Notes

Nonmutuality: Taking the Fairness out of Collateral Estoppel

I. Introduction

The scope of collateral estoppel has undergone an evolutionary expansion. Collateral estoppel, a doctrine which precludes unnecessary relitigation of issues, was limited until recently by a requirement of mutuality in nearly every jurisdiction. Thus, collateral estoppel was applied only if both parties were mutually bound by the previous judgment; if one party was not bound, then neither was bound.[1]

Mutuality was abandoned in California in 1942 when the California Supreme Court allowed a defendant who had not been a party to the first suit to estop a plaintiff who had previously lost on the same issue.[2] Many jurisdictions have joined rank in permitting a nonparty defendant to estop a losing plaintiff from relitigating, but few jurisdictions have granted the same privilege to a nonparty plaintiff. Most opinions discussing nonmutual collateral estoppel have hinged upon whether application of the doctrine would be unfair to the estopped party.

A distinction between defendant-asserted collateral estoppel—defensive use of collateral estoppel—and plaintiff-asserted collateral estoppel—offensive use of collateral estoppel—has gradually developed. The distinction may be described as follows:

> [O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.[3]

Offensive use is feared to increase litigation and cause unfairness to defendants; therefore, some courts have limited nonmutual collateral estoppel to defensive use.[4]

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[1]F. James & G. Hazard, Civil Procedure § 11.24 (2d ed. 1977).

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

[3]Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

[4]*See, e.g.*, Standage Venture, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977); Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968); Tezak v. Cooper, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); Albernaz v. Fall River, 346 Mass. 336, 191 N.E.2d 771 (1963).

In 1979, the Supreme Court in *Parklane Hosiery Co. v. Shore*[5] discarded a defensive limitation upon nonmutual collateral estoppel and, finding no unfairness, permitted a nonparty plaintiff to estop a losing defendant.[6] Fairness instead of mutuality now limits the application of collateral estoppel in federal courts.

This Note will trace the abandonment of mutuality and explore the modern doctrine of collateral estoppel, emphasizing the federal test of unfairness as formulated in *Parklane*.[7] Application of collateral estoppel without mutuality, termed "nonmutuality,"[8] will be examined for its effects upon the objectives of collateral estoppel. The test of procedural unfairness, applicable to all cases of collateral estoppel, will be assessed. Additional considerations unique to offensive nonmutuality—lack of incentive to litigate vigorously, availability of joinder, and inconsistent judgments—will be discussed.

II. THE DEMISE OF MUTUALITY

A. *Mutuality as a Traditional Prerequisite*

Res judicata is often confused with collateral estoppel. Although both doctrines preclude relitigation, they are significantly different in the type of relitigation precluded. Res judicata precludes relitigation of identical *suits*; collateral estoppel precludes relitigation of identical *issues* in different suits. Only issues actually litigated and essential to a valid and final judgment are subject to collateral estoppel.[9]

Traditionally, courts have limited the scope of collateral estoppel by requiring identity of parties and mutuality of judgment.[10] The

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[5]439 U.S. 322 (1979).

[6]*Id.* at 332-33.

[7]*Id.* at 331-33.

[8]For the purposes of this Note, "nonmutuality" represents the assertion of collateral estoppel by a litigant who was not a party to and thus was not bound by the original litigation. "Offensive nonmutuality" denotes assertion of collateral estoppel by a nonparty plaintiff; "defensive nonmutuality" denotes assertion of collateral estoppel by a nonparty defendant.

[9]RESTATEMENT (SECOND) OF JUDGMENTS § 88, comment a (Tent. Draft No. 3, 1976).

[10]The term "mutuality" is commonly used to encompass the requirements of identical parties and mutual judgment. Mutuality has been explained in the following way: "The doctrine of mutuality requires that, as a general proposition, one who invokes the conclusive effect of a judgment must have been either a party or his privy to the suit in which the judgment was rendered. Stated differently, the mutuality requirement prevents a litigant from invoking the conclusive effect of a judgment unless he would have been bound if the judgment had gone the other way." 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1] [hereinafter referred to as 1B MOORE'S]. *See also* Clyde v. Hodge, 413 F.2d 48, 51 (1969) (using "identity of parties" and "mutuality" interchangeably). The requirements are, however, distinct. *See, e.g.*, State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979).

two requirements are generally coextensive[11] because of the binding nature of judgments; a judgment concludes a lawsuit and binds the parties to that lawsuit.[12] For example, when parties in the second suit were parties to the first suit, thus satisfying the requirement of identical parties, mutuality is also satisfied because both parties are bound by the earlier judgment. When the parties are identical and judgment is mutual, the parties are estopped from relitigating issues decided in the first suit.[13]

If the second action involves different parties, however, collateral estoppel cannot be applied because the judgment is not mutually binding.[14] For example, a party who did not previously litigate with an adversary, and thus was not bound by a prior judgment, cannot use collateral estoppel against that adversary.

Mutuality was founded upon a theory of evenhandedness. The nonparty would not have been bound by a determination in favor of the original party; therefore, the nonparty should not be permitted to use an unfavorable judgment against the original party.[15] To have allowed a nonparty the benefit of a judgment that was not earned by litigation and to which the nonparty could not have been bound seemed inequitable. Consequently, courts required mutuality of judgment to preclude assertion of collateral estoppel by nonparties.

Over the years, a general exception to mutuality developed in situations of derivative liability.[16] Courts granted defensive collateral estoppel without mutuality to a nonparty defendant whose liability had been derived from another defendant exonerated in a prior action brought by the same plaintiff.[17] The derivative liability

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[11]*But see* State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979). Although the parties were identical in both suits, mutuality did not exist. A representative of the plaintiffs won a wrongful death action against the state. In a second action, the plaintiffs sued for their own injuries. The court of appeals reasoned that the plaintiffs would not have been bound by a finding in the first suit that the state was not negligent; therefore, they could not take advantage of the finding of negligence under the mutuality rule in Indiana. *Id.* at 1177-78. The court reluctantly denied collateral estoppel and suggested for future judicial consideration that mutuality be waived in the rare instances in which mutuality does not exist although parties are identical. *Id.* at 1179-80.

[12]*See* F. JAMES & G. HAZARD, *supra* note 1, § 11.2.

[13]State v. Speidel, 392 N.E.2d 1172, 1175 (Ind. Ct. App. 1979).

[14]*Id.* at 1177.

[15]Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1470-71 (1968).

[16]1B MOORE'S, *supra* note 10, ¶ 0.412[3].

[17]*See, e.g.*, Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127-28 (1912). Liability is derivative in relationships between principal and agent, indemnitor and indemnitee, and employer and employee. Adriaanse v. United States, 184 F.2d 968 (2d Cir. 1950), illustrates the derivative liability exception. The plaintiff unsuccessfully sued his employer, a steamship company, and later sued the United States on the same

exception allowed courts to avoid secondary liability in the absence of primary liability.[18]

B. The Trend Toward Nonmutuality

Weakened by the derivative liability exception, the strict rule of mutuality was toppled in California in *Bernhard v. Bank of America National Trust & Savings Association*.[19] It had been determined in a probate action that the testator intended a gift by transfer of certain funds. The estate administrator subsequently was estopped from suing the nonparty bank for the same funds.[20] Finding no justification for mutuality, Justice Traynor explained:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation . . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.[21]

The *Bernhard* decision started a trend of nonmutual collateral estoppel. Although many jurisdictions still cling to the mutuality rule,[22] perhaps a slight majority now permit estoppel in the absence

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issue of negligence. The original judgment was not binding on the United States, which had not been a party. Despite a lack of mutuality, the court found an agency relationship and allowed the United States as principal to use the former judgment for its agent against the plaintiff. The court relied on " '[a]n apparent exception to . . . mutuality . . . where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff.' " *Id.* at 969 (citing Bigelow v. Old Dominion Copper Co., 225 U.S. at 127-28 (1912)).

[18]1B MOORE'S, *supra* note 10.

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

[20]*Id.* at 814, 122 P.2d at 896.

[21]*Id.* at 811-12, 122 P.2d at 894. Justice Traynor apparently confused the terms "collateral estoppel" and "res judicata." *See* text accompanying note 8 *supra*.

[22]Cases in which the courts have adhered to mutuality include: Suggs v. Alabama Power Co., 271 Ala. 168, 123 So. 2d 4 (1960); Hogan v. Bright, 214 Ark. 691, 218 S.W.2d 80 (1949); Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. 1971); Porterfield v. Gilmer, 132 Ga. App. 463, 208 S.E.2d 295 (1974); State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979); Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972); Barnett v. Commonwealth, 348 S.W.2d 834 (Ky. 1961); Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Pace v. Barrett, 205 So. 2d 647 (Miss. 1968); Feinstein v. Edward Livingston & Sons, Inc., 457 S.W.2d 789 (Mo. 1970); Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 153 N.W.2d 849 (1967); Atencio v. Vigil, 86 N.M. 181, 521 P.2d 646 (1974); King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972).

of mutuality.[23] Most jurisdictions discarding mutuality have emphasized that estoppel must be denied unless the defendant was afforded a full and fair opportunity to litigate in the previous suit.[24] Some courts have further limited nonmutuality to defensive as opposed to offensive use.[25]

Usually the party to be estopped is in the same adversary position in both suits.[26] Occasionally, however, positions change: An original defendant may later sue as plaintiff,[27] a former plaintiff may subsequently become a defendant,[28] or codefendants may later become adversaries.[29] Courts have been more willing to allow nonmutual estoppel defensively against a common plaintiff in these gray areas than in strict offensive situations involving multiple suits against a common defendant.[30]

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[23]Cases in which the courts have sanctioned nonmutual estoppel include: Pennington v. Snow, 471 P.2d 370 (Alaska 1970); Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360 (1977); Murphy v. Northern Colo. Grain Co., 30 Colo. App. 21, 488 P.2d 103 (1971); Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969); Tezak v. Cooper, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); Goolsby v. Derby, 189 N.W.2d 909 (Iowa 1971); Pat Perusse Realty Co. v. Lingo, 249 Md. 33, 238 A.2d 100 (1968); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 238 N.E.2d 55 (1968); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Paradise Palms Community Ass'n v. Paradise Homes, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973); Sanderson v. Balfour, 109 N.H. 213, 247 A.2d 185 (1968); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct., Special Term 1969); Hicks v. De La Cruz, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977); Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7 (Okla. 1974); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970); Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971); Simpson Timber Co. v. Aetna Cas. & Sur. Co., 19 Wash. App. 535, 576 P.2d 437 (1978); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

[24]*See* RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note (Tent. Draft No. 3, 1976); Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 529 (1976).

[25]*See* note 4 *supra* and accompanying text.

[26]*See* Currie, *Mutuality of Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957).

[27]The following cases have permitted nonmutual estoppel of a former defendant who later as the plaintiff sued a nonparty defendant: Goolsby v. Derby, 189 N.W.2d 909 (Iowa 1971); Paradise Palms Community Ass'n v. Paradise Homes, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970).

[28]A former plaintiff was estopped in a subsequent action in which he was a defendant in Hardware Mut. Ins. Co. v. Valentine, 119 Cal. App. 2d 125, 259 P.2d 70 (1953).

[29]Estoppel has been permitted in second suits between original codefendants, thus encouraging the filing of crossclaims. Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967); Simpson Timber Co. v. Aetna Cas. & Sur. Co., 19 Wash. App. 535, 576 P.2d 437 (1978); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

[30]*See* Currie, *supra* note 26, at 289.

Hesitancy to apply collateral estoppel offensively stems from judicial fear that offensive use will increase litigation and cause unfairness to defendants.[31] Courts rejecting, as well as those accepting, offensive nonmutuality have found support in the ambiguity of the *Bernhard* opinion,[32] which addressed only defensive estoppel.[33]

Several federal and state decisions have granted offensive use to successive plaintiffs who were victims of a mass accident,[34] such as an airplane crash. Additional examples of offensive use include a defendant employer estopped from relitigating an employment contract interpretation,[35] a municipal defendant estopped from denying hospital ownership previously determined,[36] and a defendant vendor estopped from relitigating the existence of an enforceable sales contract.[37] The latter two decisions did not characterize the collateral estoppel as being applied offensively and seem indicative of a trend toward de-emphasizing an offensive-defensive distinction as suggested by the *Restatement (Second) of Judgments*.[38]

C. *The Supreme Court View*

The growing volume of cases granting offensive use of nonmutual collateral estoppel indicates a judicial shift toward rejection

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[31]*See, e.g.*, Reardon v. Allen, 88 N.J. Super. 560, 571-73, 213 A.2d 26, 32 (Super. Ct. Law Div. 1965).

[32]The Third Circuit has restricted the *Bernhard* doctrine to defensive use in permitting estoppel in an analogous surety situation. Bruszewski v. United States, 181 F.2d 419, 422 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). A district court in Maryland extended *Bernhard* to offensive use in allowing subsequent plaintiffs to estop the common defendant on the issue of negligence. Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 303 (D. Md. 1967). In California, several lower court opinions declined to apply the *Bernhard* doctrine to offensive use situations. Price v. Atchison, T. & S.F. Ry., 164 Cal. App. 2d 400, 330 P.2d 933 (1958); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). *See also* notes 176-79 *infra* and accompanying text.

[33]Collateral estoppel in *Bernhard* was used by a second defendant against a losing plaintiff. Justice Traynor remarked: "[I]t would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries." 19 Cal. 2d at 813, 122 P.2d at 895. Justice Traynor was apparently thinking of defensive use, because only a plaintiff, by choosing to sue defendants in succession, may switch adversaries. A defendant who is sued by successive plaintiffs has not chosen to switch adversaries because he has no control over the filing of suits. Although reflective of defensive use, *Bernhard* did not distinguish between defendant-asserted and plaintiff-asserted collateral estoppel.

[34]*See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct., Special Term 1969).

[35]Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[36]Hicks v. De La Cruz, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977).

[37]Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971).

[38]RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note (Tent. Draft No. 2, 1975), *discussed in* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 n.13 (1979).

of a defensive limitation. The Supreme Court recently added its approval to this shift in *Parklane Hosiery Co. v. Shore*,[39] refusing to limit the federal doctrine of collateral estoppel to defensive use.[40]

The defendants, Parklane Hosiery Company and its directors, were originally sued by the Securities and Exchange Commission for making materially false and misleading statements regarding a merger; a declaratory judgment was entered to that effect.[41] Shore, a plaintiff stockholder claiming damages in a later suit, was permitted to estop the defendants on the identical issue of falsity.[42]

In granting offensive nonmutuality, the Supreme Court determined that the defendant suffered no unfairness by application of the doctrine.[43] The *Parklane* opinion examined the following factors in its determination of fairness: (1) Whether the plaintiffs could have joined in the first suit; (2) whether the defendant had incentive to litigate vigorously; (3) whether the judgment relied upon is inconsistent with a previous judgment in favor of the defendant; and (4) whether the defendant had full procedural opportunities in the first suit.[44] The *Parklane* decision formulated a general rule for federal courts: "[W]here 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."[45] The Supreme Court went on to find no violation of the seventh amendment right to jury trial,[46] a topic beyond the scope of this Note.

The federal rule of nonmutuality had originated eight years earlier in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[47] The Supreme Court granted *defensive* nonmutuality in allowing a nonparty defendant accused of patent infringement to use an earlier declaration of patent invalidity against the losing plaintiff patent holder.[48] The Court in *Blonder*, however, specifically limited its discussion to defensive use in patent invalidity cases.[49] Although most federal courts permitted nonmutuality after *Blonder*, many re-

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[39]439 U.S. 322 (1979).

[40]*Id.* at 331.

[41]Securities & Exch. Comm'n v. Parklane Hosiery Co., 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083, 1085 (2d Cir. 1977).

[42]439 U.S. at 332-33.

[43]*Id.* at 332.

[44]*Id.*

[45]*Id.* at 331.

[46]*Id.* at 333.

[47]402 U.S. 313 (1971).

[48]*Id.* at 350.

[49]*Id.* at 330.

mained confused about the viability of a defensive limitation.[50] The *Blonder* decision therefore left the federal view of nonmutuality unresolved.

The Supreme Court in *Parklane* dictated the discretionary application of nonmutual collateral estoppel in federal cases and dispelled limitations of patent invalidity or defensive use as may have been inferred from *Blonder*.[51] According to the opinion in *Parklane*, nonmutuality is limited only by fairness to the estopped party.[52]

III. The Effects of Nonmutuality on the Objectives of Collateral Estoppel

A. In General

An evaluation of the application of collateral estoppel without mutuality demands assessment of its effects upon the objectives of collateral estoppel. The basic purpose of collateral estoppel is to avoid needless relitigation, which is also reflected in such litigation-saving devices as joinder, counterclaims, intervention, and interpleader.[53]

Avoiding relitigation achieves underlying goals of preventing parties from having more than one day in court, protecting parties from the burden of relitigation, and reducing court time in the interests of judicial economy.[54] Nonmutuality fails to serve the latter two goals. Moreover, its adverse effect upon judicial economy contributes to the unpopularity of offensive use.

B. The Limit of One Day in Court

Collateral estoppel is founded on the premise that a party should not be allowed to reopen an issue that he has already had an opportunity to litigate.[55] Limiting a party to one opportunity appears equitable to all concerned. In view of today's crowded dockets, such a limit seems fair to the overworked judiciary and to "other litigants who might have to wait to have their day in court because

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[50]*See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1187 (7th Cir. 1973).

[51]439 U.S. at 331.

[52]*Id.*

[53]*See* Fed. R. Civ. P. 18-22, 24.

[54]The Supreme Court in *Parklane* recognized judicial economy and protection from burdensome relitigation as the dual purposes of collateral estoppel. 439 U.S. at 326. The Court discussed the detrimental effect on judicial economy of allowing offensive use, *id.* at 329-30, but ignored its lack of effect on burdensome relitigation.

[55]F. James & G. Hazard, *supra* note 1, § 11.2.

one litigant is allowed to litigate the same issue over and over again."[56]

A one-day limit also seems fair to the estopped party, because due process only entitles a litigant to one day in court.[57] With or without mutuality, due process is satisfied because collateral estoppel requires that the party who is estopped has already litigated the issue. The party has had his day in court. Nonmutuality expands the group of litigants who *may assert* collateral estoppel but does *not* affect the group of litigants who *may be estopped.*

Nonmutuality appears to promote fairness to a greater extent than mutuality. By expanding the scope of the one-day limit, nonmutuality further reduces relitigation which, in turn, increases fairness to the overworked judiciary and waiting litigants.

C. The Burden of Relitigation

Another purpose of collateral estoppel is to protect parties from the burden of relitigation.[58] Through collateral estoppel a final judgment is given force to identical issues in subsequent litigation. Prevention of relitigation allows parties to rely upon the original judgment and protects the winner from the burdens of repeated trials, including additional expense and risk of inconsistent judgments.

Under the rule of mutuality, parties who have once litigated are mutually foreclosed from relitigating. If the losing party attempts to relitigate, the winner may estop that party and thus avoid burdensome relitigation. Mutual collateral estoppel therefore furthers the purpose of protecting parties from the burdens of relitigation.

Unlike mutuality, nonmutuality does not protect parties from such a burden because subsequent litigation does not burden either party.[59] By the ability to estop the losing party, the nonparty is not being protected from relitigating because he is litigating for the first time. He was not a party to the previous suit and did not litigate the judgment that he uses. Only relitigation, not initial litigation, is unfairly burdensome. Likewise, the losing party who is estopped by the nonparty requires no protection because relitigation would mean a benefit, not a burden. Despite additional expense, the losing party may prefer to reopen the litigation with the hope of receiving a different judgment. Thus, nonmutuality does not serve the goal of protecting parties from burdensome relitigation.

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[56]Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

[57]*See* note 21 *supra* and accompanying text.

[58]439 U.S. at 326.

[59]*See* Reardon v. Allen, 88 N.J. Super. 560, 571, 213 A.2d 26, 32 (Super. Ct. Law Div. 1965).

D. Judicial Economy

Collateral estoppel developed upon a theory of judicial economy.[60] Society has a right to the efficient administration of justice,[61] a concern that has grown increasingly more important as courts have become more crowded. The Federal Rules of Civil Procedure reflect this growing concern in litigation-saving devices such as class actions[62] and joinder.[63] Needless relitigation hampers judicial administration; through preclusion of relitigation, collateral estoppel promotes judicial efficiency.

Collateral estoppel requiring mutuality reduces relitigation between identical parties. Eliminating mutuality expands the scope of collateral estoppel to allow nonparties as well as parties to use a prior judgment to estop a losing party from relitigating. Therefore, nonmutuality seemingly reduces the judicial workload to an even greater extent than mutuality. Nonmutuality indirectly increases the litigation that occurs within original and subsequent suits, however, and in cases of offensive use, increases the total number of suits. To determine the judicial economy of nonmutuality accurately, the relitigation avoided by expanded collateral estoppel must be weighed against the additional litigation it will cause.

1. Increased Litigation Within the Original Suit.—Nonmutuality increases the extent of litigation within the original suit because litigants are indirectly compelled to fight with greater vigor when nonparties as well as parties may later use a judgment. A cautious "litigant may feel bound to fight a case to the utmost in both trial and appellate courts which he would treat rather casually if its sole effect were on the immediate adversaries."[64] A small liability settlement which would have previously satisfied both parties will be litigated to its fullest extent, "contrary to the public interest in minimizing litigation."[65]

In denying offensive collateral estoppel, a New Jersey court in *Reardon v. Allen*[66] observed:

> The threat of collateral estoppel could impede the speedy disposition of smaller claims. More jury trials would be demanded in the county district courts; extensive discovery activities would be generated, with a corresponding increase

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[60]*See* Parklane Hosiery Co. v. Shore, 439 U.S. at 326.

[61]*See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. (1967).

[62]FED. R. CIV. P. 23.

[63]FED. R. CIV. P. 18-20.

[64]R. FIELD & B. KAPLAN, CIVIL PROCEDURE 859 (3d ed. 1973).

[65]Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 310 (1961).

[66]88 N.J. Super. 560, 213 A.2d 26 (Super. Ct. Law Div. 1965).

> in motions, and depositions taken in the first action would be repeated in each successive action because strangers, without the right of cross-examination, are not bound. More appeals would be taken in an effort to avoid the widespread consequences of an adverse judgment.[67]

Nonmutuality encourages heightened litigation in both offensive and defensive use situations; a plaintiff fears future estoppel by nonparty defendants while a defendant fears future estoppel by nonparty plaintiffs.

Limiting collateral estoppel by a test of fairness appears to exacerbate the problem of exhaustive initial litigation. Under the *Parklane* approach, if a party fully motivated to litigate was given a full and fair procedural *opportunity*,[68] he may be precluded from relitigating;[69] therefore, he is strongly induced to take fullest advantage of the opportunity.

To summarize, offensive and defensive nonmutuality induce exhaustive initial litigation, contrary to the goals of judicial economy. The *Parklane* test further induces such litigation by conditioning estoppel upon the fullness of the opportunity to litigate.

2. Increased Litigation Within Subsequent Suits.—The adoption of fairness as a limitation upon nonmutuality may increase litigation within subsequent suits.[70] Rather than engage in relitigation of issues, parties will contest the application of nonmutual collateral estoppel; to avoid being estopped, a plaintiff or defendant will argue that he did not receive a full and fair opportunity to litigate in the original suit. The focus of litigation thus shifts from the merits to procedural opportunity when nonmutual collateral estoppel is asserted, whether offensively or defensively.[71]

Litigation of procedural opportunity may prove more cumbersome than relitigation of the issues precluded. An observer explained:

> It is arguable . . . that because there is no *certainty* in the application of a full-and-fair-opportunity test nearly every litigant against whom collateral estoppel is asserted will seek to show that he would be prejudiced by a preclusion of his claim. Although trials on the merits would be minimized, the resulting increase in litigation concerning the application

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[67] *Id.* at 572, 213 A.2d at 32.

[68] *See* notes 96-114 *infra* and accompanying text.

[69] 439 U.S. at 332.

[70] *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. at 347.

[71] *Id.*

> of collateral estoppel could more than offset any saving of time or expense.[72]

The Supreme Court in *Blonder* admitted that the fairness limitation may increase litigation of the applicability of collateral estoppel but concluded that determination of procedural opportunity is less time-consuming than relitigation of the merits of an issue.[73] Considering the extreme length of most patent litigation,[74] this conclusion seems appropriate when the issue is one of patent invalidity as in *Blonder*.[75] The same may not hold true, however, for less extensive litigation. Relitigating the merits of simple issues may take less time than litigating the application of nonmutuality. By increasing the litigation of applicability, nonmutuality may actually increase litigation within subsequent suits.

3. Increased Number of Suits.—Nonmutuality increases litigation within original and subsequent suits, regardless of whether it is asserted offensively by a plaintiff or defensively by a defendant. The effect of nonmutuality upon the overall number of suits, however, does depend to a great extent upon whether the use of nonmutuality is offensive or defensive. Defensive use encourages fewer suits, which may offset any increase in original and subsequent litigation, but offensive use provokes additional suits.

Defensive use of nonmutual collateral estoppel induces joinder of defendants into one action.[76] In cases of defensive use, a plaintiff who originally loses an issue is subsequently precluded from relitigating the same issue against all defendants, including those not parties to the original suit. Consequently, defensive use motivates a plaintiff to join all potential defendants in one suit to avoid the risk of estoppel forever preventing subsequent litigation with nonparty defendants.[77]

Conversely, offensive use discourages original consolidation of

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[72]Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 730 (1967). The observer projected that litigation of opportunity would probably consume less time than relitigation of the merits. *Id.*

[73]402 U.S. at 347.

[74]*Id.* at 348.

[75]*Id.*

[76]*See* Parklane Hosiery Co. v. Shore, 439 U.S. at 329-30. For a comparison of the effects on judicial economy of defensive and offensive use, see Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967), *cited in* Parklane Hosiery Co. v. Shore, 439 U.S. at 329 n.11.

[77]A plaintiff may join defendants when claims involve the same transaction or occurrence. FED. R. CIV. P. 20. However, jurisdictional requirements must be satisfied. *See generally* F. JAMES & G. HAZARD, *supra* note 1, §§ 12.1-.30.

litigation.[78] Under offensive use, a defendant is precluded from relitigating an issue originally lost against all subsequent plaintiffs. A defendant may wish to join all plaintiffs in the original action to avoid subsequent estoppel, but such joinder is impractical for several reasons. First, a defendant may not be certain who the potential adversaries are. Second, only limited procedural consolidation is available to a defendant.[79] Offensive use thus rarely induces a defendant to join his potential plaintiffs.

Similarly, plaintiffs are not motivated to join in the first action. Plaintiffs may intervene in the initial action[80] but are reluctant to do so as long as they enjoy the possibility of relying upon a predecessor's favorable judgment. If another litigant wins a judgment against the defendant, the waiting plaintiff acquires a favorable judgment free of charge with which to estop the defendant on identical issues. If the defendant wins in a prior suit, the plaintiff who waits has lost nothing; the defendant may not use the judgment against the plaintiff because the plaintiff was not a party to the original suit and thus has not had his day in court as required by due process. Allowing nonparty plaintiffs to use another's judgment induces them to "shrink back, until coerced by the statute of limitations . . . or by other factors, to begin suit, for the claimant who goes first has the most to lose, and the one who goes last the least . . . ."[81] Thus, offensive use induces multiple suits, whereas defensive use induces consolidation of litigation.

E. Summary of the Effects

Nonmutuality advances a policy of fairness in limiting parties to one day in court against all adversaries. It neither aids nor hinders the protection of parties from burdensome relitigation. Nonmutuality contravenes judicial economy, however, especially when asserted

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[78]*See* Parklane Hosiery Co. v. Shore, 439 U.S. at 329-31. *See also* Reardon v. Allen, 88 N.J. Super. at 571-72, 213 A.2d at 32.

[79]A defendant cannot join claimants in federal courts except by necessary joinder if the court decides the plaintiff is an indispensable party, FED. R. CIV. P. 19; by interpleader in the rare situations involving exposure to double liability, FED. R. CIV. P. 22; by consolidation of claims brought in the same jurisdiction, FED. R. CIV. P. 42(a); or by declaratory judgment, if the court permits, FED. R. CIV. P. 57. Many states have adopted procedural rules identical to the federal rules. *See, e.g.*, IND. R. TR. P. 19, 22, 42, 57.

[80]Plaintiffs may join in one action under the rule of permissive joinder if they raise a common issue in asserting a right to relief arising out of the same transaction. FED. R. CIV. P. 20. A plaintiff may intervene in a pending action under the rule of permissive intervention when his claim and the main claim have a common question, as determined by the court in the exercise of its discretion. FED. R. CIV. P. 24(b).

[81]Reardon v. Allen, 88 N.J. Super. at 572, 213 A.2d at 32.

by a nonparty plaintiff. It increases the litigation within original and subsequent suits, but this increase is offset in defensive use by inducing consolidation of suits and thus totally eliminating subsequent litigation. Conversely, offensive use further defeats judicial economy by promoting multiple suits.

Fear of multiple suits contributes to judicial disfavor of offensive use.[82] This multiplicity may be prevented by adherence to a proposal in *Parklane*: plaintiffs who have unjustifiably refused to join in the original suit cannot later use its judgment.[83] If joinder is encouraged by this rule, it will offset additional litigation within the first suit and will totally avoid subsequent suits, similar to defensive nonmutuality.

IV. THE PROCEDURAL TEST OF UNFAIRNESS

A. Development of the Fairness Limitation

Nonmutuality under the *Bernhard* rule proved unworkable in later years. The *Bernhard* opinion reduced collateral estoppel to three requirements: "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?"[84]

The California Supreme Court relaxed this rigid formula fifteen years later in *Taylor v. Hawkinson*.[85] Although the requirements of *Bernhard* were satisfied, the court denied collateral estoppel because its application would unfairly give preclusive effect to a compromise verdict.[86]

Most courts abrogating mutuality have emphasized, as did the *Taylor* court, that its application is limited by fairness to the estopped party.[87] Constitutional due process[88] accounts for the emphasis upon

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[82]*Id.* A second major argument against offensive use is that its application may be unfair to the estopped defendant. *See* Parklane Hosiery Co. v. Shore, 439 U.S. at 329-31.

[83]439 U.S. at 331-33. *See also* notes 149-62 *infra* and accompanying text.

[84]19 Cal. 2d at 813, 122 P.2d at 895.

[85]47 Cal. 2d 893, 306 P.2d 797 (1957).

[86]*Id.* at 897, 306 P.2d at 799. *See* note 110 *infra* and accompanying text.

[87]*See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 330 (1971); Rachal v. Hill, 435 F.2d 59, 62 (5th Cir. 1970); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

[88]*See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 476-514 (1978). The applicable constitutional provisions are the fifth and fourteenth amendments. The fifth amendment reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

fairness, demanding that courts examine the initial action to insure that the estopped party has actually been given a full and fair opportunity to litigate.[89] Ordinarily, the party to be estopped has the burden of proving that he received less than such a full procedural opportunity.[90]

Although attaining new significance with the advent of nonmutuality, unfairness has always prevented application of collateral estoppel, whether asserted by a former party—mutuality—or a nonparty—nonmutuality.[91] However, fairness in offensive nonmutuality is tested differently from mutuality and defensive nonmutuality.[92] The Supreme Court in *Parklane* recognized differing standards of fairness in stating that "[t]he problem of unfairness is particularly acute in cases of offensive estoppel [without mutuality]."[93]

Fairness cannot be defined with precision; it varies with the circumstances of each case.[94] Only a cluster of factors may be extracted from court opinions to measure the fairness of collateral estoppel. Several factors are unique to offensive nonmutuality.[95]

B. An Assessment of Procedural Opportunity

A party who lost in the original suit because he was not given a full and fair opportunity to litigate should not be precluded from relitigating. A court will deny collateral estoppel—mutual or nonmutual—if it decides that the original suit did not give the party to be estopped a procedural opportunity that was both full and fair.

Fullness is determined by comparing the first suit with the second; an opportunity may have been less than full if the second suit afforded procedural privileges unavailable in the first suit. Fairness is determined by examining the first suit for procedural disadvantages which unfairly prevented litigation on the merits. Procedural rules should give neither party an edge because cases should be tried on their merits.[96]

The fourteenth amendment reads: "No State shall . . . deprive any person of life, liberty, or property without due process of the law . . . ." U.S CONST. amend. XIV.

[89]*See* United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-26 (E.D. Wash. 1962).

[90]Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 178 N.Y.S.2d 596, 601 (1967); Hart v. American Airlines, Inc., 61 Misc.2d 41, 46, 304 N.Y.S.2d 810, 813 (Sup. Ct. Special Term 1969).

[91]Sanderson v. Balfour, 109 N.H. 213, 216, 247 A.2d 185, 187 (1968).

[92]*See* text accompanying notes 115-90 *infra*.

[93]439 U.S. at 331 n.15.

[94]United States v. United Air Lines, Inc., 216 F. Supp. 709, 726 (E.D. Wash. 1962).

[95]*See* notes 121-23 *infra* and accompanying text.

[96]*See* Foman v. Davis, 371 U.S. 178, 181-82 (1962).

Factors which courts have considered to determine procedural opportunity include the following: Choice of forum,[97] availability of jury trial,[98] differences between administrative and civil proceedings,[99] differences in evidentiary rules,[100] availability of procedural devices such as discovery[101] and counterclaims,[102] adequacy of representation,[103] availability of new evidence,[104] opportunity to call witnesses,[105] length of trial,[106] jury prejudice,[107] compromise verdicts,[108] and differences in available law.[109]

Procedural disadvantages are weighed to determine whether they justify denial of collateral estoppel. Judicial evaluation of compromise verdicts and jury trial availability illustrate the test of procedural opportunity.

Taylor, a case of mutual collateral estoppel, is typical of the heavy weight usually accorded compromise verdicts. An auto accident was the focus of a prior suit in which an occupant, owner, and driver of one car sued the driver of another car. Judgment was given for the plaintiffs, but the plaintiff-occupant requested a new trial on the basis of inadequate damages. When the second trial resulted in a jury verdict for the defendant, the plaintiff appealed, claiming that collateral estoppel should have prevented the defendant from relitigating the issue of liability. The court refused to

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[97]*See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 968 (1969).

[98]*Compare* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), *with* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[99]*Compare* United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966), *with* North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir. 1976).

[100]*See* Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).

[101]*See* United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962).

[102]*But see* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969) (offensive collateral estoppel applied despite inability of the defendant to assert counterclaim).

[103]*See* United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

[104]*Compare* United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *with* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[105]*See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[106]*Id.* (4-day trial). *See also* United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962) (15-day trial); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct., Special Term 1969) (19-day trial).

[107]*Compare* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964), *with* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

[108]*See* Taylor v. Hawkinson, 47 Cal. 2d 893, 306 P.2d 797 (1957).

[109]*See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); First Nat'l Bank v. Berkshire Life Ins. Co., 176 Ohio St. 395, 199 N.E.2d 86 (1964).

give estoppel effect to the prior judgment, which it found represented a compromise of liability and damages, reasoning: "Defendant did not have his day in court during the first trial on the issue of liability . . . . [A] judgment [is] binding upon him . . . only on the ground that he had an opportunity to attack it."[110] Compromise verdicts in nonmutuality provide an additional reason for denial: giving preclusive effect would enrich a nonparty plaintiff with "the benefit of full damages when no tribunal has ever made a proper finding of liability."[111]

Unlike compromise verdicts, jury trial availability is not widely regarded as an indicator of insufficient procedural opportunity. Authorities have disagreed on the fairness of estopping a party on issues triable to a jury in a second suit but decided previously by a judge. According to the *Restatement (Second) of Judgments*, the availability of a jury trial in the second action is a "fuller procedural opportunit[y]" which indicates that the original litigation was less than fair.[112]

The Supreme Court in *Parklane*, however, refused to construe a jury trial as a procedural advantage:

> It is true . . . that the petitioners in the present action would be entitled to a jury trial of the issues bearing on whether the proxy statement was materially false and misleading had the SEC action never been brought . . . . But the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum.[113]

Thus, the *Parklane* decision prohibits federal courts from considering a jury trial as indicative of fairness. The conflicting views of the jury trial illustrate the unpredictability of the discretionary test of fairness.

Perhaps the Court in *Parklane* too quickly dismissed the procedural consequences of a jury trial. Arguably, a jury is not always a neutral factfinder but "sometimes act[s] capriciously in terms of its theoretical function."[114] Also, assuming that the Supreme Court considers compromise verdicts in its test of fairness, the Court takes a contradictory position by rejecting jury trial availability. On one hand, the Court acknowledges the caprice of jury trials—compromise verdicts—but on the other hand refuses to acknowledge

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[110]47 Cal. 2d at 897, 306 P.2d at 799.

[111]F. JAMES, CIVIL PROCEDURE § 11.31 (1965).

[112]RESTATEMENT (SECOND) OF JUDGMENTS § 88, comment d (Tent. Draft No. 3, 1976).

[113]439 U.S. at 332 n.19.

[114]F. JAMES, *supra* note 111, at 596.

that such caprice may be a procedural advantage—availability of a jury trial.

V. Additional Considerations in Offensive Nonmutuality

A. Higher Risk of Unfairness

As suggested by the *Parklane* opinion, fairness is evaluated by a more rigorous standard when collateral estoppel is asserted by a nonparty plaintiff than when asserted by a party or a nonparty defendant.[115] Additional factors must be weighed in cases of offensive nonmutuality because it carries a higher risk of unfairness than mutuality or defensive nonmutuality.

A plaintiff as instigator has inherent procedural advantages in any litigation. By the filing of the suit, a plaintiff chooses the shape of litigation, the forum, and the time of trial. A plaintiff also decides whether to join in identical litigation pending against the defendant. These advantages may cause disadvantages to the defendant, such as an inconvenient forum.

Additional disadvantages may result when nonparty plaintiffs are permitted to estop the defendant; thus, the chances of unfairness are increased in offensive nonmutuality. For example, the defendant may face massive damages in subsequent suits by unforeseeable plaintiffs after he loses the issue of liability in the first suit.[116] The defendant may be sued repeatedly by multiple plaintiffs who stay out of the original suit although joinder is possible.[117] Multiple suits by successive plaintiffs may expose the defendant to inconsistent verdicts.[118]

Fear of these inequitable situations has caused some courts to limit nonmutuality to use by nonparty defendants.[119] Jurisdictions granting estoppel to a nonparty plaintiff have done so only after a careful search for unfairness. The procedural opportunity test must be applied, with full consideration of the following factors unique to

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[115]*See* note 93 *supra* and accompanying text.

[116]*See* note 121 *infra*.

[117]*See* note 122 *infra*.

[118]*See* note 123 *infra*.

[119]*See* note 4 *supra* for a partial listing of cases which have adopted nonmutuality limited to defensive use. A similar limitation was formulated by Professor Currie. Currie, *supra* note 25. Rather than proposing a blanket prohibition against estoppel of defendants, Professor Currie suggested that collateral estoppel should not apply against a party who lacked "initiative," that is, whose opportunity to litigate was not "complete and unfettered" because the other party controlled the time and place of trial. *Id.* at 303. No court has accepted Professor Currie's suggestion, and the California Supreme Court has specifically rejected it. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).

estoppel of defendants: (1) Forum—the plaintiff may have chosen a forum which was inconvenient for the defendants; and (2) compromise verdicts—a verdict for the plaintiff may have represented a compromise between damages and liability.[120]

In addition to procedural opportunity, offensive nonmutuality demands consideration of the following factors of unfairness: Lack of incentive,[121] availability of joinder,[122] and inconsistent judgments.[123]

B. Incentive

Although a defendant may have received every procedural opportunity, he may not have been motivated under the circumstances to present a full defense.[124] When the liability is small, the defense tends to be less vigorous; giving subsequent effect to the resulting judgment seems unfair.

The *Parklane* opinion emphasized incentive in granting offensive nonmutuality; the Court in its decision relied upon a finding that the defendants "had every incentive to litigate the [prior] SEC lawsuit fully and vigorously."[125] Lack of incentive alone has been sufficient to justify denial of offensive nonmutuality.[126]

Incentive to litigate is intangible. Courts must look to tangible indicators such as the amount of damages,[127] the seriousness of

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[120]*See* notes 97 and 108 *supra* and accompanying text.

[121]*Compare* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), *and* United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *with* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965).

[122]Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[123]*Compare id., and* Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967), *with* Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (Super. Ct. Law Div. 1965).

[124]In denying offensive nonmutuality because minimal damages did not motivate the defendant sufficiently, the court in Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), implied that incentive is distinct from procedural opportunity: "[W]hile not necessarily suggesting that BCPA did not have a 'full and fair opportunity to litigate' in [the prior action], we think it would be unfair in this case to use [the prior] result to the disadvantage of BCPA." The Supreme Court in *Parklane*, however, seemed to confuse procedural opportunity with incentive by relying on the length of trial and the opportunity to call witnesses in its determination of incentive. 439 U.S. at 332 n.18. A defendant does not become motivated by the length of his trial or by the opportunity to call witnesses. However, the defendant may become motivated if the charges against him are serious and if he is aware of an action pending against him, other factors upon which the *Parklane* opinion relied in finding incentive. *Id.*

[125]439 U.S. at 332.

[126]*See, e.g.*, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965).

[127]*See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); United States v. United

allegations,[128] and the foreseeability of future suits[129] to determine whether a defendant was motivated to defend vigorously.

1. Damages.—The amount of damages a defendant faces generally will affect the vigor of his defense. A defendant sued for $500 will put up less of a fight than one sued for $500,000. Minimal damages in the first suit may indicate that the defendant did not contest the issues fully, especially when damages sought in the second suit are disproportionately higher.

The decision in *Berner v. British Commonwealth Pacific Airlines, Ltd.*[130] exemplifies disproportionate damages justifying denial of offensive nonmutuality. The *Berner* litigation arose from a fatal airplane crash. The defendant airlines failed to appeal an adverse judgment of $35,000 awarded to the estate of a deceased passenger. The second plaintiff, seeking over $7,000,000, attempted to preclude the defendant on the issue of liability.

The Second Circuit denied estoppel because the defendant's failure to appeal proved that it had not been motivated to contest liability as vigorously in the first suit as it might have been if faced with the second suit's damages.[131] The court distinguished the grant of offensive nonmutuality in *United States v. United Air Lines, Inc.*[132] on the ground of incentive: "[I]n [that case] . . . the first judgment involved 24 of 31 pending actions; the gravity of the potential liability is shown by the fact that the ultimate judgments against the airline totalled $2,337,308. . . . Obviously, the airline would have exerted its full efforts with so much at stake."[133]

2. Seriousness of the Allegations.—When the plaintiff's complaint charges the defendant with serious wrongs, the defendant is prompted to litigate with vigor.[134] The *Parklane* decision is instructive on the meaning of seriousness. The defendant was charged with

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Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962); McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

[128]*See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).

[129]*See* cases cited note 127 *supra*. *See also* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[130]346 F.2d 532 (2d Cir. 1965).

[131]*Id.* at 541-42.

[132]216 F. Supp. 709 (E.D. Wash. 1962).

[133]346 F.2d at 541. The conclusion the *Berner* court drew from *United Air Lines* parallels the reasoning used in the *United* opinion: the district court inferred from the large potential liability involved that the "parties were thus motivated to try the . . . case in a full and thorough manner." 216 F. Supp. at 730.

[134]Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). *See also* Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962) (felony charge, serious enough to prompt vigorous litigation, estopped defendant in subsequent civil suit).

issuing a proxy statement that was "materially false and misleading."[135] The Court relied upon the "serious allegations made in the SEC's complaint"[136] in concluding that the defendant was sufficiently motivated to litigate the SEC lawsuit fully and vigorously.[137]

3. Foreseeability.—Litigants who anticipate future suits tend to litigate more vigorously to avoid losing an issue which they may later be precluded from relitigating. Defendants, powerless in the instigation of suits, may not foresee future suits by other plaintiffs. If subsequent suits are unforeseeable, a defendant may not be motivated to defend as vigorously;[138] therefore, most courts would deny estoppel. The court in *Evergreens v. Nunan*[139] described the consequences of estoppel in subsequent unforeseeable suits: "Defeat in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train. There is no reason for subjecting the loser to such extravagant hazards . . . ."[140]

The Court in *Parklane* held that the defendants had incentive "in light of . . . the foreseeability of subsequent private suits that *typically* follow a successful Government judgment . . . ."[141] A test of foreseeability may be inferred: future suits are foreseeable if they "typically" follow the original suit. Apparently, a defendant need not be subjectively aware of future litigation because foreseeability is measured by an external objective standard similar to the foreseeability standard in negligence law.[142] The defendants in *Parklane* were actually aware of the pending stockholder's suit,[143] which added weight but apparently was not crucial to the determination of incentive.[144]

A separate opinion in *Zdanok v. Glidden Co.*,[145] however, relied upon the defendant's actual awareness in concurring with the majority's grant of offensive nonmutuality.[146] The defendant in *Zdanok* was estopped from relitigating the interpretation of an employment

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[135]439 U.S. at 324.

[136]*Id.* at 332.

[137]*Id.*

[138]Parklane Hosiery Co. v. Shore, 439 U.S. at 330.

[139]141 F.2d 927 (2d Cir. 1944).

[140]*Id.* at 929.

[141]439 U.S. at 332 (emphasis added). *See also* note 124 *supra.*

[142]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43 (4th ed. 1971).

[143]439 U.S. at 332 n.18.

[144]*Id.* The Court did not mention subjective awareness in the body of its opinion but added it in a footnote. *Id.*

[145]327 F.2d 944 (2d Cir. 1964).

[146]*Id.* at 957 (Lumbard, C.J., concurring).

contract with a second group of employees who had filed suit before the first action began.[147]

Foreseeability appears to be presumed in the litigation of mass accidents, unlike most other cases of nonmutuality. Usually decisions allowing mass-accident plaintiffs to estop the common defendant do not mention whether the defendant could foresee the subsequent litigation.[148] This may be explained by application of the *Parklane* test: multiple suits typically follow mass accidents and are therefore foreseeable.

C. Joinder

1. The Joinder Limitation.—"Joinder" describes procedural methods of unifying claims or parties.[149] Defensive nonmutuality induces joinder by its application because a plaintiff threatened by future estoppel is motivated to join all of his defendants. Unlimited offensive nonmutuality, however, fails to induce joinder because it motivates plaintiffs to sue separately rather than jointly,[150] although joinder is possible in the following ways. The plaintiffs may join in one action if they raise a common question in asserting a right to relief arising out of the same transaction or occurrence.[151] A plaintiff may intervene in a pending action if his claim and the main claim have an issue in common.[152]

Recognizing that unlimited application of offensive nonmutuality fails to promote judicial economy,[153] the Supreme Court in *Parklane* proposed a limitation: if a nonparty plaintiff "could *easily* have joined" in the first action, then he is not later entitled to the benefit of the first judgment.[154] The Supreme Court appeared to pattern its approach after a provision of the *Restatement (Second) of Judgments* which denies estoppel if the party asserting it "*could* have effected joinder in the first action between himself and his present adversary."[155] This "joinder limitation" is further explained in the *Restatement* comments:

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[147]*Id.*

[148]*See* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct., Special Term 1969).

[149]*See* FED. R. CIV. P. 18-25.

[150]*See* notes 76-81 *supra* and accompanying text.

[151]*See* note 80 *supra.*

[152]*Id.*

[153]Parklane Hosiery Co. v. Shore, 439 U.S. at 329.

[154]*Id.* at 331 (emphasis added).

[155]RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975) (emphasis added), *cited in* 439 U.S. at 330 n.13.

> A person in such a position that he might *ordinarily* have been expected to join as plaintiff in the first action, but who did not do so, may be refused the benefits of "offensive" issue preclusion where the circumstances suggest that he wished to avail himself of the benefits of a favorable outcome without incurring the risk of an unfavorable one. Such a refusal may be appropriate where the person could *reasonably* have been expected to intervene in the prior action, and ordinarily is appropriate where he withdrew from an action to which he had been a party.[156]

2. The Limitation Applied.—The joinder rules of *Parklane* and the *Restatement* suggest a potential difference in application, in particular, in deciding under what circumstances a party has failed to join. Under the *Parklane* rule, a plaintiff has failed to join only when he could have *easily* joined.[157] The *Restatement* rule further expands denial for failure to join: a plaintiff has failed when he might *ordinarily* have joined.[158]

Arguably, the *Parklane* rule is too lenient in granting offensive nonmutuality, especially in view of the Supreme Court's application of the principle in *Parklane*. The stockholder in *Parklane* did not attempt to join in the initial action, but the Court nevertheless allowed collateral estoppel: "The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent *probably* could not have joined in the injunctive action brought by the SEC even had he so desired."[159] Thus, the Supreme Court did not require that the plaintiff even attempt to join because he "probably" could not have joined.

The *Parklane* rule appears to be of minimal value as a limitation upon offensive nonmutuality; defendants, who have the burden of proving that estoppel should not apply,[160] face difficulty in proving that a subsequent plaintiff could "easily" and "probably"[161] have joined in the first suit. The *Restatement* rule of joinder appears to be a more effective means of restricting unnecessary suits because plaintiffs will be denied the use of a judgment if they could have "reasonably" and "ordinarily" joined.[162]

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[156]RESTATEMENT (SECOND) OF JUDGMENTS § 88, comment e (emphasis added).

[157]*See* note 154 *supra* and accompanying text.

[158]*See* note 156 *supra* and accompanying text.

[159]439 U.S. at 331-32 (emphasis added).

[160]*See* note 90 *supra* and accompanying text.

[161]*See* notes 154 & 159 *supra* and accompanying text.

[162]*See* note 156 *supra* and accompanying text.

3. The Benefits of the Joinder Limitation.—Denial of offensive nonmutuality for failure to join seems to induce joinder artificially in the same way that defensive nonmutuality naturally induces joinder. When offensive nonmutuality is denied, plaintiffs are motivated to consolidate their claims because waiting will not give them the benefit of estoppel. Furthermore, joining in the litigation may reduce individual litigation expenses when additional plaintiffs share costs. Plaintiffs, discouraged from a "wait and see" attitude, are induced to join.[163] By inducing joinder and thus avoiding subsequent litigation altogether, the joinder limitation appears to align offensive nonmutuality with the goal of judicial economy.[164]

The joinder rule is also useful in preventing any unfairness that may result from unlimited offensive nonmutuality. First, a defendant, fearing an unfavorable verdict that multiple plaintiffs could later use, may feel compelled in the first suit to make an unsatisfactory settlement which has no estoppel effect.[165] By limiting the multiplicity of plaintiffs, the joinder rule reduces, in turn, any compulsion to settle unsatisfactorily. Second, plaintiffs might be tempted to arrange the order of trials so that the plaintiff most appealing to a jury will try his case first.[166] The joinder rule discourages such collusion because subsequent plaintiffs who could have joined cannot use the original judgment. Third, a plaintiff should not be permitted to ignore the public interest in minimizing litigation by avoiding joinder and later use to his advantage the judgment of the suit he avoided joining.[167] Moreover, a plaintiff who could have joined cannot avoid meeting the defendant face-to-face through his unjustifiable refusal to join. If the plaintiff chose to join in the first suit, the defendant will confront the plaintiff on the merits of the litigation. If the plaintiff refuses to join and later sues, the defendant will also confront the plaintiff on the merits: the plaintiff is denied use of the first judgment and thus the issue will be relitigated.

4. Class Actions.—When plaintiffs are so numerous that joinder is impracticable, courts may allow the plaintiffs to be represented in a class action, provided the plaintiffs are similar-

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[163]*See* Semmel, *supra* note 15.

[164]A corollary to the denial of estoppel to plaintiffs who failed to join has been suggested: if a defendant refuses to consolidate pending suits, he cannot complain when he is later estopped because he is responsible for the nonconsolidation. Semmel, *supra* note 15, at 1471-79.

[165]*See* Note, *Res Judicata: The Shield Becomes a Sword, Prior Adjudication of Negligence Bars Relitigation of That Issue by Other Plaintiffs in Subsequent Actions Based on Same Accident*, 1964 DUKE L.J. 402.

[166]*See* Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968).

[167]RESTATEMENT (SECOND) OF JUDGMENTS § 88, comment e (Tent. Draft No. 3, 1976).

ly situated and a class action is a superior form to individual suits.[168] When a class action is instituted under Federal Rule of Civil Procedure 23(c)(2), plaintiffs within the class may choose to opt out or remain in the action.[169] All those who remain within the class are bound as parties by a favorable or unfavorable judgment.[170] Plaintiffs who opt out of the class action are not bound and presumably cannot benefit from the judgment.[171]

The *Restatement (Second) of Judgments* instructs that offensive nonmutuality should ordinarily be refused to a person who withdrew from a class action although his situation was substantially similar to other class members.[172] Denial of collateral estoppel to one who unjustifiably chose not to be a member of the class coincides with the joinder limitation. Allowing plaintiffs to opt out of a class action and later use its judgment would promote additional litigation similar to allowing estoppel to plaintiffs who unjustifiably refuse to join in an action. The reliance by a plaintiff on a judgment from which he chose to opt out would also be unfair to class members who had paid all of the court costs while the subsequent plaintiff had paid none.

D. Inconsistent Judgments

1. Mass Accidents.—Multiple litigation may subject a defendant to judgments that conflict on the issue of liability. The possibility of inconsistent judgments is best seen in the litigation of mass accidents—nearly every victim files a claim against the defendant on the identical issue of negligence. The claims are often adjudicated separately because the plaintiffs typically reside in diverse jurisdictions. Thus, the likelihood of inconsistent judgments is great.

Illustrative of mass accidents is Professor Currie's postulation of a train accident in which fifty passengers are injured.[173] The first twenty-five actions result in victories for the defendant, but the twenty-sixth is decided for the plaintiff. Should the remaining plaintiffs be allowed to use the favorable finding against the defendant? Due process prevents a defendant from using a favorable judgment against new plaintiffs who have not had a chance to litigate.[174] However, due process does not foreclose a nonparty plaintiff from

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[168]FED. R. CIV. P. 23.

[169]FED. R. CIV. P. 23(c)(2).

[170]FED. R. CIV. P. 23(c)(3).

[171]RESTATEMENT (SECOND) OF JUDGMENTS § 88, comment e (Tent. Draft No. 3, 1976).

[172]*Id.*

[173]Currie, *supra* note 26.

[174]*See* note 21 *supra* and accompanying text.

estopping a defendant who has had his day in court.[175] Thus, the remaining plaintiffs can use the aberrational twenty-sixth judgment under a limitless application of offensive nonmutuality.

2. Multiple Plaintiff Limitation.—California rejected multiple plaintiff estoppel in *Nevarov v. Caldwell.*[176] The plaintiffs, parents of an infant passenger, were denied use of the infant's judgment to establish the negligence of a common defendant. The court excluded "multiple claims of different persons for personal injuries or property damage against a single defendant or set of defendants growing out of a single accident"[177] from application of the *Bernhard* doctrine. The court in *Price v. Atchison, Topeka & Santa Fe Railway*[178] followed *Nevarov* in disallowing a nonparty passenger to estop a defendant railroad from relitigating negligence in a train derailment.[179]

3. Denial of Estoppel When Judgments Conflict.—The *Reardon v. Allen*[180] opinion implied that New Jersey also denied offensive estoppel to multiple plaintiffs.[181] The court in *Reardon* refused to allow a nonparty plaintiff to use a prior determination of negligence in an automobile collision because inconsistent judgments were possible.[182]

The same jurisdiction several years later in *Desmond v. Kramer*,[183] however, granted offensive nonmutuality to a bus passenger who had not been a party to the first suit in which fourteen other passengers won a favorable judgment.[184] The *Desmond* court decided that the defendants had a full and fair opportunity to litigate because the original suit approximated a class action, prior verdicts were not inconsistent, and the stakes were high.[185] The *Desmond* opinion instructed: "The problem of inconsistent verdicts can be avoided if, as a practical matter, a rule is adopted which would allow the application of *res judicata* only where there has been no actual inconsistency."[186] The finding of full and fair opportunity apparently accounted for the switch in viewpoints because such a finding seems to provide courts with "a means of overcoming their

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[175]*Id.*
[176]161 Cal. App. 2d 762, 327 P.2d 111 (1958).
[177]*Id.* at 778, 327 P.2d at 119.
[178]164 Cal. App. 2d 400, 330 P.2d 933 (1958).
[179]*Id.* at 403, 330 P.2d at 935.
[180]88 N.J. Super. 560, 213 A.2d 26 (Super. Ct. Law Div. 1965).
[181]*Id.*
[182]*Id.* at 573, 213 A.2d at 32-33.
[183]96 N.J. Super. 96, 232 A.2d 470 (Super. Ct. Law Div. 1967).
[184]*Id.*
[185]*Id.* at 108, 232 A.2d at 477.
[186]*Id.* at 104, 232 A.2d at 475.

reluctance to apply collateral estoppel in the multiple-claimant situation and their fear of irregular results which might occur."[187]

The Supreme Court in *Parklane* adopted a rule identical to that in *Desmond*: "Allowing 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 defendant."[188] The original judgment of liability did not conflict with any prior judgments; thus, offensive estoppel was granted.[189]

Arguably, the inconsistent judgments rule relies too heavily upon the first decision as being correct. A judgment for the defendant in the first suit will prevent subsequent plaintiffs from using a later favorable judgment; thus, the defendant's liability will necessarily be relitigated in each subsequent suit. On the other hand, a judgment for the original plaintiff will preclude the defendant on the issue of liability in all subsequent suits; nonparty plaintiffs need only prove damages. Nevertheless, the inconsistent judgments restriction proves its worth in a sizable way: a defendant is forced to present only one very vigorous defense—in the first suit. If the defendant loses, he will be subsequently precluded from relitigating the issue. If the defendant wins, he may later defend in a normal manner because no fear of future issue preclusion will exist. Therefore, the defendant is relieved from having to defend each suit with full vigor as he would be forced to do if no restriction were placed on multiple plaintiff estoppel.

Another problem is avoided. If the last twenty-four plaintiffs in Professor Currie's example were allowed use of the favorable judgment, the first twenty-five "who emerged from court penniless . . . [would] now look on in horror as others suddenly collect handsome sums without effort . . . ."[190]

VI. Flaws in Nonmutuality Limited by Fairness

A. Shortcomings of the Unfairness Test

1. Insufficient Guideline.—The fairness limitation varies with each court and each case. A court within its discretion decides whether estoppel would be unfair under the circumstances. Replacing the rigid test of mutuality with the discretionary test of unfairness gives courts much leeway in defining what is "unfair."

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[187]47 Neb. L. Rev. 640, 649 (1968).
[188]439 U.S. at 330.
[189]*Id.* at 332-33.
[190]43 Ind. L.J. 155, 160 (1967).

Judicial evaluation of jury trial availability[191] is but one illustration of conflicting notions of fairness. Consequently, the law of preclusion is unpredictable[192] although possibly "no greater than existed under the situation prior to *Bernhard* when the 'mutuality' rule was subject to unpredictable exceptions."[193] A litigant can never be certain of the future effects of a losing judgment because he cannot predict how the next court will judge fairness.

The problem of evaluating a nebulous concept such as fairness is compounded by the difficulty a second court faces in determining from lifeless transcripts the fairness of a case heard by another court. In this context, one authority has questioned: "How can a judge evaluate the vigor of litigation in a case in which he did not sit? How can he weigh the difficulty a defendant faced by being forced to litigate in one jurisdiction rather than another? How did the burden of proof or applicable presumptions affect the result?"[194]

The vagueness and difficulty of the unfairness test may provide courts with an insufficient guideline for proper decision-making. Consequently, the test may be misapplied to the detriment of the estopped party, as the following cases illustrate. The Supreme Court of Minnesota in *Lustik v. Rankila*[195] allowed issue preclusion against a defendant-turned-plaintiff on the issue of negligence decided adversely in the first suit although the original plaintiff had been afforded a presumption of due care.[196] The New York Supreme Court in *Schwartz v. Public Administrator*[197] permitted estoppel in a second action between former codefendants although the estopped party had been unable to interpose a counterclaim initially because of insurance policy regulations.[198] These examples reveal that the discretionary test of unfairness will not insure an accurate and predictable determination of fairness.

2. Limited Consolidation of Parties.—The modern doctrine of nonmutual collateral estoppel does not save subsequent litigation of issues but simply shifts it to heightened original litigation of issues and subsequent litigation of fairness;[199] however, any increase in litigation is offset by consolidation of suits induced naturally in

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[191]*See* notes 112-14 *supra* and accompanying text.

[192]Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 14 (1969).

[193]F. JAMES & G. HAZARD, *supra* note 1, § 11.25, at 584.

[194]Semmel, *supra* note 15, at 1469.

[195]269 Minn. 515, 131 N.W.2d 741 (1964).

[196]*Id.* at 518-19, 131 N.W.2d at 743-44.

[197]24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

[198]*Id.* at 72-73, 246 N.E.2d at 730, 298 N.Y.S.2d at 964.

[199]*See* notes 60-75 *supra* and accompanying text.

defensive-use cases[200] and artificially through a joinder limitation in offensive-use cases.[201]

Procedural joinder is not totally effective in promoting consolidated suits. In cases of defensive nonmutuality, the plaintiff may be unable to find a forum in which to join all defendants because of jurisdictional barriers.[202] Faced with the possibility of future estoppel by defendants he cannot join, a plaintiff is forced to choose his first defendant carefully, selecting the defendant who might be the easiest to defeat.

Joinder in offensive nonmutuality may also be difficult to effect; thus, the joinder limitation may be of minimal value in encouraging plaintiffs to consolidate. Plaintiffs often reside in scattered jurisdictions and may choose to file separately rather than join in an inconvenient forum. When joinder is not "easy"[203] or "ordinary,"[204] the joinder rule will not deny estoppel and thus plaintiffs will not be induced to consolidate. Consequently, plaintiffs will not be discouraged from filing separately and may secretly arrange the order of suits to have the most sympathetic plaintiff file first.[205] Also, the defendant may still feel forced to settle to avoid future estoppel; he may be unable to discern, under present joinder standards, whether a plaintiff waiting to sue has failed to join and thus cannot use estoppel.[206]

If joinder is impracticable, plaintiffs may consolidate in a class action with permission of the court.[207] Class actions are rarely granted, however, particularly when the litigation involves a mass accident. The drafters of the 1966 amendments to the Federal Rules of Civil Procedure caution that a " 'mass accident' . . . is ordinarily not appropriate for a class action . . . ."[208] Class actions have seldom been permitted in mass accident cases; courts are reluctant to bind absent class members in personal injury suits.[209]

The Third Circuit in *Katz v. Carte Blanche Corp.*[210] seemed to undercut the effectiveness of class actions by suggesting that the availability of offensive collateral estoppel may negate the superiority of a class action to individual suits. At the defendant's request, the *Katz* court granted postponement of a class action until a "test

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[200]*See* notes 76-77 *supra* and accompanying text.

[201]*See* note 163 *supra* and accompanying text.

[202]*See generally* F. JAMES & G. HAZARD, *supra* note 1, § 12.1-.30.

[203]*See* note 154 *supra* and accompanying text.

[204]*See* notes 155-56 *supra* and accompanying text.

[205]*See* note 166 *supra* and accompanying text.

[206]*See* note 165 *supra* and accompanying text.

[207]*See* notes 168-71 *supra* and accompanying text.

[208]FED. R. CIV. P. 23 (Notes of Advisory Committee on 1966 Amendment to Rules).

[209]*See* Note, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615 (1972).

[210]496 F.2d 747 (3d Cir. 1974).

case" could decide liability because the defendant was willing to risk estoppel by the future class members if it should lose.[211] Although *postponement* of a class action may be justified under such circumstances, *denial* is not: denying class actions because offensive estoppel exists fosters successive litigation by plaintiffs instead of encouraging them to consolidate their claims.

In summary, consolidation of suits induced by nonmutuality is limited by current restrictions on joinder and class actions. In addition, the joinder limitation on offensive nonmutuality provides little guidance for determining whether a plaintiff has failed to join.[212]

3. Reliance on Incentive.—Offensive nonmutuality requires evaluation of the defendant's incentive to litigate, measured by the foreseeability of future suits[213] and the size of damages.[214] Reliance on these factors may unreasonably compel a vigorous defense.

Foreseeability in *Parklane* supported an inference of incentive, which, in turn, supported a finding of fairness.[215] By implication, when suits are foreseeable, estoppel may apply unless unfair for some other reason. Thus, a defendant is compelled to increase the vigor of his first defense if suits "typically follow"[216] the original suit because the defendant will not be given a second chance to litigate. To allocate adequate funds to the original defense of an issue, the defendant must estimate the worth of potential suits. Imposing a duty to foresee future suits and defend based on an estimation of their worth seems unjust:

> Defendants who have no claims of their own should be under no such procedural obligation. They are thrust into courts at the instance of claimants; they do not of their own motion impose upon the time of the courts. Once in court their only obligation should be to themselves—to defend the present claim as they see fit.[217]

The unfairness of forcing a defendant to defend with full vigor in the first action as if defending against all *future foreseeable* suits is magnified when original damages are minimal. A defendant with little at stake should not be compelled to intensify his defense to the utmost simply because he may foresee a larger claim that might never be filed. Such a result seems not only unjust to the defendant

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[211] *Id.*

[212] *See* notes 157-62 *supra* and accompanying text.

[213] *See* note 129 *supra* and accompanying text.

[214] *See* note 127 *supra* and accompanying text.

[215] 439 U.S. at 332.

[216] *Id.*

[217] Note, *The Impacts of Defensive and Offensive Assertion*, *supra* note 76, at 1055.

of a small suit, but also to the plaintiff who is suddenly faced with a vigorous defense on an issue he expected to dispose of in a brief trial.[218] Consequently, the plaintiff may be forced to give up his valid claim because further pursuit is no longer economically feasible.[219]

To force a vigorous defense merely because future suits are *possible* seems unreasonable. Only when suits are actually pending does the compulsion of a heightened defense seem fair.

B. Inherent Unfairness in Nonmutuality

Nonmutuality rests on the proposition that a person cannot relitigate after having his day in court, but this begs the question "a day in court against whom?"[220] A losing party has not had a day in court *against* the nonparty who estops him; thus, nonmutuality may inherently violate due process if "day in court" is defined as a private contest between parties.[221]

The history of the legal system supports this definition. The lawsuit evolved to protect society from the dangers of unrestricted disputes and still remains a kind of "sublimated, regulated brawl, a private battle conducted in a court-house."[222] The present adversary system is designed to allow opponents to meet in battle; nonmutuality conflicts with this system by allowing a competitor to be declared the loser to one he has never met on the field of contest.[223]

Courts make specific decisions in specific disputes. The Third Circuit described the lawsuit as "not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants."[224] Judgments are tailor-made to the parties they bind.[225] Thus, estoppel by a nonparty may give untoward effect to a judgment fashioned with a former litigant in mind.

Preclusion may be unfair for an additional reason: extraneous factors rather than the merits may decide a case.[226] An Arizona

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[218]Reardon v. Allen, 88 N.J. Super. 560, 572, 213 A.2d 26, 32 (Super. Ct. Law Div. 1965).

[219]Semmel, *supra* note 15, at 1465, 1469.

[220]1B MOORE'S, *supra* note 10, ¶ 0.412[1]. *But see* Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956), in which it was stated: "[T]he fact that a party has not had his day in court on an issue *as against a particular litigant* is not decisive in determining whether the defense of *res judicata* is applicable." *Id.* at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4.

[221]*See* J. FRANK, COURTS ON TRIAL 5-9 (1949).

[222]*Id.* at 7.

[223]Spettigue v. Mahoney, 8 Ariz. App. 281, 286, 445 P.2d 557, 562 (1968).

[224]Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F.2d 143, 145 (3d Cir. 1943).

[225]*See* J. FRANK, *supra* note 221.

[226]*Id.*

court in *Spettigue v. Mahoney*[227] described how such factors may arbitrarily affect a judgment:

> The selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of the presentation of their testimony, the dynamics of the rapport between witnesses and fact-finder, and the personalities and appearances of the parties as they impress the fact-finder in various ways, are all matters that defy scientific analysis, are affected by fortuitous circumstances and variously determine the outcome of a contest conducted in the courts of this country.[228]

Courts have no way of ascertaining whether these elusive factors unfairly influenced the original judgment; consequently, a party may be estopped although the original judgment was arbitrary. Retention of mutuality would minimize the danger of estopping a party on an arbitrary judgment. A losing party prejudiced by such a judgment would suffer its harm only once—at the hands of the original adversary—and not subsequently at the hands of multiple nonparties.

Risk of arbitrary judgments has caused a supporter of mutuality to argue that a party should have as many trials as he has adversaries.[229] Each trial represents a mathematical probability of an accurate and fair judgment; nonmutual estoppel after the first trial diminishes the probability of a fair judgment that a party would have been afforded had he been allowed to relitigate with each adversary.

VII. CONCLUSION

Many jurisdictions have been swept into the tide of nonmutuality begun in California. Nonmutual estoppel of defendants, however, has gained slower acceptance than estoppel of plaintiffs because of the heightened risk of unfairness and increased litigation.

The Supreme Court in *Parklane* instructed federal courts to apply nonmutuality when it seems fair, whether asserted against a plaintiff or a defendant. Many state courts which have resisted offensive nonmutuality are likely to follow the federal lead.

With the safeguard of mutuality gone, however, courts should carefully consider the consequences of allowing nonparties to assert

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[227]8 Ariz. App. 281, 445 P.2d 557 (1968).

[228]*Id.* at 286, 445 P.2d at 562.

[229]*See* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978).

the doctrine. Collateral estoppel must be denied if the party to be estopped would somehow be prejudiced by its application. Courts have examined the procedural opportunity afforded in the first suit to insure that the party had actually had a chance to litigate the issue. The Supreme Court in *Parklane* suggested additional considerations when nonmutual estoppel is asserted against a defendant, namely, incentive, joinder, and inconsistent judgments.[230]

Although courts can readily discern the inconsistency of judgments, they are unable to judge procedural opportunity, incentive, and joinder with complete accuracy and certainty. Judgments may vary as the result of procedural factors as well as extraneous ones not subject to analysis. The motivation of a defendant eludes clear proof. Certainly, the grant of nonmutuality does occasionally work unfairly because the estopped party is unable to prove to the court's satisfaction that he lacked incentive or procedural opportunity.

Nonmutuality treats estopped defendants and estopped plaintiffs unequally. Defendants undoubtedly suffer greater hardship when estopped by nonparty plaintiffs than plaintiffs when estopped by nonparty defendants. If a plaintiff loses in the first suit, he is simply *denied* the relief he requested in the present and future suits. However, a defendant who loses in the first suit is *compelled* by a decision of liability to pay damages proven in all subsequent identical claims. A defendant's first judgment is similar to an "adverse in rem adjudication, with an invitation to the world to make the most of it."[231] A prudent plaintiff will search court records for an adverse judgment against the defendant to use the judgment to the plaintiff's own benefit in his claim. The estoppel effect can be avoided only if unfairness can be proven.

Products liability litigation serves as an example of the crushing burden a losing defendant bears. A manufacturer is sued by a plaintiff for injuries resulting from a faulty product. Countless buyers have purchased the same product. If the manufacturer is held liable, all buyers similarly injured may avail themselves of the judgment on the defect issue because estoppel is fair in light of the factors which courts consider to determine fairness. Given the large number of customers, similar future suits are foreseeable because they may "typically follow,"[232] the charge of products liability is serious enough to expect vigorous defense, and joinder of plaintiffs is impossible because claims arise separately at the time of each injury.

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[230]439 U.S. at 331-33.

[231]Moore & Currier, *supra* note 65, at 309.

[232]Parklane Hosiery Co. v. Shore, 439 U.S. at 332.

Thus, the defendant can be estopped ad infinitum by future users injured by the product.

Perhaps all nonmutuality runs too great a risk of unfairness because fairness cannot be unerringly determined. If fairness is the prime concern of courts, then requiring mutuality may be the best method of meeting this concern. Mutuality guarantees fairness to the party by restricting the effect of the judgment to parties with whom the original party has actually litigated. A nonparty who has not litigated has lost nothing when he is denied the use of a judgment for lack of mutuality.

The rise of jurisdictions adopting nonmutuality, however, indicates that today's crowded courts are willing to risk potential unfairness to minimize litigation. Such risk-taking is sanctioned by the Supreme Court; its *Parklane* opinion directs discretionary application of nonmutuality. The judicial trend to reject mutuality appears well underway, especially after *Parklane*. Offensive as well as defensive nonmutuality will certainly receive wider attention and, perhaps, acceptance in future decisions. Limiting nonmutuality to defensive use, however, seems altogether reasonable in light of the greater hardship a defendant suffers by offensive use. If a defensive limitation is unacceptable, courts at least should retain a distinction between offensive and defensive use. Offensive use is inherently more burdensome and should be applied with greater caution only after application of a strict test for unfairness.

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