University of Arkansas at Little Rock Law Review

Volume 3 | Issue 1 Article 5

1980

Banks and Banking–12 U.S.C. Section 85–The Broadened Power of National Banks Regarding Interest Rates on Credit Card Transactions

Lucrecia Ann Henderson

NOTES

CIVIL PROCEDURE—COLLATERAL ESTOPPEL—OFFENSIVE USE OF EQUITY FINDING ALLOWED IN SUBSEQUENT LAW ACTION. *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979).

Shares in the Parklane Hosiery Company, Inc., were offered to the public in December 1968. Parklane's president, Herbert N. Somekh, and others affiliated with him, controlled 71.6 percent of the outstanding shares. The value of the public shares was drastically reduced during a subsequent recession. Somekh and his affiliates decided in 1974 to convert Parklane into a privately owned company by merging with a new company and purchasing the public shares. They caused a proxy statement to be issued to Parklane stockholders on September 24, 1974, advising that there would be a meeting on October 14, 1974, to consider the proposed merger. Following that meeting, Parklane merged with New PLHC Corporation, a private company controlled by Somekh and his affiliates, and each minority stockholder was paid two dollars per share for his holdings in Parklane. Dissenting stockholders had the right to obtain an appraisal under the New York Business Corporation Law.

Leo M. Shore brought a stockholder's class action challenging the veracity of the proxy statement in the District Court for the Southern District of New York. Parklane Hosiery Co., Inc., and twelve of its officers, directors, and majority stockholders, including Somekh, were named as defendants. The complaint alleged that the proxy statement:[1]

(1) Failed to disclose that the purpose of the merger was to help Somekh meet personal obligations rather than to further any valid corporate objective;

(2) Failed, in referring to Parklane's termination of lease negotiations with the Federal Reserve Board of New York, to reveal that continuation of the negotiations could have resulted in substantial financial benefits to Parklane; and

(3) Failed to disclose that the two appraisers employed by Parklane to determine the fair value of its stock had not been furnished

1. Shore alleged that Parklane had violated §§ 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a) and 78t(a), as well as rules and regulations promulgated by the SEC.

with sufficient information to prepare a true and complete valuation.

The complaint further alleged that distribution of the proxy statement was part of a fraudulent scheme giving rise to liability under Rule 10b-5 of the Securities Exchange Act of 1934. Shore sought damages, rescission of the merger, recovery of costs, and such other relief as might be granted by the court.

Before Shore's action came to trial, the Securities and Exchange Commission (SEC) filed suit in federal district court against Parklane and Somekh. The SEC's complaint alleged that Parklane's September 24, 1974, proxy statement was materially false and misleading in essentially the same respects as those alleged in Shore's complaint. The SEC sought equitable relief, including the appointment of special counsel to determine the fair value of the Parklane shares held by minority stockholders eliminated by the merger and an injunction against further violations by the defendants of federal securities laws. After a four day trial, the district court found that:

(1) The overriding purpose of the merger was to enable Somekh to repay his personal indebtedness and non-disclosure of this fact in the proxy statement was clearly established;

(2) The proxy material was false in regard to the Federal Reserve Board negotiations;

(3) The proxy statement was misleading when it set forth the fact of an appraisal but failed to disclose that the appraisal was based upon inadequate and incomplete information; and

(4) These ommissions and misstatements were material. The court entered a declaratory judgment for the SEC on November 9, 1974.[2] The Court of Appeals for the Second Circuit affirmed.[3]

On the basis of the district court's November 9 decision, Shore moved on November 24, 1974, for partial summary judgment against Parklane and Somekh,[4] asserting that they were estopped from relitigating issues that had been resolved against them in the SEC action. The district court denied the motion on the ground that application of collateral estoppel would deny Parklane's seventh amendment right to a jury trial. The Court of Appeals for the Second Circuit reversed, holding that a party who has had issues of fact determined against him after a full and fair opportunity to litigate

2. SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976).
3. SEC v. Parklane Hosiery Co., 558 F.2d 1083 (2d Cir. 1977).
4. Parklane and Somekh will hereinafter be referred to collectively as Parklane.

in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial on the same issues of fact.[5]

The United States Supreme Court granted certiorari because the position taken by the Second Circuit was in conflict with that taken by the Court of Appeals for the Fifth Circuit.[6] The Supreme Court held that because Parklane had a "full and fair" opportunity to litigate its claims in the SEC action it was collaterally estopped from relitigating the question of whether the proxy statements were materially false and misleading. The Court affirmed the Second Circuit's position that application of collateral estoppel did not violate Parklane's seventh amendment right to a jury trial. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979).

Collateral estoppel is a branch of the doctrine of res judicata.[7] Res judicata is defined as

> the principal that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.[8]

Although the terms res judicata and collateral estoppel have been used interchangeably, they are two distinct principles.[9] A judgment operates as res judicata to preclude subsequent suits on the same cause of action between the same parties (and those in privity with them). Under the doctrine of collateral estoppel, a judgment precludes relitigation by the parties and their privies of facts and issues actually determined in the first suit, *regardless of whether the subsequent suit involves the same cause of action.*[10] Simply, res judicata is claim preclusion and collateral estoppel is issue preclusion.[11] The doctrine of collateral estoppel is based on the policy of limiting litigation to one fair trial on an issue.[12] The doctrine has the dual

---

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

6. Parklane Hosiery Co. v. Shore, 435 U.S. 1006 (1978).

7. Editorial Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty,* 35 GEO. WASH. L. REV. 1010, 1012 (1967).

8. BALLENTINE'S LAW DICTIONARY 1105 (3d ed. 1969).

9. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); United States v. Moser, 226 U.S. 236, 241 (1924); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877).

10. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

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

12. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942).

purpose of protecting litigants from the burden of relitigating an identical issue in a subsequent action and of promoting judicial economy by preventing needless litigation.[13] Actual litigation of an issue is a prerequisite to application of collateral estoppel.[14]

The requirements of due process dictate that a person cannot be bound by an adjudication to which he was not a party.[15] Collateral estoppel cannot therefore be asserted against a litigant who has not had his day in court. It will apply only against a party or privy[16] to a prior adjudication of the issues sought to be precluded.[17]

The doctrine of mutuality limits the use of collateral estoppel to actual parties or privies of parties of a prior adjudication.[18] The doctrine states that the party asserting collateral estoppel on an issue as well as the party against whom it is asserted must have been parties to a prior determination of the same issue.[19] Mutuality was requisite to the application of collateral estoppel at common law.[20] The early American courts adopted the common law rule that "there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties."[21]

Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from litigating an issue that the plaintiff previously litigated with another party and lost. The purpose of defensive collateral estoppel is to prevent a plaintiff from relitigating issues by merely switching adversaries.[22] Defensive use was first allowed as an exception to the mutuality doctrine in derivative lia-

---

13. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 328-29 (1971).

14. Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948); RESTATEMENT OF JUDGMENTS § 68 (2) (1942).

15. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 A. 260 (1934).

16. "A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942).

17. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

18. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

19. *Id.*

20. Annot., 11 Eng. Ruling Cases 7 (1897) (quoting the Duchess of Kingston's Case, 34 Lords' Journals 655 (1776)).

21. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 131 (1912).

22. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

bility situations. A plaintiff could be estopped from bringing an action against a master for the actions of his servant if the plaintiff had previously litigated the same issues with the servant and lost. This defensive use exception has also been upheld in cases where the relationship between the defendants in the two suits was that of principal and agent, and of indemnitor and indemnitee.[23]

The landmark decision expanding defensive collateral estoppel beyond derivative liability cases was *Bernhard v. Bank of America.*[24] The California Supreme Court in *Bernhard* reasoned that while the requirements of due process of law forbid assertion of collateral estoppel *against* a party who was not bound by an earlier adjudication of an issue, there was no reason for requiring the party *asserting* the plea to have been a party to the earlier litigation.[25] *Bernhard* replaced the mutuality doctrine with three requirements for a valid plea of collateral estoppel. First, the issue decided in the prior adjudication must be identical with the issue in the present case. Second, there must have been a final judgment on the merits in the prior case. Last, the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication.[26] The language in *Bernhard* regarding application of collateral estoppel is broad. The case is limited by its facts, however, to defensive use.

The impact of *Bernhard* was significant. Many state and federal courts subsequently rejected the mutuality requirement, especially where the prior judgment was invoked defensively.[27] The United States Supreme Court allowed defensive collateral estoppel in *Blonder-Tongue Laboratories* v. *University of Illinois Foundation.*[28] The Court noted the erosion of the mutuality requirement and rejected the requirement in favor of defensive collateral estoppel in patent infringement cases.

Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue which the defendant previously litigated unsuccessfully in an action with another party. A plaintiff successfully asserting offensive collateral estoppel will

23. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 128 (1912).
24. 19 Cal. 2d 807, 122 P.2d 892 (1942).
25. *Id.* at 812, 122 P.2d at 894.
26. *Id.* at 813, 122 P.2d at 895.
27. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 324 (1971).
28. 402 U.S. 313 (1971).

prevail on the issues subject to the estoppel without litigating them. If, for example, one plaintiff established an airline's liability for a plane crash, subsequent plaintiffs with similar claims need only litigate the question of damages. The recent cases allowing offensive collateral estoppel have applied the following requisites to its application: (1) The three conditions established in *Bernhard* must be met; and (2) The defendant must have had a "full and fair" opportunity to litigate the issues in the earlier suit.[29]

Factors which have been considered in determining whether a party had a "full and fair" opportunity are: the forum of the prior litigation;[30] the extent of the litigation;[31] the size of the claims in the prior and present action;[32] and the forseeability of future litigation at the time of the prior suit.[33]

The courts that have abrogated the mutuality requirement have considered the particular facts and circumstances in each case to determine whether it is fair to apply collateral estoppel. Considerations of fairness led to opposite results in the Second and Fifth Circuits when application of offensive collateral estoppel conflicted with the right to trial by jury. The Second Circuit allowed offensive use of an equity decision in a subsequent law action.[34] The Fifth Circuit held the seventh amendment right to a jury trial was an overriding consideration which allowed the defendant to relitigate issues decided by the equity court.[35]

The seventh amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any

---

29. *See, e.g.*, United States v. United Air Lines, Inc., 216 F. Supp. 709 (E. D. Wash. and D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom.* United Air Lines, Inc. v. United States, 379 U.S. 951 (1964); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). *Accord*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

30. Zdanok v. Glidden Co., 327 F.2d 532 (2d Cir.) *cert. denied*, 377 U.S. 934 (1964).

31. Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

32. United States v. United Air Lines, Inc., *supra* note 27.

33. Shore v. Parklane Hosiery Co., 565 F.2d 815, 821-22 (2d Cir. 1977); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

34. Shore v. Parklane Hosiery Co., 565 F.2d 815, 821-22 (2d Cir. 1977).

35. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).

Court of the United States, than according to the rules of common law."[36]

The amendment "preserved" the right to a jury trial as it existed in 1791 when the amendment was incorporated into the Constitution. The fundamental elements of the jury trial are preserved by the seventh amendment, but the incidental procedures of common law practice in 1791 are not.[37] Procedural limitations on the scope of the jury's function, such as the directed verdict[38] and summary judgment,[39] have been held not to violate the seventh amendment. Any substantive diminution of the right to a jury trial as it existed in 1791, however, would be unconstitutional.[40]

The conflict between the Second and Fifth Circuits hinged on the issue of whether allowing an equity decision (by the court with no jury) to act as an estoppel in a subsequent law action (where the defendant would have a right to a jury trial) was a procedural limitation or substantive diminution of the defendant's seventh amendment right. Both circuit courts relied on *Beacon Theatres, Inc.* v. *Westover,*[41] which held that the right to a jury trial of legal issues should be preserved wherever possible, in cases of mixed legal and equitable claims, by trying the legal issues first to a jury. The Fifth Circuit in *Rachal* v. *Hill,*[42] in rejecting offensive use of collateral estoppel, reasoned that *Beacon Theatres* demonstrated the primacy of the jury trial right.[43] The Second Circuit in *Shore v. Parklane Hosiery Co.*[44] argued that the *Beacon Theatres* decision would not have been necessary if not for the fact that an equity decision *may* have a collateral estoppel effect in a subsequent law action.[45]

The intercircuit conflict was resolved by the United States Supreme Court in *Parklane Hosiery* v. *Shore.*[46] The Court decided "not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[47]

---

36. U.S. CONST. amend. VII.
37. Galloway v. United States, 319 U.S. 372 (1943).
38. *Id.* at 388-93.
39. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-21 (1902).
40. Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897).
41. 359 U.S. 500 (1959).
42. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).
43. *Id.* at 64.
44. Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977).
45. *Id.* at 820-21.
46. 439 U.S. 322 (1979).
47. *Id.* at 331.

In addition, the Court held that offensive use of an equity decision in a subsequent law action did not violate a defendant's seventh amendment right to a trial by jury.[48]

The threshold issue before the Court was whether a plaintiff (Shore) who was not a party to a prior judgment may nevertheless use that judgment offensively against a defendant (Parklane) who was a party to prevent the defendant from relitigating issues resolved against him in the earlier proceeding. The Court cited *Blonder—Tongue* for the proposition that it is not tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.[49] The *Blonder—Tongue* case, however, involved only defensive use of collateral estoppel. The Court considered several reasons why offensive use should be treated differently from defensive use. First, defensive use creates an incentive for a plaintiff to join all potential defendants,[50] while offensive use encourages plaintiffs to await the outcome of other suits against a potential defendant.[51] Second, offensive use may be unfair to a defendant in situations where he had little incentive to defend the first suit vigorously,[52] where the judgment relied on by the plaintiff is inconsistent with prior judgments,[53] or when the second action af-

48. *Id.* at 337.

49. *Id.* at 327-28.

50. *See* Bruszewski v. United States, 181 F.2d 419, 421 n.2 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950): "While the claimant was not obliged thus to consolidate his suits, no canon of fairness requires that he be given the special advantage of twice trying the same issue where he did not elect to join them." *Id.*

51. *E.g.*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P. 2d 111, 115 (1968); Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965). *But see, Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 537-38 (1967):

> The use of collateral estoppel by a non-party as a sword (offensively) as well as a shield (defensively) may compel defendants to change trial strategy, especially in multiple-claimant situations. Whereas defendants at one time tried to separate plaintiffs and prevent class actions in order to force each plaintiff to bear the high cost of litigation, they may now prefer to have all potential plaintiffs join in one action, so that the determination will be binding on the plaintiffs as well as the defendants.

52. *See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F. 2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

53. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 285-86 (1957). Professor Brainerd Currie's famous "Multiple Claimant Anomoly" situation demonstrates the unfairness of allowing offensive collateral estoppel where the judgment relied on is inconsistent with prior judgments. Imagine a railroad accident in which fifty passengers are injured.

> The first injured passenger to sue loses his action against the railroad. The railroad cannot plead that judgment against the next passenger to sue, because the second

fords the defendant significant procedural opportunities that were unavailable in the first action.[54] Reasoning that these problems could best be dealt with on a case by case basis in the trial courts, the Court determined that offensive use of collateral estoppel should be allowed except "in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant. . . ."[55]

The Court applied these criteria to the present case and found no reason to bar Shore's offensive use of collateral estoppel. Because a private action cannot be consolidated with one brought by the SEC without its approval,[56] Shore probably could not have joined in the earlier action. Several other factors contributed to the Court's determination that there would be no unfairness to Parklane in applying offensive collateral estoppel in this case. First, Parklane had every incentive to defend the SEC action vigorously due to the seriousness of the allegations against them and the pendency of Shore's private action. Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, no procedural opportunities of a kind likely to cause a different result would be available to Parklane that were unavailable in the first action.

The Court found no merit in Parklane's contention that the use of offensive collateral estoppel in this case would violate its seventh amendment right to a jury trial. Parklane argued that "since the scope of the amendment must be determined by reference to the common law as it existed in 1791, and since the common law permitted collateral estoppel only where there was mutuality of parties, collateral estoppel cannot constitutionally be applied when such mutuality is absent."[57] In rejecting this argument, the Court held that an equitable determination can have a collateral estoppel effect

---

passenger was not a party to the first action, nor in privity with the first passenger. Nevertheless, let us say that the second passenger also loses, and indeed that twenty-five passengers, in twenty-five separate actions, all fail to establish negligence on the part of the railroad. Then passenger No. 26 wins his action. Are we to understand that the remaining twenty-four passengers can plead the judgment in the case of No. 26 as conclusively establishing that the railroad was guilty of negligence, while the railroad can make no reference to the first twenty-five cases it won?

54. The Court considers the presence or absence of a jury a "neutral" factor and not a significant procedural opportunity. 439 U.S. 322, 332 n.19 (1979).

55. 439 U.S. 322, 331 (1979).

56. 15 U.S.C. § 78u(g).

57. 439 U.S. 322, 335 (1979).

in a subsequent legal action and the seventh amendment does not preclude procedural reforms such as collateral estoppel.[58]

Mr. Justice Rehnquist, in his dissenting opinion, would have held the seventh amendment determinative in *Parklane*. Rehnquist and the majority agreed that the amendment protects the jury trial right as it existed in 1791. They also agreed that it is the substance of the jury trial right that is to be preserved, not the incidental common law procedures. Rehnquist contended, however, that offensive collateral estoppel is not a procedural reform, but a serious diminution of the right to a jury trial in direct contravention of the seventh amendment.[59]

In addition, Rehnquist argued that notwithstanding the seventh amendment violation, offensive collateral estoppel should not be allowed in this case. He offered two reasons why "it is 'unfair' to apply offensive collateral estoppel where the party sought to be estopped had not had an opportunity to have the facts of his case determined by a jury."[60] First, the use of offensive collateral estoppel in this case contravened the strong federal policy favoring jury trials.[61] Second, a jury trial is the type of "procedural opportunity" that could easily have caused a different result in the second action.[62] In applying the majority test of fairness, Rehnquist concluded, the denial of a jury trial should always militate against application of offensive collateral estoppel.[63]

Parklane is significant as the first United States Supreme Court decision to abrogate the mutuality doctrine entirely. The Supreme Court replaces the mutuality doctrine in the federal courts with broad trial court discretion. The Court provides some guidance for the trial courts with the general rule that offensive collateral estoppel should not be allowed in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant.[64] Several examples of situations in which offensive use of collateral estoppel may be unfair to a defendant were offered by the Court:

(1) A defendant had little incentive to vigorously defend in the

58. *Id.* at 337.
59. *Id.* at 344-47 (Rehnquist, J., dissenting).
60. *Id.* at 351.
61. *Id.*
62. *Id.* at 353.
63. *Id.* at 351.
64. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

first action because he was sued for small or nominal damages, particularly if future suits were not foreseeable;

(2) The judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant;

(3) The second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[65]

These guidelines would seem to protect a defendant who has lost one lawsuit from an unfair extension of that judgment through offensive collateral estoppel. A defendant preparing to litigate an issue for the first time, however, cannot know whether another court will later hold the litigation sufficient for the application of offensive collateral estoppel. He must therefore litigate even trivial claims to the fullest extent because of their potential collateral estoppel effect. Greater certainty in the rules governing application of collateral estoppel could minimize this possibility of excessive litigation. One alternative is to allow offensive collateral estoppel only in suits that were pending at the time the defendant litigated the first action. Another option is to allow collateral estoppel only against the party who had the initiative in a prior suit. In either case, the trial court could exercise its discretion to disallow unfair use of collateral estoppel. A rule which limited the application of collateral estoppel to certain specified situations would apprise parties of the potential extent of a judgment prior to litigation and prevent unnecessary escalation of trivial claims.

Parklane is also significant because of the majority's treatment of the right to a jury trial in civil cases. The majority does not consider a jury trial to be a procedural opportunity of the same order as a convenient forum or full scale discovery. In determining whether a defendant has had a full and fair opportunity to litigate an issue, the majority considers the presence or absence of a jury a "neutral" factor.[66] This seems incongruous in view of *Beacon Theatres* and the strong federal policy favoring jury trials. It could have the effect of denying jury trials for all alleged violations of federal securities law in which the SEC brings the first suit and wins. It also provides the incentive for a private plaintiff to delay his action in hope that the SEC will settle the issue for him. The

65. *Id.* at 332.

66. *See* 439 U.S. 322, 331 n.15, 332 n.19 (1979).

Court's decision in *Parklane* "may well extend to other areas, such as antitrust, labor, employment discrimination, consumer protection, and the like, where a private plaintiff may sue for damages based on the same or similar violations that are the subject of government actions."[67]

Christopher John Heller

---

67. 439 U.S. 322, 352 n.20 (1979) (Rehnquist, J., dissenting).