached in *Parklane*, the historical test would disallow estoppel and grant a jury trial. *Id.* at 862.

82. 359 U.S. 500 (1959).

83. 382 U.S. 323 (1966).

84. 99 S. Ct. at 653.

85. It should be noted that *Beacon* can be distinguished on its facts from *Parklane*. *Parklane* involved not a blending but a separate equitable claim followed by a legal one.

86. 359 U.S. at 504.

87. 359 U.S. at 510 (quoting Scott v. Neely, 140 U.S. 106, 109-10 (1891)).

88. 359 U.S. at 510-11.

Parklane refused to apply *Beacon* to separate actions and limited its application to situations involving a mixture of legal annd equitable claims in one action. Justice Stewart does not explain why *Beacon* should not equally apply in *Parklane*.

subsequent legal issues without a jury trial. Again, this analysis seems to be based on a strained reading of *Beacon*.

The facts of *Katchen* are arguably within the extraordinary circumstances exception enunciated in *Beacon*. *Katchen* stressed that to allow a plenary suit with a jury trial in a bankruptcy proceeding—a proceeding which is designed to be summary in nature—would "dismember a scheme which Congress has prescribed."[89] Hence, *Katchen* easily fits the exception to *Beacon's* general principle that a prior equitable judgment cannot deny a litigant a trial by jury.[90]

Unlike *Katchen, Parklane* mentions no extraordinary circumstances, no pressing reason why a jury already impaneled to decide damages could not also decide if the proxy statement was materially misleading.

A case further questioning *Parklane's* interpretation of and reliance on *Beacon* is *Meeker v. Ambassador Oil Co.*[91] Justice Black's fears in *Beacon* of estoppel operating to deny a jury trial never did materialize—except, of course, in *Parklane*. Four years after *Beacon, Meeker* refused to apply collateral estoppel when a prior equitable determination would have denied the plaintiff a jury trial on his legal claims.[92]

C. *Unfairness and the Accident of Joinder*

Aside from recent case law, simply employing *Parklane's* own fairness test[93] seems to suggest that issue preclusion should not be invoked against Parklane. First, in *Colgrove v. Battin*[94] the Court held that the very design of a jury trial is to guarantee a fair factual determination.[95]

More importantly, however, it seems manifestly unfair that one's inviolate right to jury trial[96] depends (among other things) upon the accident of joinder. Paradoxically, if Shore could have joined in the SEC action, Parklane could have demanded the legal issues be submitted to a jury.[97] Parklane discovered its inviolate right was reduced to the accident of joinder.

As a result of the application of estoppel in *Parklane*, a defendant's Constitutional right is now contingent on whether joinder can be effectuated;

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89. 382 U.S. at 339.

90. In response to Katchen's demand for a jury trial, the Court said:

> In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury. We think Congress intended the trustee's § 57g objection to be summarily determined . . . . To implement congressional intent, we think it essential to hold that the bankruptcy court may summarily adjudicate . . . .

Id. at 339-40.

91. 308 F.2d 875 (10th Cir. 1962), *rev'd per curiam*, 375 U.S. 160 (1963).

92. Citing *Beacon* in a one-line opinion, the *Meeker* Court reversed the trial court. 375 U.S. 160.

93. Offensive estoppel should not be allowed when its use would be "unfair to a defendant." 99 S. Ct. at 651-52.

94. 413 U.S. 149 (1973).

95. *Id.* at 157.

96. "The right of trial by jury as declared by the Seventh Amendment . . . shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a).

97. *See* Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962).

whether the equitable decree is rendered while the legal action is still in its pretrial stage; and whether the government even decides to file a complaint. By seeking an injunction, the SEC now can divest a defendant of the jury mode. Ignoring the seventh amendment aspects, how equitable is it that Parklane's right to a jury hinges on these fortuitous circumstances?

CONCLUSION

Parklane represents the demise of mutuality in the federal courts, a framework of considerations when applying the full-and-fair-opportunity test in the context of offensive estoppel, and a conflict between the common law doctrine of collateral estoppel and the Constitutional right to trial by jury. The Court's decision will be praised by those who denounce juries or those who seek to expedite litigation. *Parklane*, however, should be viewed with concern by those who recognize the serious erosion of the seventh amendment for minimal savings of judicial resources.

A stranger's ability to assert collateral estoppel should depend on the extent he furthers estoppel's policy goals. With Shore invoking estoppel as a sword, only two policies are served: preventing a jury from reaching a determination inconsistent with the SEC judgment, and avoiding the delay of relitigating Parklane's liability. Without the policy of repose from repetitious litigation applicable, Shore represents, in effect, society's interests at large.

Symmetry of factual findings should not stand in the way of fairness to Parklane, and the amount of judicial energy conserved here would be minimal.[98] In any event—and especially when juxtaposed against the insignificant judicial economies achieved—collateral estoppel should be disallowed when it so derogates the seventh amendment.

First, Parklane was denied a full and fair opportunity to litigate the issue of its liability in the SEC action. The jury mode is significant, *Parklane* notwithstanding. The Court's decision relegates the seventh amendment to a level of importance subordinate to an inconvenient forum.

Second, recent Court decisions, *Beacon* in particular, do not support the result reached in *Parklane* and, in fact, would argue to preserve the right to trial by jury. There were no imperative circumstances present to justify denying Parklane the right to a jury trial.

Finally, there is the inherent unfairness of granting one defendant the jury mode if the legal and equitable claims happen to be present in the same action and denying Parklane a trial by jury because the equitable claim is followed by, and separate from, the legal claim.

Parklane does not represent the high mark of judicial respect for the seventh amendment or its preservation.

Steve M. Skoumal

98. Note, *supra* note 81, at 870-73.