University of Baltimore Law Review

Volume 14
Issue 2 *Winter 1985*

Article 2

1985

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UNIVERSITY OF BALTIMORE LAW REVIEW

Volume Fourteen Winter 1985 Number Two

ISSUE PRECLUSION: THE RETURN OF THE MULTIPLE CLAIMANT ANOMALY

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Offensive collateral estoppel occurs when a plaintiff estops a defendant from relitigating an issue the defendant has previously litigated and lost. Although this doctrine is accepted by the Supreme Court, its application is limited to situations that would not cause unfairness to the defendant. Recently, the Supreme Court has exempted the government from the application of offensive collateral estoppel for prevailing policy reasons. The author analyzes these decisions and their underlying policies and concludes that a private defendant can fashion an argument that the application of nonmutual offensive collateral estoppel should not be allowed in the second case of a multiple claimant series, even against some private defendant.

I. INTRODUCTION

In 1957, Brainerd Currie published a famous article on mutuality of collateral estoppel.[1] The article discussed a hypothetical train crash in which fifty passengers are injured and fifty personal injury actions are filed against the railroad. Currie noted that if the railroad won the first twenty-five actions and lost the twenty-sixth, no court would consider estopping the railroad from litigating the subsequent cases.[2] Case twenty-six was clearly anomalous.[3] He then reasoned that because the

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1. Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957). The article was a response to the Supreme Court of California's decision in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). For further discussion of the *Bernhard* case, see *infra* notes 24-34 and accompanying text.
2. Currie, *supra* note 1, at 286. It is clear that a victory by the defendant could not be used against any of the other plaintiffs because due process requires that each claimant have his day in court. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982) (it is generally accepted that a party have a full and fair opportunity to litigate, fulfilling the elements of due process, before being estopped from relitigating the same issue with another party).
3. Currie, *supra* note 1, at 286. Professor Currie stated that "such a judgment in such

first case in a multiple claimant situation is just as likely to reach an anomalous result as the twenty-sixth or any other, offensive collateral estoppel should not be based on the first case in such a situation.[4]

Currie's reasoning was rejected,[5] and most courts, including the federal courts, do not hesitate to permit estoppel based on the first case of a multiple claimant series.[6] Currie's famous example, however, is now experiencing a revival. Since the example was used by the Supreme Court in *Parklane Hosiery Co., Inc. v. Shore*[7] to illustrate the dangers of unbridled use of offensive collateral estoppel, numerous decisions have discussed it.[8] More recently, the Court, in *United States v. Mendoza*,[9]

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a series must be an aberration." *Id.* at 289. Professor Currie noted that one commentator had suggested that estoppel should be granted in cases 27-50 because the benefit of the experience from the first trial will help the defendant in subsequent trials, and should the defendant lose the first case, he ought not complain after having a fair opportunity to defend. *Id.* at 286 (citing Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607 (1926)); *see* Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies — Two California Cases*, 57 HARV. L. REV. 98 (1943). Professor Currie felt, however, that such an outcome would be so grossly unfair to the defendant that the argument may not need an answer. Currie, *supra* note 1, at 287.

4. Currie, *supra* note 1, at 289, ("[W]e have no warrant for assuming that the aberrational judgment will not come as the first in the series."). In a later work, Professor Currie appears to have tempered some of his reservations about the *Bernhard* doctrine. *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). Some commentators read this article as a retraction of Currie's reservations. *See, e.g.*, Note, *Offensive Collateral Estoppel in Asbestos Litigation*: Handy v. Johns-Manville Sales Corp., 15 CONN. L. REV. 247, 251 n.20 (1982). The better reading of Currie's second article, however, is to limit it to the context in which it was written. The article was part of a tribute to former California Chief Justice Roger Traynor, the author of the *Bernhard* decision. The basic thrust of the article was that because the *Bernhard* doctrine had been used quite cautiously, it had not worked great unfairness and thus evidenced Traynor's wisdom. Currie, *supra* note 4, at 29; *see also*, Note, *The Impact of Defensive and Offensive Assertion of Collateral Estoppel by a Non Party*, 35 GEO. WASH. L. REV. 1010, 1018-19 (1967) (noting that Currie remained committed to the proposition that collateral estoppel should not be applied to work injustice). Thus, Currie's initial analysis remains very useful.

5. *See, e.g.*, Zdanok v. Glidden, 327 F.2d 944, 956 (2d Cir. 1964); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 609, 375 P.2d 439, 441-42, 25 Cal. Rptr. 559, 561-62 (1962) (discussing and rejecting Currie's reasoning that a nonparty to the first action should not be allowed to collaterally estop one who did not have the initiative in the first proceeding); Professor Currie discusses the rejection of his arguments in this and other cases in Currie, *supra* note 4, at 29-33. Some cases, however, have appeared to agree with Currie's reasoning. *See, e.g.*, Nevarov v. Caldwell, 167 Cal. App. 2d 762, 327 P.2d 111 (1958) (adopting Currie's reasoning and refusing to allow accident victims to avail themselves of prior plaintiff's judgment). Indeed, one commentator has suggested that most of the exceptions to the *Bernhard* rule are the result of Currie's reasoning. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 MISS. L.J. 765, 785 (1982).

6. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 298-99 (1982) (stating that "*Bernhard* . . . has now gained general acceptance" and citing cases from numerous jurisdictions); *accord*, 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§ 4463-64 (1981).

7. 439 U.S. 322, 329 n.11 (1979) (discussed *infra* at notes 115-24 and accompanying text).

8. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982)

accepted an argument by the Solicitor General that sounded very much like Currie's.[10] This article argues that *Parklane*[11] and *Mendoza*[12] combine to provide a strong basis for courts to adopt Professor Currie's multiple claimant anomaly reasoning.

II. BACKGROUND

Collateral estoppel or issue preclusion[13] is a judge-made doctrine concerning the effect of a final judgment on subsequent litigation.[14] Collateral estoppel precludes parties or their privies[15] from relitigating a

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(holding that offensive collateral estoppel based on Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), was improper); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1170 (5th Cir. 1982) (citing Currie's article to show that acceptance of offensive collateral estoppel by commentators is far from unanimous); Wetherill v. University of Chicago, 548 F. Supp. 66, 70 (N.D. Ill. 1982) (using the citation of Currie's article in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) to explain what *Parklane* meant to do about inconsistent judgments); Lindsay v. Cutter Laboratories, Inc., 536 F. Supp. 799, 804 (W.D. Wis. 1982) (reviewing Currie's reasoning and concluding that the dangers he feared were not present).

9. 104 S. Ct. 568 (1984).
10. *Id.* The Solicitor General's argument can be seen at Petition for Certiorari at 19, United States v. Mendoza, 104 S. Ct. 568 (1984) (issue preclusion absent mutuality should not be invoked in a government case because of the potential unfairness that arises from the uniqueness of the government as a litigator, that is, the number of cases and jurisdictions in which the government litigates, and the types of issues, often constitutional, that the government litigates). *See infra* notes 163-65 and accompanying text (discussing the Solicitor General's argument).
11. 439 U.S. 322 (1979).
12. 104 S. Ct. 568 (1984).
13. RESTATEMENT OF JUDGMENTS § 68 (1942) used the term "collateral estoppel," while the RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) uses "issue preclusion" for substantially the same doctrine. One of the reporters of the original Restatement, Professor Scott, stated that the term "collateral estoppel" was adopted "with some hesitation," because it is not precisely an estoppel. However, the reporters concluded that "[i]t seemed unwise, however, to invent a new terminology." Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 n.4 (1942). The Restatement (Second) noted that use of estoppel had caused some confusion because estoppel was being used in numerous similar circumstances. Thus, the drafters concluded that "issue preclusion" would be clearer. RESTATEMENT (SECOND) OF JUDGMENTS introduction at 5-6 (1982). Also, the Restatement (Second) noted that "issue preclusion" is broader in that it includes both direct and collateral estoppel. *Id.* § 27 comment b.
14. *See* Scott, *supra* note 13, at 2-3. Professor Scott distinguished res judicata, the effect of a judgment on subsequent causes of action, from collateral estoppel, the effect of a judgment on issues actually litigated. Section 27 of the Restatement (Second) (1982) provides: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."
15. Privity concerns the relationship between a party to a suit and a person not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party. BLACK'S LAW DICTIONARY 1079 (5th ed. 1979) (citing Foltz v. Pullman Inc., 319 A.2d 38, 41 (Del. Super. Ct. 1974)); *see* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979) (citing 1B J. MOORE,

fully litigated[16] issue of fact or law[17] when a court has decided the issue and such decision was essential to the judgment.[18] Due process requires that the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate.[19]

Until recently, courts required mutuality of estoppel.[20] This meant that unless both parties in a second action are bound by a prior judgment, neither party may use the prior judgment for collateral estoppel purposes. From its inception, the mutuality doctrine was criticized by scholars[21] and eroded by the creation of judicial exceptions.[22] Neverthe-

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MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 622-24 (2d ed. 1983)). It is a violation of due process to bind someone who was not a party or in privity with a party. *Parklane*, 439 U.S. at 327 n.7; Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940). The RESTATEMENT (SECOND) OF JUDGMENTS avoids the term "privity" in favor of the concept of representation. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 41-42 (1982). The concept of privity is discussed in detail in 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.411 (2d ed. 1983).

16. See the RESTATEMENT (SECOND) OF JUDGMENTS § 27 comments d - e (1982) for a discussion of the policies that require that the issue be actually litigated. The RESTATEMENT (SECOND) OF JUDGMENTS provides that if a party could not obtain review of a judgment, that judgment should not serve as an estoppel. *Id.* § 28(1). *See generally*, 1B J. MOORE, *supra* note 15 ¶ 0.443[3] (2d ed. 1983) (unlitigated issues do not have conclusive effect for collateral estoppel). The importance of fully litigating the issue is further explained in Standefer v. United States, 447 U.S. 10 (1977) (holding that offensive collateral estoppel is not appropriate against the government in criminal cases because the government often does not have the opportunity to fully litigate the issues).
17. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comments d-e (1982). The reporter's note, *id.* at 265, cites Buckeye Indus. Inc. v. Secretary of Labor, 587 F.2d 231 (5th Cir.) (permitting estoppel based on an issue of constitutional law), *reh'g denied*, 591 F.2d 1343 (1979).
18. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Comment h to this section explains that if a determination is not essential to the judgment, it is dicta and thus not appealable. In such circumstances, the interest in providing an opportunity for reconsideration outweighs the interests that favor estoppel. *See also* 1B J. MOORE, *supra* note 15, at ¶ 0.443[5] (incidental determination of an issue in prior litigation does not foreclose reconsideration of the issue in a subsequent action where the issue is material).
19. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971). The Court permitted nonmutual collateral estoppel to prevent the owner of a patent that had been adjudged invalid from enforcing the patent. The Court indicated that as long as a party had one full and fair opportunity to litigate, due process would not prevent estoppel. *Id.* at 330; *see also*, RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982) (even though an issue is litigated and essential to a final judgment, relitigation of the issue is not precluded if there is a clear and convincing need for a new determination of the issue because the party sought to be precluded did not have a full and fair opportunity to litigate).
20. Mutuality was not rejected in the federal courts until 1971. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 321-30 (1971) (also discussing the history of the mutuality requirement); *see also*, 1B J. MOORE, *supra* note 15, at ¶ 0.441 [3.-2] (history of mutuality requirement).
21. Jeremy Bentham said it was "destitute of any semblance of reason." 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827), *reprinted in* 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843), *as quoted in* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 323 (1970). The principle was also

less, many states still require mutuality of estoppel.[23]

One of the earliest states to reject mutuality was California in *Bernhard v. Bank of America National Trust & Savings Association*.[24] *Bernhard* was the second of two suits brought by Helen Bernhard regarding funds removed from a decedent's bank account. In the first suit, a contested accounting, the funds were found to be a gift from the decedent to Mr. Cook.[25] In the second suit Mrs. Bernhard claimed that the bank had no authority to transfer the funds to Mr. Cook.[26] The court granted the bank's motion to dismiss on the ground that Mr. Cook's right to the funds had been conclusively determined by the probate court.[27] Justice Traynor, writing for a unanimous court, rejected mutuality[28] and set down a new test for collateral estoppel: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"[29] If each question can be answered affirmatively, collat-

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attacked in Cox, *Res Adjudicata: Who is Entitled to Plead*, 9 VA. L. REG. (N.S.) 241, 245-47 (1923); Comment, *The Requirement of Mutuality in Estoppel by Judgment*, 29 ILL. L. REV. 93, 94 (1934); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 610 (1926); Note, 18 N.Y.U. L. REV. 565, 570-73 (1941); Recent Cases, 15 U. CIN. L. REV. 349 (1941); Recent Decisions, 27 VA. L. REV. 955 (1941); *cf.* Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 303 (1920); Note and Comment, 23 OR. L. REV. 273 (1944); Recent Cases, 54 HARV. L. REV. 889 (1941).

22. See 1B J. MOORE, *supra* note 15, at ¶ 0.441[3.-2] for a thorough discussion of these exceptions (the exceptions include: if an injured third party sued the indemnitor first, and lost, and then sued the indemnitee and won, the latter had a cause of action against the former, and the indemnitee could plead the judgment in favor of the indemnitor to bar the suit against him by the third party; also applicable in master-servant or principal-agent situations and derivative liability actions).
23. *See, e.g.*, Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977) (refusing offensive use of collateral estoppel); Lukacs v. Kluessner, 154 Ind. App. 452, 290 N.E.2d 125 (1972) (mutuality required for res judicata); Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. Dist. Ct. App. 1971) (refusing to adopt identity of issues and full and fair opportunity to litigate test).
24. 19 Cal. 2d 807, 122 P.2d 892 (1942).
25. *Id.* at 809-10, 122 P.2d at 893. Because of ill health the decedent authorized Mr. Cook to make drafts against her account. He used some of the money to meet expenses of the decedent, and deposited the rest in an account in his name. He qualified as executor and submitted an accounting that made no mention of this money. Helen Bernhard and others interested in the estate challenged the accounting and the court held that during her lifetime the decedent made a gift of the money to Mr. Cook. *Id.*
26. *Id.* After Mr. Cook's discharge, Helen Bernhard was appointed administratrix and she sued the bank for the money.
27. *Id.*
28. *See* 1B J. MOORE, *supra* note 15, at ¶ 0.441 [3.-2] (noting that had the bank been liable, it would have had an action against Mr. Cook, and therefore the case would have come within one of the traditional exceptions to the mutuality doctrine); *see also supra* note 19 (exceptions to mutuality doctrine). Instead, Justice Traynor "chose to extirpate the mutuality requirement and put it to the torch." Currie, *supra* note 4, at 26.
29. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895.

eral estoppel is appropriate.[30] The *Bernhard* rule thus provides that no party should have more than one full and fair opportunity to litigate.

The *Bernhard* test makes no reference to the position of the parties in the prior case.[31] Commentators and subsequent decisions, however, have distinguished offensive collateral estoppel — a plaintiff seeking to estop a defendant from litigating issues the defendant had previously litigated and lost — from defensive collateral estoppel — a defendant seeking to estop a plaintiff from litigating issues the plaintiff had previously litigated and lost.[32] Most courts that distinguish offensive and defensive collateral estoppel place greater limitations on offensive use.[33] Nevertheless *Bernhard*, a defensive collateral estoppel case, is the basis of both offensive and defensive collateral estoppel.[34]

Numerous courts followed *Bernhard* in rejecting mutuality.[35] When the issue reached the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[36] the Court unanimously rejected mutuality.[37] Many read *Blonder-Tongue*'s rejection of mutuality to sup-

30. *Id.* Justice Traynor stated that only these three questions are pertinent in determining whether to permit collateral estoppel.
31. The only issue in *Bernhard* was whether the plaintiff was a party in privity with a party to the prior suit. *Id.* The position of the party did not seem to be relevant.
32. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329 (1979); *see also* Currie, *supra* note 1; Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968). Both Currie and Semmel were cited by the *Parklane* Court to explain the offensive/defensive distinction. *Parklane*, 439 U.S. at 329 n.11. Both Currie and Semmel discuss the distinction and conclude that it is not as important as who had the initiative in the prior suit. Thus, if the party against whom estoppel is asserted offensively was plaintiff in the prior case, it would be much different from offensive use against a defendant in the prior suit. Currie, *supra* note 1, at 291-94; Semmel, *supra*, at 1466-67.
33. RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299-300 (1982) (while there is no intrinsic difference between offensive and defensive use of collateral estoppel, some courts require a stronger showing that prior opportunity to litigate was adequate before allowing offensive use of collateral estoppel); *see, e.g.*, Johnson v. United States, 576 F.2d 606 (5th Cir. 1978); Speaker Sortation Sys. v. United States Postal Serv., 568 F.2d 46 (7th Cir. 1978); Vanguard Recording Soc'y, Inc. v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 100 Cal. Rptr. 826 (1972). The *Parklane* Court explained that offensive use does not promote judicial economy as well as does defensive use, and that offensive use may be unfair to a defendant. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329-30 (1979).
34. *See, e.g.*, Davidson v. Lonoke Prod. Credit Ass'n, 695 F.2d 1115, 1117 (8th Cir. 1982) (defensive use); Arkla Exploration Co. v. Watt, 548 F. Supp. 466, 474 (W.D. Ark. 1982) (since *Bernhard*, many jurisdictions permit defensive use of collateral estoppel by a nonparty to first litigation).
35. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982) (citing Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); Brown v. R.D. Werner Co., 428 F.2d 375 (1st Cir. 1970); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950)); *see also* 1B J. MOORE, *supra* note 15, at ¶ 0.441[3.-2] (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980)).
36. 402 U.S. 313 (1971). *See supra* note 19 and accompanying text.
37. Justice White delivered the opinion of the Court. He gave a thorough analysis of

port both offensive and defensive collateral estoppel.[38] Others, however, reasoned that *Blonder-Tongue* was a defensive case and should be limited to that situation.[39] The Supreme Court resolved this question in *Parklane Hosiery Co., Inc. v. Shore*,[40] which squarely addressed the issue of whether to permit nonmutual offensive use of collateral estoppel in the federal courts.[41]

Parklane was the second of two suits against Parklane Hosiery Co. concerning the same allegedly misleading proxy statement. In the first case, an equitable action brought by the Securities and Exchange Commission, a district court held that the proxy statement was materially misleading.[42] Subsequently, the stockholders brought a class action suit for damages and for rescission of a merger contract. The district court refused to apply offensive collateral estoppel to preclude Parklane from relitigating issues previously decided against it,[43] but the Court of Appeals for the Second Circuit reversed, holding that the prior suit had conclusively determined that the proxy was materially misleading.[44] The Supreme Court affirmed, upholding the Second Circuit's use of offensive collateral estoppel.[45]

The *Parklane* Court began with a brief discussion of *Blonder-*

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the mutuality doctrine, including a discussion of *Bernhard* and other cases that rejected mutuality. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 321-30 (1971). The Court reasoned that considerations of judicial economy combined with the criticisms of mutuality, such as Bentham's, *supra* note 21, required rejection of mutuality in the federal courts. *Blonder-Tongue*, 402 U.S. at 328-29.

38. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982). Justice White's emphasis on "full and fair opportunity to litigate" indicates that the position of the party is not nearly as important as the opportunity to litigate. *See Blonder-Tongue*, 402 U.S. at 328-29.
39. *See infra* note 47; notes 89-92 and accompanying text.
40. 439 U.S. 322 (1979).
41. *Id.* at 326.
42. Securities & Exch. Comm'n v. Parklane Hosiery Co., Inc., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Herbert Somekh, the controlling shareholder of Parklane Hosiery Co., sought to have the company "go private." Proxy material was distributed and the SEC sued, claiming that the proxy statement should have disclosed that the underlying reason for the transaction was to solve some of Mr. Somekh's financial troubles. The SEC sought an amendment of the proxy statement and an injunction against further violations. 422 F. Supp. at 479-80.
43. The district court reasoned that "application of collateral estoppel would deny [Parklane Hosiery Co.] the Seventh Amendment right to a jury trial." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. at 325.
44. Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979). The court assumed that the rule of *Bernhard* and *Blonder-Tongue* would permit estoppel if the prior suit had been for damages and concentrated on the issue of whether applying estoppel based on an equitable action denied the right to a jury trial. *Id.* at 819.
45. *Parklane Hosiery*, 439 U.S. at 337. The Court granted certiorari because of an intercircuit conflict. *Id.* at 325. The Second Circuit's position conflicted with the Fifth Circuit's position in Rachal v. Hill, 435 F.2d 59 (5th Cir. 1975) (previous injunction finding that defendants had violated securities law did not, under doc-

Tongue and the rejection of mutuality.[46] The Court noted that *Blonder-Tongue* suggests that no party should be permitted more than one full and fair opportunity to litigate, a conclusion that would support offensive collateral estoppel. The Court concluded, however, that the *Blonder-Tongue* holding should be limited to defensive use.[47]

Next, the Court stated several reasons supporting the different treatment of offensive and defensive collateral estoppel. Offensive collateral estoppel does not promote judicial economy as well as does defensive collateral estoppel. Defensive use of collateral estoppel prevents a plaintiff from relitigating issues merely by switching adversaries, and thus encourages a plaintiff to join all potential defendants. Conversely, because offensive use of collateral estoppel allows a plaintiff to rely on a previous judgment against a defendant, but does not bind the plaintiff to the defendant's previous success, the plaintiff is encouraged to "wait and see" what happens.[48] In addition, offensive collateral estoppel may be unfair to certain defendants, e.g., defendants who lacked the incentive to vigorously defend a prior suit,[49] defendants who have prevailed on that issue in other litigation,[50] and defendants whose defense was hindered by the

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trine of collateral estoppel, preclude relitigation of this issue in an action brought by strangers to the first action where defendant had a jury trial right).

46. *Parklane Hosiery*, 439 U.S. at 326-29. The Court cited *Blonder-Tongue*'s detailed description of the criticisms of mutuality and concluded that no reason could be found for the mutuality requirement. *Id.* at 327 n.8.

47. *Parklane Hosiery*, 439 U.S. at 329. The Court noted that *Blonder-Tongue* had rejected mutuality "at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid." *Id.* at 327. The Court then noted that *Blonder-Tongue* also considered the question of "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue" and concluded that, although *Blonder-Tongue* indicated a negative answer to the above question, it had not directly confronted it. *Id.* at 328. Thus, the Court limited *Blonder-Tongue* to the defensive case. *Id.* at 329.

48. *Parklane Hosiery*, 439 U.S. at 330. The Court cited Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115 (1958), where although a driver and passsenger injured in the same accident sued together, each had a separate trial because the issue of contributory negligence existed as to the driver, but not the passenger. Thus no one was guilty of "wait and see," and estoppel was improper because the issues were different. The Court accurately cited Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1961).

49. *Parklane Hosiery*, 439 U.S. at 330. The Court cited The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944), and Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965). Both citations are tenuous. *The Evergreens* was a case of mutual defensive collateral estoppel. *The Evergreens*, 141 F.2d at 928. The *Berner* holding appears to be premised on the idea that the defendant would have behaved differently in the first suit had he known about the possibility of estoppel. *Berner*, 346 F.2d at 540-41. If that reasoning is what the Court was citing, it is difficult to see how this problem could arise now that the Supreme Court has made clear that nonmutual offensive collateral estoppel is permissible.

50. *Parklane Hosiery*, 439 U.S. at 330. If a defendant has previously prevailed on the same issue, it may be unfair to prevent him from relitigating it. RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment f (1982) explains that one of the policies underlying collateral estoppel is enhancing confidence in the results of litigation.

procedural peculiarities of the prior forum.[51]

As further support for treating offensive and defensive collateral estoppel differently, the Court cited several law review articles,[52] including the Currie article mentioned above.[53] The primary thrust of these articles is against offensive use of collateral estoppel. Thus, many courts have interpreted *Parklane*'s citation of these articles as evidence that the Court did not really approve of offensive collateral estoppel.[54]

The Court concluded that trial courts should have "broad discretion" to determine when offensive collateral estoppel should be applied.[55] The Court advised trial courts that offensive collateral estoppel should not be permitted if: (1) the plaintiff could easily have joined in the previous action[56] or (2) the application of offensive collateral estoppel would be unfair to a defendant.[57]

The Court then applied its rule. First it noted that the plaintiff

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This confidence, however, is not enhanced when inconsistent determinations have already been reached.

51. *Parklane Hosiery*, 439 U.S. at 331. The Court cited inconvenient forum as an example of differing procedural opportunities. *Id.* at n.15. It is interesting to note that the Court cited § 88(2) and comment i of RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft No. 2, 1975). That section stated the same rule for differing procedural opportunities. One example used by the Restatement, however, was existence of the right to a jury trial. This example was not carried over in RESTATEMENT (SECOND) OF JUDGMENTS as adopted. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 and comment i (1982).

52. *Parklane Hosiery*, 439 U.S. at 329 n.11 states:

> Various commentators have expressed reservations regarding the application of offensive collateral estoppel. Currie, *Mutuality of Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967). Professor Currie later tempered his reservations. Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

53. *See supra* notes 1-4 and accompanying text.

54. *See* cases cited at *supra* note 8; *see also infra* notes 105-07 and accompanying text.

55. *Parklane Hosiery*, 439 U.S. at 331. The Court stated, "We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Id.*

56. *Id*; *see supra* note 48 and accompanying text. This portion of the *Parklane* decision is discussed in detail in Kempkes, *Issue Preclusion:* Parklane Hosiery Co. v. Shore *Revisited*, 31 DRAKE L. REV. 111 (1982); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) comment e (1982) (circumstances may suggest that the plaintiff is trying to invoke the previous favorable determination without incurring the risk of an unfavorable determination).

57. *See supra* notes 49-51 and accompanying text. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) lists similar circumstances that are likely to make application of offensive collateral estoppel unfair. In addition, § 29(8) provides that estoppel may be denied when "other compelling circumstances make it appropriate that the party be permitted to relitigate the issue." The lists are merely illustrative and the real question is whether any good reason exists to permit relitigation. RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment j and reporter's note at 303 (1982).

could not have easily joined in the prior suit.[58] In addition, the Court noted that applying offensive collateral estoppel would not be unfair to the defendant because: (1) the defendant had every incentive to fully litigate the prior suit;[59] (2) the decision relied upon was not inconsistent with any other determination of the same issue;[60] and (3) the defendant would have no procedural opportunities in the second forum that were unavailable in the first.[61] The Court rejected the defendant's argument that the opportunity for a jury trial in the second suit provided a procedural advantage in the second forum absent in the first.[62] Thus, the Court, applying nonmutual offensive collateral estoppel, held that the defendant was estopped from relitigating the question of whether the proxy statement was materially false and misleading.[63]

Most commentators, including the American Law Institute in the Restatement (Second) of Judgments, interpret *Parklane* as extending the *Bernhard* rule to the federal courts.[64] Some courts, however, concluded

58. *Parklane Hosiery*, 439 U.S. at 332. The Court noted that 15 U.S.C. § 78u(g) (1976 & Supp. 1981) prohibits consolidation of a private action with a Securities & Exchange Commission action without consent of the SEC. *Id.* at n.17; *see also* Securities & Exch. Comm'n v. Everest Management Corp., 475 F.2d 1236, (2d Cir. 1972) (denial of attempt by private parties to intervene in SEC enforcement action because the added issues would complicate the case).

59. *Parklane Hosiery*, 439 U.S. at 332. The Court stated that the seriousness of the allegations and the foreseeability of future suits created sufficient incentive to litigate. The Court also noted that the length of the trial (four days) and the existence of suits by other plaintiffs supported its conclusion. *Id.* at n.18. *But cf. supra* note 49 and accompanying text (noting that the Court's prior discussion of incentive centered on the amount in controversy).

60. *Parklane Hosiery*, 439 U.S. at 332; *see supra* note 50 and accompanying text.

61. *Parklane Hosiery*, 439 U.S. at 332. The Court noted that petitioners in the present action would have been entitled to a jury trial had the SEC action never been brought, but concluded that presence or absence of a jury as fact finder was "basically neutral" compared to the necessity of litigating the first suit in an inconvenient forum. *Id.* at n.19.

62. A major portion of the opinion is devoted to a determination that the petitioner's seventh amendment right to a jury trial had not been denied by the application of collateral estoppel. The Court relied upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1958) (declaratory judgment given collateral estoppel effect in subsequent action at law). *Parklane Hosiery*, 439 U.S. at 333-37. Justice Rehnquist argued that the Court has severely limited the right to a jury trial and reduced a "fundamental right" to a "mere neutral factor." *Id.* at 338 (Rehnquist, J., dissenting).

63. *Parklane Hosiery*, 439 U.S. at 337.

64. *See, e.g.*, Lucas, *The Direct and Collateral Effects of Alternative Holdings*, 50 U. CHI. L. REV. 701, 702 n.8 (1983); Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 8 (1980). The RESTATEMENT (SECOND) OF JUDGMENTS states a rule that is, in substance, the *Bernhard* rule, and favorably cites *Parklane* in a number of places. RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 298-300 (1982). Moreover, the reporter's note cites *Parklane* for the proposition that "the distinct trend if not the clear weight of recent authority is that there is no intrinsic difference between offensive and defensive issue preclusion." *Id.* at 299-300; *see also*, Davidson v. Lonoke Prod. Credit Ass'n, 695 F.2d 1115, 1119 (8th Cir. 1982) ("[t]he doctrine developed in *Bernhard*, *Blonder-Tongue* and *Parklane* has now been incorporated into the Restatement (Second) of Judgments (1982)").

that *Parklane* negatively viewed the use of offensive collateral estoppel, relying on the apparent hesitancy of the Court to permit its use and the citation of articles disapproving of its use.[65] This second view of *Parklane* is the better; *Parklane* set forth a rule for offensive collateral estoppel that is very similar to the rules in *Bernhard* and the Restatement, but was intended to be applied more restrictively.[66] *Parklane* set out to restrict the use of offensive collateral estoppel, and is thus a step toward Professor Currie's conclusions.[67]

III. RESTRICTING THE USE OF COLLATERAL ESTOPPEL

Section 29 of the Restatement (Second) of Judgments (Section 29) states a rule for nonmutual issue preclusion that explains the *Bernhard* doctrine as it is currently applied in most states.[68] The rule set forth in

65. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 n.13 (5th Cir. 1982) ("The injustice of applying collateral estoppel in cases involving mass torts is especially obvious. Thus, in *Parklane*, the Court cited Professor Currie's 'familiar example' [of the 50 passengers injured in a train wreck]."); Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 543 (D. Minn. 1982) ("The Supreme Court declined to either prohibit or wholeheartedly approve the offensive use of collateral estoppel."); GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1214 (S.D.N.Y. 1981) ("Rather than wholeheartedly endorsing the doctrine of offensive collateral estoppel, the Supreme Court in *Parklane Hosiery* cautioned that the policies of judicial economy could be frustrated . . . .").
66. *See infra* notes 68-129 and accompanying text.
67. *See supra* notes 1-4.
68. Section 29 provides:

> Issue Preclusion in Subsequent Litigaton with Others
> A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:
> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
> (7) The issue is one of law and treating it as conclusively determined

Section 29 closely resembles the *Parklane* rule: like *Parklane*, it requires that the prerequisites of mutual issue preclusion be met before considering nonmutuality,[69] grants discretion to district judges,[70] and takes into account potential unfairness to defendants and effects on judicial economy.[71] However, the Restatement rule differs from the *Parklane* rule in a number of ways. Those differences demonstrate the Court's intent to restrict the offensive use of collateral estoppel.

The primary difference between *Parklane* and the Restatement concerns the effect of "a full and fair opportunity to litigate." The Restatement, following *Bernhard* and *Blonder-Tongue*, provides that no party should have more than one full and fair opportunity to litigate an issue.[72] Thus, under the Restatement, absent a showing of special circumstances, a defendant's full and fair opportunity to litigate in the prior action will be sufficient justification for the offensive use of collateral estoppel.[73]

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would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

69. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) states that issue preclusion must first be appropriate under §§ 27 and 28, which state the Restatement's rule for mutual issue preclusion (a final determination of an issue of law or fact is conclusive in any subsequent litigation between the parties unless: the party against whom collateral estoppel is invoked could not have obtained review of the determination; the issue is one of law and a new determination is warranted; procedural differences in the forums require relitigation; the burdens of proof have changed; public interest requires relitigation; or the lack of an incentive to fully and fairly litigate requires relitigation). *See id.* § 29, reporter's note at 300 (if a party is precluded from relitigating an issue with a former adversary, the issue is whether circumstances exist which justify relitigating the issue with another party); *see also*, 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4465 (1981) (discussing the limits of nonmutual issue preclusion).

70. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) lists factors that a district judge should consider: the incompatibility with the scheme of administering remedies that may result from denying the opportunity to relitigate; the procedural advantages available to the defendant that were not present in the previous action; the ability of the plaintiff to join in the prior action; the inconsistency of the determination relied upon with other determinations of the same issue; the absence of unusual circumstances, such as a compromise verdict, that were present in the prior determination; the possibility of prejudice to another party from denying a chance to relitigate; the foreclosure of an opportunity to reconsider a legal rule; and any other circumstances compelling relitigation. Section 29 is discussed in 1B J. MOORE, *supra* note 15, at ¶¶ 0.441[3.-2] & [3.-3].

71. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (2), (4), (5), (8) (1982) list reasons why estoppel may be unfair: procedural advantages in the second forum; the possibility of inconsistent determinations; unusual circumstances surrounding the first finding; and any other circumstances compelling relitigation. *See* 1B J. MOORE, *supra* note 15, at ¶ 0.441[3.-4].

72. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) provides that unless he lacked a full and fair opportunity to litigate, a party precluded from litigating an issue with an opposing party is precluded from litigating that issue against another person. Comment b to this section suggests that a full and fair opportunity to litigate is generally sufficient for estoppel.

73. RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982) states that the "full and fair opportunity to litigate" rule has gained general acceptance.

Under *Parklane*, although a full and fair opportunity to litigate is necessary, it is never a sufficient justification for offensive use of collateral estoppel. *Parklane* requires a full and fair opportunity to litigate plus a showing that other listed circumstances are not present.[74]

The Court made this difference clear in *Parklane* by refusing to follow *Blonder-Tongue*.[75] *Blonder-Tongue* followed *Bernhard* in concluding that it is unfair to permit a party more than one full and fair opportunity to litigate.[76] When the *Bernhard* rule was applied offensively, courts found that in certain circumstances estoppel would be unfair even if the defendant has had a full and fair opportunity to litigate.[77]

"Where the opportunity has been found, preclusion is applied . . . ." 1B J. MOORE, *supra* note 15, at ¶ 0.441[3.-3] mentions that the Restatement and *Parklane* both fail to define "full and fair opportunity."

74. *See infra* notes 80-83 and accompanying text. This rule is best illustrated by the *Parklane* Court's application of its own rule. The Court, in applying its rule, explained the absence of each of the circumstances that might prevent estoppel: the plaintiff could not have joined in the first action; the defendant had an incentive to fully and fairly litigate because of the seriousness of the first action and the foreseeability of private suits; the first determination was not inconsistent with any other determination; and the defendant had no procedural advantages in the second suit that were unavailable in the first action. *Parklane Hosiery*, 439 U.S. at 331-32.

75. *See infra* notes 79-85 and accompanying text. The Court stated: "The *Blonder-Tongue* case involved defensive use of collateral estoppel . . . . The present case, by contrast, involves offensive use of collateral estoppel . . . ." *Parklane Hosiery*, 439 U.S. at 329.

76. *Blonder-Tongue*, 402 U.S. at 323-29. The Court concluded that it is no longer "tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328-29; *see Parklane Hosiery*, 439 U.S. at 327.

77. Courts have found at least five reasons not to apply estoppel:
(1) Failure to join in the prior action. The *Parklane* Court decried this "wait and see attitude." *Parklane Hosiery*, 439 U.S. at 327; *see* Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967) (unfair to permit plaintiff, who knew of and could have joined prior suit, to benefit from estoppel); RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment e (1982) (explaining why failure to join should prevent estoppel); *see supra* note 45 and accompanying text. This problem was perhaps first raised in Semmel, *supra* note 32.
(2) Inconsistent determinations. *See Parklane Hosiery*, 439 U.S. at 327; RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). A discussion of this rule can be found in Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980); *see also* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (trial court erred in applying collateral estoppel to defendants where prior judgment granted, estoppel effect was inconsistent with previous judgments in similar suits).
(3) Procedural differences. *See Parklane Hosiery*, 439 U.S. at 331; RESTATEMENT (SECOND) OF JUDGMENTS § 29(2) (1982). This rule, while noted with approval by *Parklane* and the Restatement, has rarely been applied. In GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1215-16 (S.D.N.Y. 1981), the court rejected several alleged "procedural differences" in such a way as to all but eliminate this from the list of considerations. Any procedural difference that does not prevent "a full and fair opportunity to litigate" should not prevent estoppel.
(4) Lack of incentive to defend. *See supra* note 49 and accompanying text.
(5) Issues not identical. *See, e.g.*, Wetherill v. University of Chicago, 548 F. Supp. 66, 69 (N.D. Ill. 1982) (the court discussed *Parklane* and the potential for unfairness, but concluded that the issues were not sufficiently identical to warrant estoppel); *see also* Weinberger, *supra* note 64, at 35-42 (arguing that whenever reasonableness is at issue the issues should not be deemed identical).

Thus, the rule was modified, as it appears in the Restatement, to permit a defendant to show the existence of special circumstances to avoid estoppel.[78] If *Parklane* intended to follow *Bernhard*, it would have followed *Blonder-Tongue*, granting an opportunity for the defendant to show special circumstances that would preclude the offensive use of collateral estoppel. Instead, the Court stated that the *Blonder-Tongue* full and fair opportunity rule is not applicable to the offensive case and designed a new rule that where the plaintiff could easily have joined in the prior action and the application of collateral estoppel would be unfair to the defendant, the offensive use of collateral estoppel should be denied.[79] Thus, the *Parklane* Court's refusal to follow *Blonder-Tongue* indicates that the *Parklane* Court viewed a full and fair opportunity to litigate as less significant than does the Restatement.

The *Parklane* Court illustrated its divergence from the Restatement rule when it applied its rule. Concluding that the defendant had a full and fair opportunity to litigate, the Court proceeded to explain why no unfairness would result from the offensive application of collateral estoppel.[80] The Court explained the absence of each of the circumstances that might cause unfairness to the defendant.[81] Under the Restatement, this reasoning is unnecessary because the defendant must show the existence of some circumstance requiring relitigation.[82] Thus, by disposing of each

78. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) (a party is precluded unless circumstances justify relitigation).

79. *Parklane Hosiery*, 439 U.S. at 329; *see supra* note 75 and accompanying text. It is interesting to note that in his *amicus curiae* brief in *Parklane* the Solicitor General argued for a broad reading of *Blonder-Tongue*. Brief for the United States as Amicus Curiae at 12, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) ("This Court recognized in *Blonder-Tongue* that it is not tenable 'to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue'."). Petitioners, however, argued that *Blonder-Tongue* was not controlling. Reply Brief for Petitioners at 5, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) ("In one decision, *Blonder-Tongue* . . . approved the application of the doctrine of estoppel in the absence of mutuality when asserted defensively to avoid redundant litigation of the validity of a patent . . . . No circumstances . . . are present as would warrant the extension of *Blonder-Tongue* . . . ."). The *Parklane* Court used petitioners' language to distinguish *Blonder-Tongue*, then stated its own rule. *Parklane Hosiery*, 439 U.S. at 327.

80. *Parklane Hosiery*, 439 U.S. at 331-32; *accord*, 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE ¶ 4465 (1981); *see* Gunn, *supra* note 5, at 773 (asserting that *Parklane* requires courts to examine the possibility of joinder and the possibility of unfairness before applying estoppel); *see also infra* notes 84-87 and accompanying text (demonstrating the practical effect of the difference between the rules in *Parklane* and the Restatement).

81. *See supra* notes 59-61 and accompanying text.

82. *Compare* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) *with Parklane Hosiery*, 439 U.S. at 331. Section 29 puts forth a three part test for the offensive use of collateral estoppel: (1) presence of the conditions for mutual estoppel; (2) defendant's full and fair opportunity to litigate the issue in the prior action; and (3) defendant's inabilty to show some circumstances that justify relitigation. *Parklane*, however, requires the plaintiff to show that the offensive use of collateral estoppel would not be unfair to the defendant. *Parklane Hosiery*, 439 U.S. at 331-32.

possible reason to relitigate, the Court showed that along with the opponent's previous full and fair opportunity to litigate, a party seeking estoppel must demonstrate the nonexistence of circumstances which might require relitigation.[83]

The decision in *Wetherill v. University of Chicago*[84] illustrates the practical effect of the difference between *Parklane* and the Restatement. In *Wetherill*, the plaintiffs alleged injury resulting from exposure to diethylstilbestrol (DES) manufactured by the defendant, and sought estoppel based on a prior DES case the defendant had lost.[85] The court refused to permit estoppel because, *inter alia*,[86] the plaintiffs had failed to show that the defendant would not suffer any unfairness.[87] This decision follows the *Parklane* rule by requiring the plaintiff to show a lack of unfairness. The Restatement, however, requires the defendant to show unfairness and would not have refused estoppel for the reason used by the court. Thus, estoppel was refused in *Wetherill* for a reason sufficient under *Parklane*, but insufficient under the Restatement.

A second significant difference between *Parklane* and the Restatement concerns the differences between offensive and defensive collateral estoppel.[88] While *Parklane* controls the offensive use of collateral estoppel, it leaves *Blonder-Tongue* as the controlling rule for defensive use of collateral estoppel.[89] *Parklane* requires different rules for offensive and defensive use because offensive collateral estoppel does not promote judicial economy as well as does defensive collateral estoppel[90] and because offensive collateral estoppel may be unfair to defendants.[91] Conversely, the Restatement provides one rule for both situations and states that "the clear weight of recent authority is to the effect that there is no intrinsic

83. The difference between *Parklane* and the RESTATEMENT (SECOND) OF JUDGMENTS is best illustrated by what happens when a court senses some general, unarticulated unfairness. If the Restatement rule applied, estoppel would be granted because the defendant must show a good reason to relitigate. Under *Parklane*, however, where the plaintiff must show the absence of reasons to relitigate, estoppel would probably be an abuse of discretion. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 80, at § 4465.

84. 548 F. Supp. 66 (N.D. Ill. 1982) (denying estoppel in products liability case). The case purports to apply the Illinois law of collateral estoppel, not federal law, but it serves to illustrate how some judges have used *Parklane*.

85. Plaintiff alleged that defendant manufacturer, Eli Lilly & Co., had litigated the same issues and lost in Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1979), *aff'd*, 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982).

86. The court found three reasons to permit relitigation: (1) plaintiff failed to prove that the issues in *Bichler* were identical to the issues in the present case; (2) the existence of inconsistent judgments; and (3) plaintiff's failure to prove that there would be no unfairness to defendant. *Wetherill*, 548 F. Supp. at 69-70.

87. The court, citing *Parklane*, clearly placed the burden on the plaintiff to prove the lack of any unfairness. *Wetherill*, 548 F. Supp. at 70.

88. *See supra* note 32 and accompanying text.

89. *Parklane*, 439 U.S. at 329. For a discussion of *Blonder-Tongue*, see *supra* notes 36-39, 47 and accompanying text.

90. *See supra* note 48 and accompanying text.

91. *See supra* notes 49-51 and accompanying text.

difference between 'offensive' and 'defensive' issue preclusion."[92] The use of different rules for offensive and defensive collateral estoppel, when viewed in light of the Court's citation of articles disapproving of offensive collateral estoppel,[93] leads to the conclusion that *Parklane* intended to restrict the use of offensive collateral estoppel.

The difference in the treatment of offensive and defensive collateral estoppel should not be overstated. The Restatement recognizes that the potential for unfairness is greater in the offensive case, and therefore courts may require a stronger showing that the prior opportunity to litigate was adequate.[94] *Parklane* permitted the use of offensive collateral estoppel despite a serious constitutional challenge.[95] Thus, the difference between *Parklane* and the Restatement is not that one is for and the other against the offensive use of collateral estoppel; the difference is much more subtle. *Parklane* requires courts to be more sensitive to the differences between offensive and defensive collateral estoppel. *Parklane* requires courts to use essentially the same rule as the Restatement,[96] but to apply it in a way that demonstrates awareness of the potential unfairness involved in offensive collateral estoppel.

A number of recent decisions have noted *Parklane*'s hesitancy concerning offensive collateral estoppel and concluded that *Parklane* either did not approve of offensive collateral estoppel or said that offensive collateral estoppel is unfair.[97] These cases greatly overstate the differences between *Parklane* and the Restatement. Nevertheless, the *Parklane* decision contains at least three bases for the conclusion that the Court did not approve of offensive collateral estoppel,[98] indicating that, while the Court was not opposed to offensive collateral estoppel, it intended that future courts be hesitant about using it.

Courts often cite *Parklane*'s background discussion of offensive col-

92. RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299 (1982). The Restatement does, however, note two differences between the rules for offensive and defensive collateral estoppel. First, a stronger showing that the prior opportunity to litigate was adequate may be required in the offensive case. Second, many of the circumstances listed that justify relitigation (e.g., impossibility of joining the first suit and inadequate procedural opportunities in the first forum) can only exist in the offensive case.

93. *See supra* note 65 and accompanying text.

94. RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299-300 (1982). The cases cited by the reporter's note, Johnson v. United States, 576 F.2d 606 (5th Cir. 1978) and Speaker Sortation Sys. v. United States Postal Serv., 568 F.2d 46 (7th Cir. 1978), do not discuss the relationship between offensive and defensive collateral estoppel. They do, however, apply offensive collateral estoppel based on *Blonder-Tongue*.

95. *Parklane Hosiery*, 439 U.S. at 335-37 (discussing the jury trial issue and deciding that it is not grounds to permit relitigation). *See also id.* at 337 (Rehnquist, J., dissenting) (arguing that the Court has eliminated a fundamental right for the sake of convenience).

96. *Parklane Hosiery*, 439 U.S. at 331 n.16. The Court said: "This is essentially the approach of [the Restatement § 29]. . . ."

97. *See supra* notes 54 & 65.

98. *See infra* notes 99-108 and accompanying text.

lateral estoppel to show that the Court did not approve of it.[99] In its background discussion, the Court considered *Bernhard* and *Blonder-Tongue* and outlined the virtues of nonmutual defensive collateral estoppel.[100] The Court then discussed the likely negative impact of offensive collateral estoppel on judicial economy, and the potential for unfairness that may result.[101] Yet, in all of the background discussion, the Court did not make a positive statement about offensive collateral estoppel. Because the Court's only discussion of offensive collateral estoppel warns of its potential ill effects, however, many assume that the Court did not approve of it.[102]

The wording of the rule announced in *Parklane* might also suggest disapproval of offensive collateral estoppel. The Court did not explicitly permit offensive collateral estoppel. Instead, the Court stated that the preferable approach is "not to preclude the use of offensive collateral estoppel."[103] "Not to preclude" is a far cry from an endorsement of the doctrine. Moreover, that the "not to preclude" phrase was immediately preceded by the discussion of the probable ill effects of offensive collateral estoppel could suggest that the Court permitted the use of offensive collateral estoppel without approving of the doctrine.[104] Thus, the courts that suggest that *Parklane* did not approve of offensive collateral estoppel demonstrate a sensitivity to the Court's choice of words and the organization of the decision.

Courts also cite the law review articles used by the *Parklane* Court to support the offensive/defensive distinction to conclude that the *Parklane* Court did not unconditionally approve of offensive collateral estoppel.[105] The primary thrust of these articles is opposed to the use of offensive collateral estoppel.[106] They go well beyond the Court's recogni-

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99. *See supra* note 65 and accompanying text.
100. *Parklane Hosiery*, 439 U.S. at 326-29.
101. *Id.* at 330.
102. *See supra* note 65.
103. The Court stated:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Parklane Hosiery, 439 U.S. at 331 (footnote omitted).
104. *But cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 298-99 (1982) (offensive use of collateral estoppel is now accepted to the same extent as the rejection of mutuality).
105. *See supra* note 8 and accompanying text. This is reasonable because both Currie and Semmel concluded that collateral estoppel should not be permitted against a party who lacked the initiative in the prior litigation. *See supra* note 32.
106. *See* Currie, *supra* note 1. Professor Semmel argues that because it is not possible to determine whether a prior case involved "a full and fair opportunity to litigate," attempts to apply nonmutual collateral estoppel will result in a horrible mess. Sem-

tion that offensive collateral estoppel *might* be unfair to some defendants and *might* not promote judicial economy by arguing that offensive collateral estoppel should not be permitted because it *is* unfair to defendants and does *not* promote judicial economy.[107] Some courts have cited these articles and their anti-offensive collateral estoppel bent as if *Parkland* approved of the articles.[108] That conclusion is not unreasonable in light of the apparently approving citations.

None of the arguments, however, that *Parklane* is against offensive collateral estoppel is convincing. The argument based on the background discussion is unconvincing because it ignores what the Court actually did. The Court granted district courts broad discretion to allow the use of offensive collateral estoppel.[109] It is difficult to believe the Court would grant broad discretion to do something of which it disapproved. Moreover, in explaining its rule, the Court said it followed "essentially the approach" of the Restatement.[110] The Restatement approves of offensive collateral estoppel to almost the same extent as it approves of defensive collateral estoppel.[111] Thus, any argument that *Parklane* did not approve of offensive collateral estoppel ignores the Court's conclusion and assumes that the Court cited the Restatement without knowing what the Restatement said.

The argument based on the wording of the rule is also difficult to reconcile with the Court's decision. That argument assumes that "not to preclude" means that the Court did not approve of offensive collateral estoppel, but merely recognized that there may be some situations in which there is no reason not to permit its use, and that district judges should be free to use offensive collateral estoppel in those situations.[112] Yet, in *Parklane*, the Court was faced with a serious reason not to permit the offensive use of collateral estoppel — the defendant's claim of a right to jury trial.[113] If the argument based on the wording of the rule were sound, the *Parklane* Court would have relied on this reason and would have refused to apply offensive collateral estoppel. Thus, the argument fails because it emphasizes a nuance in the Court's wording over what the Court actually did.

The law review citations provide the weakest basis for concluding that *Parklane* did not approve of offensive collateral estoppel because most of the points made in those articles are rejected by the Court's hold-

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mel, *supra* note 32, at 1468-70. He concludes that amending the joinder rules is a much wiser approach to the multiple claimant situation than use of collateral estoppel. *Id.* at 1480-81.

107. *See* Currie, *supra* note 1; Semmel, *supra* note 32, at 1466-68 (apparently adopting Currie's reasoning).

108. *See supra* note 8.

109. *Parklane Hosiery*, 439 U.S. at 331.

110. *Id.* at 331 n.16.

111. *See supra* note 104.

112. *See supra* note 103.

113. *Parklane Hosiery*, 439 U.S. at 333 (allowing the offensive use of collateral estoppel prevented defendant from having a jury decide issues already decided in the prior equitable proceeding).

ing.[114] Nevertheless, because these articles are often cited[115] in decisions based on *Parklane*, a brief discussion of their reasoning will be helpful.

In his Stanford Law Review article, Professor Currie expressed reservations about the *Bernhard* doctrine.[116] His main concern was that judges with unrestrained discretion might use the doctrine to reach unfair or anomalous results.[117] To prevent this, he suggested two rules of thumb to serve as limitations on the *Bernhard* doctrine. First, because of the possibility of anomalous results, offensive collateral estoppel should not be used when the same incident produces a number of potential claimants who may sue separately. Second, because the party who takes the initiative always has some advantages, collateral estoppel should not be used against a party who lacked the initiative in the prior suit.[118] *Parklane* implicitly rejected the second of these rules by permitting collateral estoppel against a party who lacked the initiative in the prior suit.[119] It did not face the first because the second *Parklane* case was a class action and thus not a multiple claimant situation.

Although the law review articles do not support the view that the *Parklane* Court opposed offensive collateral estoppel,[120] it would be equally wrong to assume that the Court was not using them to make a statement about offensive collateral estoppel. Although the Court clearly did not cite the articles to agree with them, it clearly did not cite them to disagree completely with them.[121] A closer look at these articles and the use made of them in *Parklane* will indicate that the Court may have cited them to distance itself from the Restatement's position.

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114. *See supra* notes 105-07 and accompanying text.
115. *See supra* note 8.
116. Currie, *supra* note 1, at 282-85; *see also* notes 1-4 and accompanying text.
117. Professor Currie stated:

> For immediate purposes it is sufficient to state the reservations as briefly as possible: to jettison the mutuality rule without some saving provision might lead to (1) anomalous results in multiple-claimant cases, such as those resulting from mass disasters, and (2) injustice in those cases in which, by reason of his opponent's astute employment of the initiative, the party against whom the former judgment is invoked did not . . . have, in a realistic sense, a full and fair opportunity to defend.

Currie, *supra* note 4, at 27.

118. Professor Currie stated his "rules of thumb" as follows:

> First, it should not be applied, and the plea should not be allowed, where the result would be to create an anomaly such as would occur in the railroad type of sitation, where the party against whom the plea is asserted faces more than two successive actions. Second, since the principle assumes that the party against whom the plea is asserted has had a full and fair opportunity to litigate the issue effectively, the principle should not be applied, and the plea should not be allowed, where, by reason of his former adversary's possession of the initiative, he has not had such an opportunity.

Currie, *supra* note 1, at 308.

119. Parklane Hosiery Co. was defendant in both actions.
120. *See supra* notes 105-07 and acompanying text.
121. *Parklane Hosiery*, 439 U.S. at 329 n.11, 330-31 nn.14-15. The Court used examples from the articles to support its position.

The *Parklane* Court's first citation to these articles was in a footnote designed to support the proposition that offensive and defensive collateral estoppel "should be treated differently."[122] This proposition needed extra support because the Restatement says that the same rule should apply to both.[123] If the Court's sole purpose were to support that proposition, however, why did it cite articles that discuss this distinction and conclude that other distinctions are more important[124] when there are cases and commentators who see the offensive/defensive distinction as crucial?[125] The reason is clear: These articles raise concerns about fairness that the Court wanted to inject into the debate. Thus, the footnote clearly sets *Parklane*'s position as different from that of the Restatement, but it does so by injecting different concerns into its rule, not by proposing a different rule.

The *Parklane* Court's second citation to Currie's article was intended to support the proposition that "offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendants."[126] Again, the Court's citation does not really support the proposition, and this highlights a subtle distinction between *Parklane* and the Restatement. The Court simply could have cited only the Restatement's rule, which says substantially the same thing.[127] Instead, the Court cited Currie's train wreck example, with a slight variation. Currie said that if defendant wins the first twenty-five suits and loses number twenty-six, *no court would uphold* use of estoppel against the defendant in the last twenty-four suits.[128] The *Parklane* Court changed this to say that Currie argued that estoppel *should not be applied* in the last twenty-four suits.[129] Currie and the *Parklane* Court agree that

122. *Id.* at 329.

123. The Restatement (Second) of Judgments clearly covers both the offensive and the defensive case. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note at 299-300 (1982) (stating that most agree that they should be treated the same).

124. Currie, *supra* note 1, at 303, concluded that who had the initiative in the prior litigation is more important than whether nonmutual estoppel is being used offensively or defensively. Semmel, *supra* note 32, at 1480, concluded that joinder of parties, not collateral estoppel, is the correct way to deal with the issue.

125. *See, e.g.*, Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977) (limiting nonmutual estoppel to the defensive case); Albernaz v. City of Fall River, 346 Mass. 36, 191 N.E.2d 771 (1963) (same); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 75 (1964) (predicting that courts are much more likely to use estoppel defensively than offensively).

126. *Parklane Hosiery*, 439 U.S. at 330 n.14.

127. RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) (1982) provides that estoppel may be improper if "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue." *But see* Wetherill v. University of Chicago, 548 F. Supp. 66, 70 n.8 (N.D. Ill. 1982) (arguing that § 29(4) differs from *Parklane* because the Restatement rule only prevents relitigation if the judgment that is inconsistent with the judgment relied upon was rendered *prior* to the judgment relied upon).

128. Currie, *supra* note 1.

129. *Parklane Hosiery*, 439 U.S. at 330-31 n.14.

mutuality should be rejected, and the *Parklane* Court used this example to make a point about how nonmutual estoppel should be applied. The *Parklane* Court changed Currie's example with the result that the Court emphasized the potential for unfairness more strongly than had Currie himself. Thus, the *Parklane* Court's use (or misuse) of Currie's example, combined with its grant to district courts of broad discretion to allow the use of nonmutual offensive collateral estoppel, demonstrates that the key concern of the Court was how the rule should be applied, not whether the rule should be permitted to exist.

Thus, although it permitted offensive collateral estoppel to exist, the *Parklane* Court took a step toward adopting Currie's approach. It did so by forming a rule for offensive collateral estoppel that is substantially the same as that of the Restatement, yet injecting into its application concerns, substantially the same as Professor Currie's,[130] that militate against the use of offensive collateral estoppel.

The Court further limited the unbridled discretion of district judges in *Standefer v. United States*.[131] In *Standefer*, the Court held that nonmutual collateral estoppel is not appropriate against the government in criminal cases, reasoning that the rules of criminal procedure often prevent the government from having "the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel."[132] It is significant that rather than repeat the requirement that courts should consider the lack of a full and fair opportunity to litigate in the previous action,[133] the Court removed a whole class of cases, criminal cases, from the district court's discretion.[134] Such an action can only indicate distrust of such broad discretion in the district courts, or disapproval of how it has been exercised.[135] In either case, the Court was motivated by the same con-

130. *See* Currie, *supra* note 1. Professor Currie had no objection to the *Bernhard* decision. He agreed with it, and with the rejection of mutuality. His main purpose was to see that the *Bernhard* rule was not applied in situations in which injustice was likely. *Id.* at 284-85.

131. 447 U.S. 10 (1980). Petitioner Standefer was indicted for aiding and abetting an Internal Revenue Service agent in accepting unlawful compensation. In a separate action the agent was acquitted. The petitioner moved to dismiss, alleging that one cannot be convicted of aiding and abetting when the principal has been acquitted and that the government should be collaterally estopped from relitigating the issue of whether the agent received unlawful compensation. *Id.* at 11-13.

132. *Id.* at 22. Some of the procedural handicaps of the government in criminal cases are: 1) the government's discovery rights are limited by the Constitution and by rules of court; 2) the government cannot obtain a directed verdict or a judgment notwithstanding the verdict; 3) the government cannot obtain a new trial on the ground that acquittal was clearly against the weight of the evidence; and 4) the government does not have a right of appeal. *Id.*

133. The Court could very easily have followed *Blonder-Tongue* and held that estoppel is inappropriate in this case because the government lacked a full and fair opportunity to litigate the prior case. Instead, the Court formed a new rule, noting that criminal cases present "considerations different from those in *Blonder-Tongue* and *Parklane Hosiery*." *Standefer*, 447 U.S. at 22.

134. *Standefer*, 447 U.S. at 24-25 (rejecting the traditional case-by-case approach).

135. *Id.* at 25 (noting that to permit estoppel on a case-by-case basis would permit courts

cerns first pointed out by Professor Currie.[136]

Standefer, however, does not provide any basis for extrapolating from the criminal case to civil cases.[137] The Court did not interpret *Parklane* to conclude that nonmutual estoppel in criminal cases is improper. Instead the Court concluded that "this criminal case involves 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine,"[138] a clear indication that the Court was not ready to make wholesale exceptions to the judges' discretion to apply offensive collateral estoppel in civil cases. In *United States v. Mendoza*,[139] however, the Court removed some private suits against the government from the trial judge's discretion in a way that went well beyond the limited exception it could have provided, indicating a willingness to move from the government to the nongovernment case.

IV. EXEMPTING THE GOVERNMENT FROM OFFENSIVE COLLATERAL ESTOPPEL

In *United States v. Mendoza*,[140] the Supreme Court held that nonmutual offensive collateral estoppel is not applicable in suits against the United States.[141] In *Mendoza*, a Filipino national filed a petition for naturalization under the Nationality Act, a 1942 statute designed to facilitate the citizenship applications of noncitizens who served honorably in the United States Armed Forces in World War II.[142] The plaintiff

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to "spread the effect of an erroneous acquittal to all who participated in a particular criminal transaction," (quoting United States v. Standefer, 610 F.2d 1076, 1093 (3d Cir. 1979))).

136. *See infra* note 165 and accompanying text.

137. A criminal case presents different considerations than those in *Blonder-Tongue* and *Parklane*. *Standefer*, 447 U.S. at 22. In addition, rules of evidence unique to criminal law distinguish a criminal case from civil cases. *Id.* at 23. Finally, the important federal interest in enforcing the criminal law is not present in private actions where no significant harm follows from allowing parties only one full and fair opportunity to litigate. *Id.* at 24.

138. *Standefer*, 447 U.S. at 25; *see also supra* note 137 (discussing the different policy considerations).

139. 104 S. Ct. 568 (1984).

140. *Id.*

141. *Id.* at 574. "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case." One might think "issues such as those" means issues of law, but a footnote to this statement makes clear that this is not the case. *Id.* at n.7. Issues of constitutional law are another possibility, but the Court's reasoning is much broader. This article will not take a position on the meaning of "issues such as those."

142. The Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940), was amended in 1942 by the Second War Powers Act, Pub. L. No. 77-507, § 101, 56 Stat. 182 (1942) to make it easier for noncitizens who served in the United States Armed Services to become citizens. Section 701 of the Second War Powers Act exempted noncitizen servicemen from requirements such as residence in this country and literacy in English. Section 702 of the same Act provided for naturalization of servicemen who were not within the jurisdiction of any court authorized to naturalize aliens. Section 705 of this Act authorized the Commissioner of Immigration

claimed that although the statute had expired, the government's administration of the statute denied him due process.[143] The district court held that the government was precluded from relitigating the due process issue because it had litigated the same issue and lost in *In re Naturalization of 68 Filipino War Veterans*.[144] The Ninth Circuit affirmed, rejecting the government's argument that suits against the federal government should be treated differently from suits against other parties.[145] The Supreme Court reversed this holding.[146]

Justice Rehnquist, writing for a unanimous Court, discussed four factors which make nonmutual offensive collateral estoppel inappropriate for suits against the federal government. First, the government is a party to a far greater number of suits than even the most litigious private entity.[147] Second, because of the public nature of the issues involved in government suits, the government is more likely than any private entity to litigate the same issue with different parties.[148] Third, many legal issues litigated by the federal government deserve to be reviewed by several lower courts before review by the Supreme Court.[149] And fourth, the government's litigation strategy, including decisions to appeal, is affected

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and Naturalization to prescribe rules to implement the Act. A complete text of this Act can be found in Olegario v. United States, 629 F.2d 204, 207-09 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

143. United States v. Mendoza, 104 S. Ct. 568, 570-71 (1984). In August 1945, shortly after the liberation of the Philippines from the Japanese, the Vice Consul of the United States to the Philippines was designated to naturalize aliens under the Second War Powers Act, Pub. L. No. 77-507, § 101, 56 Stat. 182 (1942). The Philippine government feared that mass emigration of newly naturalized Filipinos would drain the country of much needed manpower and expressed this concern to the Department of State. The United States responded by revoking the Vice Consul's authority under the Act and not appointing a replacement. Olegario v. United States, 629 F.2d 204, 209-10 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

144. *Mendoza*, 104 S. Ct. at 570; *see* In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975). In this case, the district court dealt with a group of veterans who, like Mendoza, had made no effort to become naturalized before expiration of the Act, and concluded that the government had violated the due process rights of those veterans. *Id.* at 940-51.

145. Mendoza v. United States, 672 F.2d 1320 (9th Cir. 1982), *rev'd*, 104 S. Ct. 568 (1984). The circuit court of appeals recognized that the government often litigates issues of national importance where the need for a second opinion is more important than conservation of judicial resources, but concluded that this was not such a case. 672 F.2d at 1329-30.

146. United States v. Mendoza, 104 S. Ct. 568, 574 (1984).

147. *Id.* at 572. The Court noted that in 1982 the government was a party to more than 75,000 of the 206,193 suits filed in federal district courts and thirty percent of the civil cases appealed to the courts of appeals. This distinguishes the government from a private litigant: the government litigates more than even the most litigious private party.

148. *Id.*

149. *Id.* The Court stated that applying estoppel "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." This would deprive the Court of the benefit of the exploration of the issue by several of the circuit courts, and may require the Court to change its practice of waiting for an intercircuit conflict before granting certiorari.

by policy considerations not present in the case of private litigants.[150] The Court noted that, while a private litigant generally will not forego an appeal if he feels he can prevail, the government may forego an appeal after considering such factors as limited government resources and crowded dockets. The Court was also concerned that the use of estoppel might prevent successive administrations from taking different positions on an issue. These differences, Justice Rehnquist reasoned, make the policies that might normally favor offensive collateral estoppel inapplicable in suits against the government.[151]

The crucial aspect of the decision, for purposes of collateral estoppel policy, is its breadth. The Court could have limited its decision to attempts to estop the government on issues of constitutional law, or on issues of public policy.[152] A narrow decision would have made clear that the development of public policy outweighs the policies that favor collateral estoppel. Such a narrow decision was reached by the Second Circuit in *Olegario v. United States*[153] and sought by the Solictor General in *Mendoza*.[154] The inquiry thus becomes why the Court reached a broader decision.

The Court explained the collateral estoppel significance of only two of the four factors it relied on: development of the law and considerations relevant to appeal. With respect to the development of the law, the Court followed its reasoning in *Standefer*[155] and held that the development of legal doctrine by permitting several lower courts to consider, and perhaps differ, on the same issue before review by the Court is more important than the policies that favor estoppel.[156] The Court could have stopped there, but a decision based on the type of issues, and not the type of defendant, would have included many cases not covered by the present decision. Private parties often litigate constitutional issues. If development of the law was the sole basis for the decision, then, perhaps nonmutual estoppel should not be permitted on any issue of law. The Court

150. *Id.* at 573.

151. *Id.* at 574.

152. The Solicitor General, in his brief filed May 12, 1983, stated the issue as: "Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States." Brief for Petitioner at (I), United States v. Mendoza, 104 S. Ct. 568 (1984).

153. 629 F.2d 204, 215 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). The *Olegario* decision is actually narrower. The Second Circuit focused on the failure of the government to appeal and concluded that unappealed decisions against the federal government on matters of public concern should not be the basis of estoppel since they might cause the Attorney General to appeal decisions he would not otherwise appeal.

154. *See supra* note 152.

155. *See supra* notes 131-38 and accompanying text. As in *Standefer*, the *Mendoza* Court found that matters of policy made this type of case inappropriate for the case-by-case determination of estoppel favored in *Parklane*.

156. *Mendoza*, 104 S. Ct. at 574.

dealt with this issue in *United States v. Stauffer Chemical Co.*[157] and concluded that such a rule would deny the benefits of estoppel in many instances in which the development of the law would not be affected.[158] Thus, the *Mendoza* Court did not base its decision solely on the development of the law because such a decision would have been much too broad.

The Court gave two reasons for the significance of appeal considerations. First, the Court explained that the policy considerations that affect a government decision to appeal are more important than the potential benefits of estoppel.[159] Second, the Court noted that allowing offensive collateral estoppel against the government would force the government to appeal every case and thus disserve judicial economy.[160] The judicial economy rationale appears not to be a separate rationale, but rather a consequence of the recognition that policy considerations may be more important than the benefits of collateral estoppel. Thus, the Court echoed *Standefer* by holding that certain policy considerations outweigh the normal estoppel considerations. The prevailing argument was specific to the government as a defendant, and the Court could have stopped there without substantially changing its holding.[161] Instead, the Court added two more reasons for not precluding the government from reliti-

157. 104 S. Ct. 575 (1984). The Environmental Protection Agency (EPA) attempted to use private contractors to inspect one of Stauffer Chemical's plants. Stauffer refused to permit the inspection unless the private contractors would sign an agreement not to disclose trade secrets. The EPA obtained a warrant and Stauffer refused to honor it. The EPA started civil contempt proceedings and Stauffer moved to quash the administrative search warrant, arguing that private contractors are not "authorized representatives" under § 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414 (1976). The district court denied Stauffer's motion to quash. United States v. Stauffer Chem. Co., 511 F. Supp. 744 (M.D. Tenn. 1981), *rev'd*, 684 F.2d 1174 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984). On appeal, Stauffer asserted that the EPA should be collaterally estopped from contending that § 114(a)(2) authorizes private contractors because the EPA had litigated that issue and lost in Stauffer Chem. Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981). The Sixth Circuit reversed the district court and adopted alternative grounds for its decision. The Sixth Circuit agreed with the Tenth Circuit's interpretation of the Clean Air Act, and held that the government was collaterally estopped by the Tenth Circuit decision. United States v. Stauffer Chem. Co., 684 F.2d 1174, 1181-90 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984). The Supreme Court affirmed, holding that mutual defensive collateral estoppel is appropriate against the federal government. United States v. Stauffer Chem. Co., 104 S. Ct. 575, 580 (1984). The Court rejected the government's argument that estoppel was improper because of the "unmixed questions of law" exception. *Id.* at 578; *see* United States v. Moser, 266 U.S. 236, 242 (1924) (a question of law is always justiciable by the same parties in subsequent actions based on different demands, but not based on the same fact question or rights adjudicated previously).

158. *Stauffer Chem. Co.*, 104 S. Ct. at 579-80. The development of the law is not implicated here because the EPA remains free to litigate this issue against other parties.

159. *Mendoza*, 104 S. Ct. at 574 (the economy interests underlying the application of collateral estoppel are outweighed by the constraints of resources and political administrations peculiarly faced by the government).

160. *Id.*

161. This reasoning was used in Olegario v. United States, 629 F.2d 204 (2nd Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *see supra* note 153.

gating an issue: the number of cases and the nature of the issues litigated by the government. The use of four reasons, when two would have been sufficient, indicates that the Court wanted to make an additional statement about offensive collateral estoppel.

The Court gave no indication why the number of suits and therefore the increased potential for multiple claimants should be considered. Indeed, because some defendants, particularly in the products liability area, have argued that these two factors should make offensive collateral estoppel inapplicable to them, it is difficult to see how these factors are unique to the federal government.[162] These factors make the government different in number, but not different in kind. An argument found in the Solicitor General's brief, however, clarifies the relevance of these factors.[163]

The Solicitor General made an argument that sounds strikingly similar to Professor Currie's. The Solicitor General argued that the large number of cases litigated by the federal government makes it extremely likely that the government will lose some cases that involve multiple claimants.[164] To bind the federal government in such cases would be unfair because it would permit private litigants to benefit from the government's unique position. That is, it would be unfair to the government to permit a litigant to benefit from the increased odds that the government will lose some cases that involve multiple claimants.

The government's argument is Currie's argument. Currie was not concerned that courts would grant estoppel on the last twenty-four cases after the defendant had won the first twenty-five before one loss. He merely used that as an example of a clearly anomalous result. The anomalous result Currie feared was the hidden one. If a plaintiff is lucky enough to win the first case in a situation where he is likely to win only one or two out of fifty, courts might not give the defendant another chance.[165] Thus Currie's reasoning has its greatest impact on the second case, not the twenty-seventh.

The Solicitor General's argument is that the government is constantly trying cases in which there are more than Currie's fifty potential cases. This increases the chances that Currie's clearly anomalous suit will be the first of a series. The government argued that it should have the same right to show, in the second case, that something went wrong in the first case; the same opportunity Currie's defendant in case number twenty-seven has to show that something went wrong in case number twenty-six.

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162. *See* Weinberger, *supra* note 64, at 53 (arguing against use of offensive collateral estoppel in certain types of product liability suits because, *inter alia*, the number of people likely to be affected is "mind boggling"); Davis, *Collateral Estoppel — An Awesome Specter*, 34 FED. INS. COUNSEL Q. 73 (1983).

163. Petition for Certiorari at 19, United States v. Mendoza, 104 S. Ct. 568 (1984).

164. *Id.* The Solicitor General cited *Parklane*'s citation of Currie's example of the fifty suits arising out of a railroad accident.

165. *See supra* notes 1-4 and accompanying text.

V. POTENTIAL ARGUMENTS FOR DEFENDANTS IN MULTIPLE CLAIMANT SITUATIONS

A defendant who foresees a large number of potential plaintiffs, such as the manufacturer of a widely-used product that is suspected of being dangerous, might argue that offensive collateral estoppel should not apply to it in light of *Mendoza*. The defendant should argue that the factors that justified relieving the government from the burdens of offensive collateral estoppel are also present in the defendant's case, therefore suggesting the same result. Of course, no claim can be made that any class of defendants is exactly like the government and that therefore *Mendoza* should control their case. The unique position of the federal government in forming public policy makes that clear. *Standefer* and *Mendoza*, however, clearly demonstrate that the Court is willing to remove classes of cases and defendants from the usual rule of estoppel.[166] Furthermore, the Court's acceptance of an argument similar to Professor Currie's indicates that the Court may be willing to extend similar treatment to other defendants in some cases.

The defendant's argument should begin by focusing the court's attention on the potential for unfairness foreseen in *Parklane* and the extreme caution that the *Parklane* Court suggested judges should use in applying the doctrine. Then, the defendant should emphasize the gross injustice that would result if the first case were wrongly decided. *Mendoza* recognized the possibility of an anomalous result as well as the extreme unfairness of allowing an anomalous result to have a nationwide effect. Although the plaintiffs might argue that such reasoning would represent a return to the long discarded mutuality rule, the defendants could respond by noting the narrowness of their claim. Such a defense should be raised only after one previous adverse determination of the issue. If several courts previously held for the plaintiffs, however, it is unlikely that several courts will consecutively reach anomalous results, and therefore there is no reason to forbid the application of offensive collateral estoppel in the subsequent cases. Such a result complies with the fairness interests raised in *Parklane*, in *Mendoza*, and in Professor Currie's article, and still provides the recognized benefits of nonmutual estoppel.

This emphasis on the second case is mandated by the *Parklane*, *Mendoza*, and Currie reasoning. *Parklane* made clear, and no subsequent case has questioned, that nonmutual offensive collateral estoppel is permissible when it will not cause unfairness. After a second trial reaches the same result as the first, the fear that the first was anomalous, that is, merely the result of the increased odds that plaintiff would win one case, is greatly reduced.[167] Finally, because no particular type of

166. *See supra* notes 131-51 and accompanying text.

167. The converse is also true. In Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980), the court correctly applied estoppel in the face of inconsistent prior judgments. The court reasoned that because so many courts had found that asbes-

defendant or class of defendants litigates the first case in a series with anything like the frequency of the federal government, no defendant or class of defendants can claim a *Mendoza*-like blanket exemption, but must instead argue against application of nonmutual collateral estoppel on a case-by-case basis.

VI. CONCLUSION

In *Bernhard v. Bank of America National Trust and Savings Association*,[168] a state court rejected the traditional requirement of mutuality for the application of collateral estoppel, and devised a new test providing that no party should have more than one full and fair opportunity to litigate an issue. In response to this decision, Professor Currie wrote a law review article famous for its hypothetical situation involving a train wreck. Currie noted that if fifty people are injured in this wreck, and each individually sues the train owner, due process requires that collateral estoppel effect not be given to the first case if the defendant won that case. Furthermore, Currie noted that if the defendant should lose the twenty-sixth suit after twenty-five victories, the loss would not be given collateral estoppel effect in subsequent suits because the twenty-sixth case was clearly anomalous in light of the first twenty-five cases. Currie's concern was that the anomalous result would occur in the first or second suit, thus causing unfairness to the defendant.

Eventually, the Supreme Court also abandoned the mutuality requirement in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[169] a case involving the defensive use of collateral estoppel. Defensive collateral estoppel occurs when the defendant estops the plaintiff from relitigating issues the plaintiff has previously litigated and lost. The opposite situation, offensive collateral estoppel, occurs when the plaintiff estops the defendant from relitigating issues the defendant has previously litigated and lost. Offensive collateral estoppel was accepted by the Supreme Court in *Parklane Hosiery Co., Inc. v. Shore*,[170] although the Court urged caution in applying the estoppel. The Court attempted to restrict the use of offensive collateral estoppel in order to avoid unfairness to defendants. The concerns voiced by the Court in *Parklane* echoed those of Professor Currie in his response to *Bernhard*.

Subsequently, the Court expressed further doubt about the unlimited discretion it had granted to the district courts to apply offensive col-

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tos is unreasonably dangerous, one case to the contrary could be disregarded. The important rule that seems to come from Professor Currie's reasoning is that if one allows a pattern to develop before granting estoppel the possibility of unfairness is greatly reduced. *Cf.* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978) (using probability theory to attack the use of nonmutual estoppel).

168. 19 Cal. 2d 807, 122 P.2d 892 (1942).

169. 402 U.S. 313 (1971).

170. 439 U.S. 322 (1979).

lateral estoppel in *Parklane*. In *Standefer v. United States*,[171] the Court held that nonmutual collateral estoppel was not applicable to the government in a criminal case. In *United States v. Mendoza*,[172] the Court held that nonmutual collateral estoppel did not apply against the government in a civil case. The Court relied on several factors to conclude that policy considerations normally favoring nonmutual offensive collateral estoppel are inapplicable to the government as a defendant: the number of suits the government defends, the public nature of the issues involved in government litigation, the requisite development of law for federal appellate review, and litigation strategies based on political administration. In *Mendoza*, the Court accepted an argument made by the Solicitor General that sounded very much like Professor Currie's, namely, because of the large number of suits on the same issue that the government is subject to as a defendant, the chances are greater that an anomalous result will be given preclusive effect.

These considerations are of great relevance to the private defendant involved in multiple claimant litigation. Although it is unlikely that such a defendant could secure a class-like exemption similar to the one enjoyed by the government, it is possible that with respect to the transaction involved, the private defendant may successfully argue that nonmutual offensive collateral estoppel based on the first case of a multiple claimant series is improper.

171. 447 U.S. 10 (1980).
172. 104 S. Ct. 568 (1984).