JUDGMENTS—COLLATERAL ESTOPPEL—SEC INJUNCTION PROCEEDING GIVEN OFFENSIVE COLLATERAL ESTOPPEL EFFECT IN SUBSEQUENT CIVIL SUIT UNDER FEDERAL SECURITIES LAWS—*Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645 (1979).

In November 1974, a stockholders' class action was brought against Parklane Hosiery Co., Inc. (Parklane) and twelve of its officers, directors and stockholders in federal district court.[1] The action alleged that the proxy statement issued by Parklane on September 24, 1974, was "materially false and misleading," and thus violated several provisions of the Securities Exchange Act of 1934.[2] The proxy statement concerned a proposed merger plan to convert Parklane from a publicly owned corporation into a privately operated company, leaving the individual defendants in complete control.[3] The merger was affirmatively voted on at a stockholders' meeting on October 14, 1974, and implemented soon thereafter.[4] Parklane thus merged with New PLHC Corp., a privately held company owned by the defendants and formed solely for the purpose of the merger.[5] The plaintiff minority shareholders received two dollars per share for their holdings, subject to any dissenting shareholder's appraisal rights.[6] The individual defendants, however, received shares of the newly formed corporation and a right of participation in its future business.[7] The complaint alleged, *inter alia*,[8] that the proxy state-

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[1] Shore v. Parklane Hosiery Co., 565 F.2d 815, 816 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979). Parklane was a company engaged in the retail sale of women's apparel. *Id.*

[2] *Id.* The provisions of the Act alleged to have been violated were § 10(b), 15 U.S.C. § 78j(b) (1976) (manipulative and deceptive devices), § 13(a), 15 U.S.C. § 78m(a) (1976) (inadequate reporting to the SEC), § 14(a), 15 U.S.C. § 78n(a) (1976) (solicitation of proxies in violation of rules and regulations), and § 20(a), 15 U.S.C. § 78t(a) (1976) (joint and several liability of control persons). *Id.*

[3] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 480 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). The overall plan called for the majority shareholder, Herbert N. Somekh, and those associated with him, to transfer their stock to New PLHC Corp., a newly formed corporation. This company would then attempt to obtain the remaining outstanding Parklane shares, resulting in a merger with Parklane and the elimination of the minority shareholders. *Id.*

[4] *See* Shore v. Parklane Hosiery Co., 565 F.2d 815, 816 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979).

[5] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 479–80 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

[6] Shore v. Parklane Hosiery Co., 565 F.2d 815, 816–17 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979). The purpose of appraisal is to determine the true value of shares. *Id.* at 817.

[7] Brief for Respondent at 3–4, Parklane Hosiery Co. v. Shore, 99 S. Ct. 645 (1979).

[8] *See* note 2 *supra* and accompanying text.

ment fraudulently caused the merger[9] and that the defendants were liable pursuant to SEC rule 10b-5.[10] This provision prohibits distribution of a proxy statement in connection with a fraudulent scheme.[11]

In May 1976, about a year and a half after the commencement of the class action but before the decision in that action had been rendered,[12] the Securities and Exchange Commission (SEC) brought a suit in district court[13] against Parklane and its majority shareholder. The complaint was based on the charge that defendants had issued a materially false and misleading proxy statement.[14] Similar to that of the minority shareholders' class action, the SEC alleged that the statement obscured "the true underlying purpose of having Parklane Hosiery Co., Inc. go private."[15] The SEC sought injunctive[16] and

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[9] Brief for Respondent, *supra* note 7, at 3. The minority shareholders' complaint alleged that the proxy statement was false and misleading because it failed to disclose that: (1) the true purpose of the merger was to financially benefit Parklane's president to help him satisfy personal obligations and not to achieve a valid corporate objective; (2) certain lease negotiations could result in a substantial economic benefit to Parklane; and (3) the appraisers who determined the fair value of Parklane's stock were not supplied with sufficient information to be accurate in their evaluation. *Id.* at 4.

[10] *Id.* at 3. Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
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> (1) to employ any device, scheme, or artifice to defraud,
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> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 34.14 (1979).

[11] Shore v. Parklane Hosiery Co., 565 F.2d 815, 817 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979). The minority shareholders sought recission of the merger, damages, costs and such other relief as might be granted by the court. *Id.*

[12] *Id.*

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

[14] *Id.* at 479–80. The SEC, in seeking an injunction and other equitable relief, alleged that the issuance of the September 1974 proxy statement by Parklane was in violation of section 17(a) of the Securities Act of 1933 and sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934. *Id.* Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976), prohibits the use of interstate commerce for fraudulent interstate transactions. For a parenthetical description of the other sections of the securities laws, *see* note 2 *supra*.

[15] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 480 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

[16] *Id.* at 479. The SEC sought an injunction to prevent the defendants from further violating the proxy, antifraud and reporting provisions of the federal securities laws. *See* notes 2 & 14 *supra* and accompanying text.

other equitable relief.[17] The district court found that the omissions and misstatements of the proxy had violated Section 14 (a)[18] of the Securities Exchange Act of 1934. The only relief afforded was an amendment to the proxy statement since the court found the violation "was an isolated occurrence."[19] The Second Circuit affirmed the decision.[20]

Subsequently, the minority shareholders of the class action suit sought partial summary judgment.[21] They contended that the defend-

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SEC enforcement actions are governed by criteria which are less stringent than those in private injunctive actions. SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). *Management Dynamics*, cited for support in *SEC v. Parklane Hosiery Co.*, articulated that:

> Unlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are "creatures of statute." "[P]roof of irreparable injury or the inadequacy of the remedies as in the usual suit for injunction" is not required.

Id. at 808.

The court in *Management Dynamics* reasoned that when the possibility of future violation of the securities laws is clearly demonstrated, the SEC is statutorily exempted from showing irreparable injury. *Id.* Therefore, in SEC suits, the only critical question asked by the courts is whether "there is a reasonable likelihood that the wrong will be repeated." SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); *accord*, Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 394, 405–06 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); SEC v. Culpepper, 270 F.2d 241, 249–50 (2d Cir. 1959).

[17] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 479 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Part of the SEC action was "for ancillary relief to remedy those [violations] which it claims have already occurred." *Id.* Specifically, the SEC suggested that a special counsel be appointed to appraise the fair value of the stock held by the minority shareholders who were eliminated by the merger. The SEC recommended that the counsel be granted the power to calculate and distribute the difference between the amount paid to the minority shareholders who did not dissent to the merger (two dollars per share) and the stock's true value. *Id.* at 486.

[18] 15 U.S.C. § 78n(a) (1976). This section states in part:

> It shall be unlawful for any person, . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

Id.

[19] SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Herbert Somekh was the president of and an investor in Parklane, not a securities dealer or broker, and had never been involved in any impropriety with other Parklane securities transactions prior to this litigation. *Id.* Although Somekh's and Parklane's actions constituted a violation of section 14(a), the court granted only equitable relief. *Id.* This decision demonstrates the second circuit's adherence to the analysis by Mr. Justice Douglas on the role of the equity court in Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) (equity judgment, historically flexible, promotes justice through deterence rather than punishment); *accord*, SEC v. Geon Indus., Inc., 531 F.2d 39, 56 (2d Cir. 1976); SEC v. Management Dynamics, Inc., 515 F.2d. 801, 807 (2d Cir. 1975).

[20] SEC v. Parklane Hosiery Co., 558 F.2d 1083 (2d Cir. 1977).

[21] Shore v. Parklane Hosiery Co., 565 F.2d 815, 818 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979). Petitioners, not yet having offered proof, *see id.* at 818, moved for partial summary judgment only on the issue that the proxy statement was materially false and misleading. *Id.* at

ants were collaterally estopped from relitigating the issue of fact that the proxy statement was false and misleading, since this issue had been resolved adverse to the defendants in the SEC action.[22] This motion was denied by the district court in a terse, "cryptic opinion."[23] The Second Circuit reversed and remanded,[24] holding that collateral estoppel prevented relitigation of identical issues of fact.[25] Because this holding created an intercircuit conflict,[26] the Supreme Court granted certiorari.[27]

In *Parklane Hosiery Co. v. Shore*[28] the Supreme Court affirmed the Second Circuit by an eight to one verdict, with Mr. Justice Rehnquist as the sole dissenter.[29] The majority held that "the petitioners received a 'full and fair' opportunity to litigate" the issues in the prior SEC suit; therefore, the "materially false and misleading" character of the proxy statement could not be relitigated—offensive collateral estoppel applied.[30] The Court further determined that the petitioners' seventh amendment right to a jury trial was not violated by the estoppel arising from the prior, nonjury SEC action.[31]

817–18. Monetary relief under the federal law requires proof of actual injury and damages. 99 S. Ct. at 648 n.2; *see* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 388–90 (1970); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 777–79 (3d Cir. 1976). In addition, suits for monetary claims require scienter. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206–14 (1976).

[22] Shore v. Parklane Hosiery Co., 565 F.2d 815, 818 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979).

[23] *Id.*

[24] *Id.* at 824. Besides determining the collateral estoppel issue, the court also concluded that since the respondents had a full and fair opportunity to litigate the issue in the SEC action, resulting in no issues of fact left for adjudication, the right to a jury trial pursuant to the seventh amendment was not denied by the estoppel. *Id.* at 822. For a full discussion of the seventh amendment issue, see notes 52–72 & 106–13 *infra* and accompanying text.

[25] Shore v. Parklane Hosiery Co., 565 F.2d 815, 816 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979); *see* notes 32–38 *infra* and accompanying text.

[26] Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 648 (1979). The Court of Appeals for the Fifth Circuit, confronted with a similar fact pattern, had determined that a prior holding in an injunction action of violations of the Securities Exchange Act of 1934 and Securities Act of 1933 did not preclude relitigation of the same issue in a civil claim. Rachal v. Hill, 435 F.2d 59, 63–64 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). The *Rachal* court reasoned that since the corporation did not have a jury trial nor a right to one in the injunction action, it had a right to a jury trial in the subsequent civil suit. *Id.* For a further discussion of *Rachal*, see notes 47–51 & 70 *infra* and accompanying text.

[27] Parklane Hosiery Co. v. Shore, 435 U.S. 1006 (1978).

[28] 99 S. Ct. 645 (1979).

[29] *Id.* at 655 (Rehnquist, J., dissenting). Justice Rehnquist, his dissent based solely on the petitioners' right to a jury trial, was not "outraged" by the outcome of the case because he believed the petitioners deserved a finding of violations of the federal securities statutes. *Id.* However, he felt the majority overstepped the boundaries of fairness when they denied petitioners' right to a jury trial. *Id.*; *see* note 54 *infra* and accompanying text.

[30] 99 S. Ct. at 652. *Parklane Hosiery* was the first Supreme Court case to entertain the question of whether the offensive use of collateral estoppel was permissible.

[31] *Id.* at 652.

The purpose of collateral estoppel, similar to that of res judicata,[32] is to expedite litigation in the courts[33] and to finalize the resolution of disputes.[34] Thus, collateral estoppel, as issue estoppel, bars a suit when an identical question of fact essential to that judgment has necessarily been litigated and determined in a prior action involving one or both of the present parties.[35] Traditionally, this issue estoppel required mutuality and could only be used in a defensive manner.[36] The doctrine of mutuality means that a subsequent

[32] Under the doctrine of res judicata, a prior judgment rendered on the merits acts as an absolute bar to a subsequent action between the same litigants, or those in privity with them, when based on the same claim or cause of action. 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 621 (2d ed. 1974); *see* Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). The doctrine has further significance, which the Eighth Circuit has well summarized:

> Whenever a court having jurisdiction has rendered a final judgment upon the merits of a cause of action, that judgment is binding upon the parties and their privies not only as to every matter that was litigated but also to every matter which could have been litigated. In event of subsequent litigation upon the same cause of action, the parties and their privies are precluded from receiving relief.

Towle v. Boeing Airplane Co., 364 F.2d 590, 592 (8th Cir. 1966).

[33] 1B MOORE'S FEDERAL PRACTICE ¶ 0.441[2], at 3779–80 (2d ed. 1974); Tillman v. National City Bank, 118 F.2d 631, 634 (2d Cir. 1941), *cert. denied*, 314 U.S. 650 (1941). Collateral estoppel is "a reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues." *Id.*; *see* Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357 (1967).

[34] *See* Commissioner v. Sunnen, 333 U.S. 591, 598 (1948). The Court stated that "[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Id.* The finality doctrines of collateral estoppel and res judicata preserve the integrity of judicial decisions. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968).

[35] RESTATEMENT OF JUDGMENTS § 68(1) (1942); *see, e.g.*, Commissioner v. Sunnen, 333 U.S. 591, 597–98 (1948); Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 671 (1944).

To best clarify what is meant by "issue" estoppel, a brief comparison of res judicata and collateral estoppel is needed. These doctrines have been called "claim preclusion" and "issue preclusion" respectively. Vestal, *supra* note 33, at 357–59. In claim preclusion (res judicata), the first suit has "an effect upon the totality of the second suit," and can result in the preclusion of the entire subsequent litigation. *Id.* at 357. In issue preclusion (collateral estoppel), the "*issues* of law or fact involved in the second suit" have been affected by the decision in the prior litigation, and the party will be estopped from relitigating those issues already determined. *Id.* at 357 (emphasis in original).

The Supreme Court in Lawlor v. National Screen Serv., 349 U.S. 322 (1955), gave an excellent analysis of the differences between these two judicial devices in more traditional terminology:

> The basic distinction between the doctrines of res judicata and collateral estoppel . . . has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

349 U.S. at 326 (footnotes omitted).

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

claim concerning the same issue can have collateral estoppel effect only if it involves the same parties as the original action.[37] Defensive use of collateral estoppel occurs when a defendant estops a plaintiff from asserting an issue that the plaintiff has litigated and lost in a prior suit.[38]

In 1942, the California supreme court abolished the doctrine of mutuality in the landmark decision of *Bernhard v. Bank of America National Trust and Savings Association*.[39] Justice Traynor reasoned

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[37] *See* RESTATEMENT OF JUDGMENTS § 93 (1942). The Restatement contains the general rule of mutuality:

> a person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered
>
> (a) cannot directly or collaterally attack the judgment, and
>
> (b) is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.

Id.; Blonder-Tongue Lab., Inc. v. University of Ill. Found'n, 402 U.S. 313, 321–22 (1971).

Mutuality, as a controlling doctrine, relates back to Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912). In *Bigelow*, the preceding pro-mutuality case law of the late nineteenth century, *see, e.g.*, Stone v. Farmers' Bank, 174 U.S. 409 (1899); Keohuk & W.R. Co. v. Missouri, 152 U.S. 301 (1894), was summarized and unified by the Court. 225 U.S. at 127. For an example of an early treatise treating the doctrine, see 1A. FREEMAN, LAW OF JUDGMENTS § 428, at 929–32 (5th ed. 1925). For further discussion of the doctrine of mutuality, see notes 39–43 *infra* and accompanying text.

[38] 99 S. Ct. at 650; *see* Note, *supra* note 36 at 1019–32. A modern application of collateral estoppel involves its offensive use. Offensive use forecloses a defendant from relitigating the claims that he had previously argued against another plaintiff and lost. *Id.* The results of applying offensive collateral estoppel differ from those of applying defensive collateral estoppel. The promotion of judicial economy, for example, is not achieved to the same extent in the application of offensive, as it is in defensive collateral estoppel. The initial premise underlying the application of either type of estoppel is that the party must have litigated in a prior suit.

Defensive use acts as a penalty to a plaintiff who does not join all defendants in one action because a decision for the defendant in the first action will estop the plaintiff from relitigating identical issues. Bruszewski v. United States, 181 F.2d 419, 421 n.2 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950) (although plaintiff is under no obligation to consolidate suits, fairness does not require that he be bestowed privilege of re-trying identical issues after failing to do so); Reardon v. Allen, 88 N.J. Super., 560, 571, 213 A.2d 26, 32 (Law Div. 1965). In Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), the California supreme court stated that defensive use of collateral estoppel alleviates the problem of allowing "one who has had his day in court to reopen identical issues by merely switching adversaries." 19 Cal. 2d at 812, 122 P.2d at 895.

Offensive use of collateral estoppel, however, creates the opposite effect. A plaintiff has a reason to adopt a wait and see attitude because a favorable judgment by another plaintiff in a prior action will allow the subsequent plaintiff to bind the same defendant in his suit. *See* Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767–68, 775, 327 P.2d 111, 115, 119 (1958) (offensive collateral estoppel promotes litigation); Reardon v. Allen, 88 N.J. Super. at 571–72, 213 A.2d at 32. In *Reardon*, the New Jersey superior court, law division, acknowledged that the plaintiff who delays in bringing suit is awarded two chances to have an essential issue litigated on the merits. *Id.* For a further comparison of defensive and offensive uses of collateral estoppel, see notes 77–105 *infra*.

[39] 19 Cal. 2d 807, 807, 122 P.2d 892, 892 (1942). In *Bernhard*, an administratrix of an estate filed objections in probate court to an accounting of the estate filed by the previous executor. *Id.* at 808, 122 P.2d at 893. The probate court found that the amount of the estate in dispute

that a party "who has had his day in court" should be prevented from again drawing an issue into controversy by merely changing opponents.[40] Nearly thirty years later in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[41] the Supreme Court, over-

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was distributed by authorization as a gift during the decedent's lifetime. *Id.* The administratrix then brought suit against the bank to recover the money in question on the ground that the decedent never authorized any withdrawals from her account with the bank. *Id.* The court held that the bank was not precluded, by lack of mutuality, from pleading collateral estoppel against the administratrix, since identical issues had been adjudicated by a court of competent jurisdiction—the probate court. *See id.* at 810–11, 122 P.2d at 894–95 (court uses term res judicata broadly as to encompass collateral estoppel).

The mutuality doctrine has been lambasted on public policy grounds at least as early as 1827 when Jeremy Bentham categorized mutuality as "a maxim which one would suppose to have found its way from the gaming-table to the bench." 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827). Nonetheless, according to Professors Moore and Currier, mutuality had been consistently followed in most state courts, with the same being true on the federal level, in cases where they were free to apply their own doctrine. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 304 (1961). Even as recently as the early 1970s, a significant number of state courts had reaffirmed their adherence to this doctrine. *E.g.*, Keith v. Schiefen-Stockham Ins. Agency, Inc., 209 Kan. 537, 498 P.2d 265 (1972); Daigneau v. National Cash Register Co., 247 So. 2d 465 (Fla. Dist. Ct. App. 1971). However, these cases were the last of a dying breed supporting an unpopular belief; the trend turned "away from the rigid requirements of mutuality" towards a more equitable and flexible system. 1B MOORE'S FEDERAL PRACTICE ¶ 0.405, at 53 (2d ed. Supp. 1976).

This movement away from mutuality has long been present but in the guise of "exceptions" to mutuality. *E.g.*, Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63, 68–69 (8th Cir. 1907) (the general rule of mutuality is subject to recognized and rational exceptions). For a general background discussion of the exceptions to mutuality, *see* Note, *supra* note 36, at 1015–17. In *Bernhard*, Justice Traynor rejected classification of the issue before him as an "exception," and as one commentator wrote, "chose instead to extirpate the mutuality requirement and put it to the torch." Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 26 (1965).

[40] 19 Cal. 2d at 812, 122 P.2d at 895.

When this previous opportunity to litigate is given, mutuality must then yield to the ever-present public policy of finality. Otherwise, a party who has lost on a question of fact will "re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one." Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 132–33, 172 A. 260, 263 (1934). The main thrust in abandoning mutuality is broader than merely achieving "efficient judicial administration." Blonder-Tongue Lab., Inc. v. University of Ill. Found'n, 402 U.S. 313, 328 (1971). The courts must decide "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.*

Of course, the opportunity to initially litigate the issue cannot be extinguished, either by res judicata or by offensive or defensive use of collateral estoppel, because of the constitutionally guaranteed privilege of due process. 19 Cal. 2d at 810, 122 P.2d at 894. Justice Traynor reiterated "that no person [may] be deprived of personal or property rights by a judgment without notice and an opportunity to be heard." *Id.*; *see Blonder-Tongue*, 402 U.S. at 329 ("[s]ome litigants—those who never appeared in prior action—may not be collaterally estopped without litigating the issue"); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (litigants must be "afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes"); Moore & Currier, *supra* note 39, at 308.

[41] 402 U.S. 313 (1971).

ruling the long controlling case of *Triplett v. Lowell*,[42] adopted the reasoning of *Bernhard* and thus abolished the requirement of mutuality on the federal level.[43]

The rationale which led to the abolishment of mutuality, namely affording a party only one fair and full opportunity to litigate, contributed to the use of offensive collateral estoppel in several state courts.[44] Offensive collateral estoppel gives a plaintiff, who had not

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[42] 297 U.S. 638 (1936). In *Triplett*, the Court succinctly stated the majority rule which had required mutuality:

> Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense.

Id. at 642. *Contra, see* notes 39–44 *supra* and accompanying text. The *Triplett* Court, like some other early courts, used the term res judicata to encompass the doctrine of collateral estoppel. *See, e.g., Developments, Res Judicata*, 65 HARV. L. REV. 818, 820 n.1 (1952). Both these doctrines required the same parties in the second suit as in the first suit. Even today, res judicata requires the same parties in the second suit, *see* note 32 *supra* and accompanying text, although the specific word "mutuality" is almost exclusively used with respect to collateral estoppel. For cases adhering to the doctrine of mutuality, see note 37 *supra* and accompanying text.

[43] 402 U.S. at 317–27, 349–50. In *Blonder-Tongue*, two separate suits involving a patent were brought by the same plaintiff against different defendants. The Seventh Circuit upheld the validity of the patent while the Eighth Circuit held that it was invalid. *Id.* at 314–17. On appeal, the Supreme Court asked that the question of mutuality be argued, and in its opinion, rejected the doctrine, thus overruling *Triplett*. *Id.* at 317, 349–50.

[44] B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967) is one of the first cases in which a state court had both specifically *identified* and *allowed* the "offensive" use of collateral estoppel. The court applied the rationale of allowing only one opportunity to litigate and found that "there seems to be no reason in policy or precedent to prevent the 'offensive' use of a prior judgment" by a nonparty. *Id.* at 143, 278 N.Y.S.2d at 598, 225 N.E.2d at 196. In *DeWitt*, the defendant's jeep collided with a truck owned by the plaintiff and operated by the plaintiff's employee. *Id.* The employee sued for personal injuries and recovered a $5,000 verdict; two months later, the plaintiff sued defendant for property damage to the truck. *Id.* The Court of Appeals of New York reinstated the decision of the trial court which had granted plaintiff's motion for summary judgment. *Id.*

Though *DeWitt* was one of the first state courts to so name the use as "offensive," courts in New York had allowed the affirmative use of collateral estoppel for years before 1967. *See, e.g.*, United Mut. Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 626 (1947); Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932). Similarly, other states, such as Ohio and New Jersey, applied collateral estoppel offensively but did not specifically categorize the use as "offensive." For example, in Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (Law Div. 1967), fourteen passengers of a bus, which had been involved in an accident with another bus and a truck, successfully sued the defendants (owner and driver of the truck, and the bus company) in a consolidated action. In a subsequent consolidated suit for contribution among the defendants and for liability to a plaintiff passenger not a party to the prior actions, the court found that the prior judgment establishing the bus company's negligence as the concurrent efficient cause of the accident estopped the defendants from relitigating that issue. 96 N.J. Super. at 97–106, 232 A.2d at 471–76. *See also* Hicks v. De La Cruz, 52 Ohio St. 2d 71, 369 N.E.2d 776 (1977).

been a party in a prior adjudication, the right to prevent a defendant, who had been a party, from relitigating an issue adversely determined.[45] At the federal level, the doctrine had been applied offensively by a minority of courts even before the Supreme Court decision in *Parklane Hosiery*.[46]

A Fifth Circuit case which denied the application of collateral estoppel in an offensive use situation, basing its decision on the primacy of the jury trial right, was *Rachal v. Hill*.[47] This case is representative of the standard approach taken by the federal courts before *Parklane Hosiery*. In *Rachal*, a derivative action was filed in the district court against the chairman of the board, the president and the secretary-treasurer of a corporation to recover damages sustained from violations of the Securities Exchange Act of 1934 and the Securities Act of 1933.[48] Prior to the filing of this suit, the SEC brought

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[45] B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 146–47, 278 N.Y.S.2d 596, 601–02, 225 N.E.2d 195, 198–99. The Supreme Court in *Parklane Hosiery* distinguished the technical differences between offensive and defensive use as follows:

> In this context, offensive 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.

99 S. Ct. at 649 n.4. For a more detailed discussion of offensive collateral estoppel, see note 38 *supra* and notes 46–51 *infra* and accompanying text.

[46] *E.g.*, Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964). *Zdanok* involved two suits (the other was Alexander v. Glidden Co.) by two groups of employees against the same employer. The *Alexander* action was filed first, but the *Zdanok* action, filed two years later, was litigated first. 327 F.2d at 946–49. The plaintiffs in *Zdanok* lost at the trial level but, on appeal, won a judgment on the merits. Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961). The *Alexander* case, in modified form, then came before the same federal district court, and the defendant corporation tried to reopen *Zdanok* on the merits in light of additional information and evidence. 327 F.2d at 946–47. After weighing the principles behind the "law of the case" doctrine and the finality considerations of collateral estoppel, *id.* at 952–53, the court, in what was effectively an offensive application of collateral estoppel, found for the plaintiff employees. *Id.* at 954–55.

Procedurally, *Zdanok* is similar to *Parklane Hosiery*. Glidden, defendant corporation, had a full and fair opportunity to litigate the *Zdanok* case, and the defendant's argument that it would have defended more diligently if both the *Zdanok* and *Alexander* actions were combined was rejected by the court. *Id.* at 955–57. Glidden could not argue that it was unfairly surprised by the estoppel effect of the *Zdanok* judgment because Alexander's action in the state court, which awaited the *Zdanok* decision, was known to Glidden. Alexander's action was filed first and heard last, and Glidden fought the case up through the United States Supreme Court. *Id.* at 946–49. *See also* Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd* as to res judicata *sub. nom.*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); McHone v. Montgomery Ward & Co., 406 F. Supp. 484 (S.D. Ohio 1975).

[47] 435 F.2d 59, 63–64 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

[48] *Id.* at 60.

an injunctive action in which it was found that the defendants violated the securities laws.[49] When the stockholder derivative suit reached the court of appeals, that court held that an injunctive proceeding[50] would not preclude relitigation of an issue in a civil action—otherwise, defendants would be denied the right to a jury trial.[51]

The seventh amendment,[52] which granted the right to a jury trial, was designed to preserve and protect the right as it existed in 1791.[53] A trial by jury has been considered by some since the beginning of our nation to be the last stronghold against overzealous courts. Thomas Jefferson stated that "trial by jury [is] the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[54] Through the years, however, the constitutionality of certain procedural devices has lessened the mystique of the hallowed right to a jury trial.[55]

In *Galloway v. United States*,[56] the Supreme Court determined that the judicial system of today should not be bound by procedural rules and peculiarities utilized by the courts in 1791.[57] The Court

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[49] *Id.* at 60–61.

[50] *Id.* at 63–64.

[51] *Id.* The court in *Rachal* was influenced by the reasoning of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (to deprive party of jury trial by adjudicating equitable claim first is abuse of court's discretion except under most extraordinary circumstances), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (though equitable and legal issues may be joined in one suit, the seventh amendment's guarantee of jury trial is not lost).

[52] The seventh amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. For an in depth analysis and discussion of the history of the seventh amendment, see Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

[53] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

[54] 3 WRITINGS OF THOMAS JEFFERSON 71 (Washington ed. 1861). Justice Rehnquist in his dissenting opinion in *Parklane Hosiery* agreed with the reasoning of Jefferson:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

99 S. Ct. at 657 (Rehnquist, J., dissenting). *See also* Wolfram, *supra* note 52, at 653–73.

[55] *Galloway v. United States*, 319 U.S. 372, 388–93 (1943) (directed verdict); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–98 (1931) (order for retrial limited to question of damages); Fidelity and Deposit Co. of Md. v. United States, 187 U.S. 315, 319–21 (1902) (summary judgment); Peterson v. Albano, 158 N.J. Super. 503, 506–07, 386 A.2d 873, 875 (App. Div. 1978) (summary dispossess action).

[56] 319 U.S. 372 (1943).

[57] *Id.* at 390–92. *Compare* Galloway v. United States, 319 U.S. 372 (1943) *with* Dimick v. Schiedt, 293 U.S. 474 (1935), in which the Court made an important distinction between the

reasoned that the conclusion which both history and prior case law would support was "that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."[58] Consequently, it held that a directed verdict, entered prior to a jury determination, did not violate the constitutional right of trial by jury.[59]

In 1959, sixteen years after *Galloway*, the vitality of the jury trial right was asserted by the Supreme Court in *Beacon Theatres, Inc. v. Westover*,[60] where the Court was faced with legal and equitable claims present in the same action.[61] The defendant in *Beacon Theatres* sought an equitable declaratory judgment in anticipation of an antitrust treble damage suit by the plaintiff.[62] The plaintiff then filed a counterclaim alleging the antitrust violations and demanded a jury trial.[63] The district court determined the nonjury equitable action first, which included issues common to both proceedings, before hearing the counterclaim suit.[64] Although the court of appeals held that the lower court acted within the scope of its discretion,[65] the Supreme Court reversed.[66] The Court recognized that the earlier decision based on equitable grounds might have a collateral estoppel effect in the petitioner's treble damage action, resulting in a denial of the jury trial right.[67] The Court held, however, that the constitu-

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constantly changing common law generally, and the seventh amendment which was based on a specific common law: The common law is

> not immutable, but flexible, and upon its own principles adapts itself to varying conditions . . . . But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is fundamental . . . .

293 U.S. at 487; Walker v. New Mexico and S. Pac. R.R., 165 U.S. 593, 596 (1897) (substance of right to jury trial should be preserved, not incidental practices of common law in 1791).

[58] 319 U.S. at 392.

[59] *Id.*

[60] 359 U.S. 500 (1959).

[61] *Id.* at 510–11.

[62] *Id.* at 501–04.

[63] *Id.* at 503.

[64] *Id.* at 503–04. The district court acted within the discretion purportedly authorized by rules 42 and 57 of the Federal Rules of Civil Procedure. *Id.* Rule 42 allows the court to order a separate trial "in furtherance of convenience or to avoid prejudice." FED. R. CIV. P. 42(b). Rule 57 allows the court to "order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." *Id.* 57.

[65] Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).

[66] 359 U.S. at 511.

[67] *Id.* at 504. For a discussion of collateral estoppel, see notes 32–51 *supra* and accompanying text.

tional right to a jury trial severely limits the courts' discretion to determine claims in equity first.[68] It further stated "that only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[69]

Beacon Theatres, capable of differing interpretations, was construed by the Fifth Circuit in *Rachal* to hold that the right to a jury determination of a legal issue is preserved even where a parallel equitable action is heard first.[70] The Second Circuit in *Shore v. Parklane Hosiery Co.*,[71] however, construed *Beacon Theatres* as implicitly confirming the principle that an earlier determination of issues in an equitable action "will collaterally estop" adjudication of the same issues in a subsequent jury trial.[72]

The primary question emphasized by the Supreme Court in *Parklane Hosiery*, however, did not involve the right to a jury trial.[73]

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[68] *Id.* at 510–11.

[69] *Id.* The Court stressed the importance of litigating the legal issue first when both legal and equitable issues are joined in one action because of the possible denial to a party of his right to a jury trial. *Id.*; *cf.* Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76, 78 (2d Cir. 1974) (to proceed with non-jury trial in one case would threaten destruction of defendant's right to jury trial in related case).

[70] 435 F.2d at 64. *Rachal* received widespread acceptance in both federal and state courts. *E.g.*, Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 111 n.7 (7th Cir. 1974); Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990, 993–94 (S.D.N.Y. 1971); Delta Airlines, Inc. v. Woods, 137 Ga. App. 693, 697, 224 S.E.2d 763, 766 (1976). In SEC v. Standard Life Corp., 413 F. Supp. 84 (W.D. Okla. 1976), for example, the district court stated that it was "of the opinion that the holding in *Rachal v. Hill* . . . is sound and would apply in the instant case." *Id.* at 87.

[71] 565 F.2d 815 (2d Cir. 1977), *aff'd*, 99 S. Ct. 645 (1979).

[72] *Id.* at 820–21. The Second Circuit indicated that the common law of 1791 had no relevance in the present case because of the lack of any 1791 proceeding which would be analogous to either an SEC hearing or a minority shareholder derivative suit. *Id.* at 823. While *Parklane Hosiery* was the first case to flatly reject *Rachal*, an earlier Second Circuit case had questioned it. Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 n.15 (2d Cir. 1973) ("we are not at all sure that *Rachal* was correctly decided").

Similar to *Parklane Hosiery*, the Tenth Circuit had also intrepreted *Beacon Theatres* to mean that collateral estoppel might operate to bar relitigation when the equitable claim is heard first. Meeker v. Ambassor Oil Corp., 308 F.2d 875 (10th Cir. 1962). However, the Supreme Court reversed the Tenth Circuit with a one-line opinion citing *Beacon Theatres*. Meeker v. Ambassor Oil Corp., 375 U.S. 160 (1963). Thus, the Supreme Court seemed to adopt an interpretation of *Beacon Theatres* similar to that later adopted by *Rachal*. *See* notes 47–51 *supra* and accompanying text. The Supreme Court in Katchen v. Landry, 382 U.S. 323 (1966), apparently reversed the position it had taken in *Meeker*. It recognized that there might be instances when a court should resolve the equitable claims first regardless of the possible loss of the party's opportunity to argue the legal claims. 382 U.S. at 339. *Katchen* was viewed by the Supreme Court in *Parklane Hosiery* as confirming "that an equitable determination can have collateral estoppel effect in a subsequent legal action, and that this estoppel does not violate the Seventh Amendment." 99 S. Ct. at 653.

[73] 99 S. Ct. at 648–49.

The major issue was whether collateral estoppel should be allowed after the petitioners had a full and fair opportunity to litigate their claims during a prior SEC action.[74] Specifically, it had to be determined whether the prior judgment could be used by a litigant not a party to the earlier proceeding to offensively estop the petitioner on issues previously resolved.[75]

In discussing offensive collateral estoppel, the Court observed that in both offensive and defensive use, the party against whom estoppel is asserted has litigated and lost in an earlier action.[76] Aside from this general similarity, the Court recognized several differences in application of the two doctrines.[77] First, defensive use of collateral estoppel promotes judicial economy while offensive use does not.[78] When applied defensively, a plaintiff is precluded from relitigating identical claims by simply "switching adversaries" because he is bound by the suit previously litigated.[79] The Court observed that this creates a powerful incentive for plaintiffs to combine all potential defendants in the initial action, whenever feasible, because that action will be his only legitimate chance to argue a given issue.[80] The offensive use of collateral estoppel produces the opposite result.[81] Since a plaintiff is not bound by a decision in which he is not a party, the incentive is to delay filing suit in the hope that an action by a different plaintiff will be decided against the defendant.[82] If the different plaintiff were successful, collateral estoppel could be applied offensively and the plaintiff would profit from his procrastination.[83] Thus, the Court pointed out that offensive collateral estoppel fosters an increase in litigation rather than a decrease because a plaintiff has

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[74] *Id.*

[75] *Id.* at 649. For a discussion of offensive use of collateral estoppel, see notes 44–51 *supra* and accompanying text.

[76] 99 S. Ct. at 649.

[77] *Id.* at 650–51. *See generally* Note, *supra* note 36. For a general discussion of the differences, see note 38 *supra* and accompanying text.

[78] 99 S. Ct. at 650.

[79] *Id.*; *see* Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

[80] 99 S. Ct. at 650–51.

[81] *Id.* at 651.

[82] *Id.*; *see, e.g.*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767–68, 327 P.2d 111, 115 (1958); Reardon v. Allen, 88 N.J. Super. 560, 571–72, 213 A.2d 26, 32 (Law Div. 1965). In *Reardon*, the court felt it was unfair for the plaintiff to delay bringing suit "in the hope that the first action by another claimant [would provide] a favorable result." *Id.* at 571, 213 A.2d at 32. For a discussion of the extent to which collateral estoppel may be constitutionally applied, see note 40 *supra*.

[83] 99 S. Ct. at 651.

"everything to gain and nothing to lose by not intervening in the first action."[84] This drawback to offensive collateral estoppel was not found to preclude the doctrine's application in *Parklane Hosiery*, since Shore could not possibly have joined in the prior SEC action without SEC approval.[85]

A second difference clarified by the Supreme Court was that offensive use of collateral estoppel might be unfair to the defendant in several circumstances.[86] One situation is when a future suit is not foreseeable. The defendant in the original action might see little reason to expend a large quantity of money to defend that suit, especially if the damages sought are nominal.[87] However, in an unforeseen future suit, the damages sought against him could be enormous.[88] This problem, similar to that of increased litigation, was not present in the facts of *Parklane Hosiery*.[89] The Court held that the appellants "had every incentive to litigate the SEC lawsuit fully and vigorously,"[90] noting that the minority shareholder suit was pending the outcome of the SEC action.[91] Due to the serious SEC allegation of a false and misleading proxy statement and the natural desire to avoid future liability, a spirited defense was likely to follow.[92]

The Court pointed out that further unfairness could result to the defendant if the previous judgment, relied upon by the new plaintiff as the basis for estoppel, was inconsistent with prior judgments favoring the defendant.[93] The well-known hypothetical in which a collision injures fifty passengers, each of whom files a personal injury action against a railroad,[94] was mentioned as an example.[95] In the

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[84] *Id.*

[85] *Id.* at 652. 15 U.S.C. § 78 u(g) prohibits consolidation of an SEC action with a private action without the consent of the SEC. *Id.*; *cf.* SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (2d Cir. 1972) (SEC workload would be increased by intervention of private litigants with resultant complication of litigation).

[86] 99 S. Ct. at 651.

[87] *Id.*

[88] *See id.*; Berner v. British Commonwealth Pac. Airlines Ltd., 346 F.2d 532, 538–41 (2d Cir. 1965). In *Berner*, a prior action resulted in a judgment for the plaintiff of $35,000 and the defendant did not appeal. A subsequent suit for over seven million dollars was filed by a different plaintiff who moved for offensive application of collateral estoppel. The court denied plaintiff's motion because of the gross unfairness which would result to the defendant. *Id.*

[89] 99 S. Ct. at 652; *see* notes 90–93 *infra* and accompanying text.

[90] 99 S. Ct. at 652.

[91] *Id.*

[92] *See id.* Subsequent suits filed by shareholders typically follow an SEC action decided in favor of the commission. *Id.*

[93] *Id.* at 651.

[94] Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 304–10 (1957).

[95] 99 S. Ct. at 651 n.14.

hypothetical, the defendant wins the first twenty-five suits but loses the twenty-sixth.[96] The Court noted Professor Currie's argument that collateral estoppel should not be applied offensively to allow the next twenty-four plaintiffs automatic recovery.[97] In *Parklane Hosiery*, since the judgment in the SEC action was not inconsistent or conflicting with any prior decision, the Court could not find this unfairness.[98]

Still another situation, noted by the Court, where offensive collateral estoppel could work unfairness against a defendant is when a second action would allow the defendant to apply procedural devices, unavailable in the original action, which could readily lead to a different result.[99] An example would be a situation where a defendant, unable to choose the forum in the first action, is forced to argue in an inconvenient setting. This could prevent the defendant from engaging in extensive discovery and could restrict the calling of witnesses.[100] The Court in *Parklane Hosiery* found that the procedures available to the defendant in the SEC suit were adequate.[101]

Despite the negative factors that an application of offensive collateral estoppel sometimes presents, the Court applied the doctrine. To summarize, the petitioners were estopped from relitigating the issue of whether there was a false and misleading proxy statement because the minority shareholders could not have joined in the earlier SEC action. The petitioners had a full and fair opportunity to argue their claim in the SEC suit and the application of the estoppel was not viewed as unfair.[102]

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[96] *Id.* After winning the first suit, the defendant cannot estop subsequent plaintiffs because these litigants have never had their day in court. Collateral estoppel, whether offensive or defensive, can only apply against a party who has had a fair and full opportunity to litigate. *See* notes 74–75 *supra* and accompanying text.

[97] 99 S. Ct. at 651 n.14. Professor Currie elaborated that it would be unfair for the defendant to "be bound by the aberrational twenty-sixth judgment while being unable to rely on the [previous] twenty-five." Currie, *supra* note 94, at 304–10. Even in the absence of the extraordinary circumstances of his hypothetical, Professor Currie was against the principle of offensive collateral estoppel. He stated that the defendant "did not enjoy the initiative in the prior action or actions, and hence by hypothesis enjoyed something less than a realistic opportunity to present its defense fully and effectively." *Id.* at 310.

[98] 99 S. Ct. at 652.

[99] *Id.* at 651.

[100] *Id.*; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 88(2), (Comment) at 92–93 (Tent. Draft No. 2, 1975).

[101] 99 S. Ct. at 652. The Court rejected any contentions that the right to a jury trial is the type of procedural opportunity falling under this exception. It felt that "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." *Id.* n.19.

[102] *Id.* at 651–52; *see* notes 77–101 *supra* and accompanying text.

The Supreme Court thus reasoned that the preferable approach in dealing with offensive collateral estoppel, rather than precluding the doctrine, was to grant trial courts "broad discretion" in determining when to apply it.[103] Trial courts must determine whether the plaintiff could have easily joined in the prior action[104] and whether the offensive application of collateral estoppel would be unfair to the defendant.[105]

After discussing the doctrinal implications of an offensive application of collateral estoppel, the Court briefly addressed the question "whether, notwithstanding the law of collateral estoppel, the use of offensive collateral estoppel in this case would violate the petitioners' Seventh Amendment right to a jury trial."[106] Although the Court recognized that the purpose of the seventh amendment was to maintain the essence of the jury trial right of 1791,[107] a rigid interpretation was not adopted in light of modern procedural developments.[108] The Court utilized the rationale of *Galloway* and held that developments in procedural doctrines, such as collateral estoppel, "are not repugnant to the seventh amendment simply for the reason that they did not exist in 1791."[109]

The Court focused on dicta from *Beacon Theatres* that seemed to admit that, if an equitable claim was heard prior to a legal claim, the result, due to collateral estoppel, could be the denial of a trial by jury.[110] Justice Stewart then adopted the Supreme Court's reasoning in *Katchen v. Landry*[111] and concluded that nothing in the seventh amendment foreclosed such a result.[112]

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[103] 99 S. Ct. at 651. A total ban on offensive collateral estoppel would have been inappropriate because the current trend is away from the offensive/defensive distinction. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 99 (Tent. Draft No. 2, 1975). The emphasis of the courts is centered on whether an individual has ever had a fair and full opportunity to litigate an issue. For a discussion of the development of this rationale which led first to the abolishment of mutuality and then to the use of offensive collateral estoppel, *see* notes 39–46 *supra* and accompanying text.

[104] *See* notes 77–85 *supra* and accompanying text.

[105] 99 S. Ct. at 651–52.

[106] *Id.* at 652. *See generally* notes 47–72 *supra* and accompanying text.

[107] 99 S. Ct. at 652.

[108] *Id.* at 654. For a discussion of procedural devices developed since 1791, see notes 55–57 *supra* and accompanying text.

[109] 99 S. Ct. at 654.

[110] *Id.* at 653. For a discussion of *Beacon Theatres*, *see* notes 60–69 *supra* and accompanying text.

[111] 382 U.S. 323 (1966). In *Katchen*, the Court acknowledged that there might be situations where it would be appropriate to determine equitable claims first. *Id.* at 339.

[112] 99 S. Ct. at 653–55. In addition, the Court cut back on the strong language in *Beacon Theatres* favoring a jury trial where legal and equitable claims are present in the same action and the district court has a choice as to which claims to hear first. *See id.*; notes 62 & 65 *supra*

Although the decision in *Parklane Hosiery* represents a step forward for the proponents of collateral estoppel, it presents a disturbing corollary—the amount of power indirectly granted to the SEC and other agencies. For example, in private civil suits dealing with violations of the securities laws, the SEC will often simultaneously initiate an injunctive action against the defendant. Since a decision in an SEC equity action will collaterally estop a defendant from relitigating an issue, such as the existence of a false and misleading proxy statement, the SEC can now wield a powerful sword in the enforcement of the securities laws.[113] Prior to the circuit court opinion in *Parklane Hosiery*,[114] an injunctive action brought by the SEC generally had no definite effect, either directly or indirectly, on civil suits for damages.[115] In the future, however, it will be imprudent for a defendant to challenge an SEC directive due to the collateral estoppel effect of a subsequent SEC suit in district court.

In SEC actions, the likely consequence will be an increase in consent agreements between the SEC and defendants since consent agreements have no collateral estoppel effect.[116] Thus, in cases where the SEC has commenced suit, the practical result of the adoption of offensive collateral estoppel will be to frustrate the doctrine's purpose of preventing multiple litigation. In addition, consent agreements themselves are not desirable because defendants will be forced to adhere to a one-sided view of the securities laws. These laws can only be well served if the SEC can be fearlessly challenged when it oversteps its bounds.

The only limitation on the use of collateral estoppel following an SEC action will be technical deficiencies such as lack of identity of issues in the SEC suit and a subsequent civil action.[117] For example, since the issue in a rule 10b-5 injunctive proceeding may merely be whether the party acted negligently and the issue in the civil action is whether the party acted intentionally,[118] collateral estoppel

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and accompanying text. Justice Stewart stated that *Beacon Theatres* "enunciated no more than a general prudential rule." 99 S. Ct. at 653.

[113] *See* Note, *Collateral Estoppel and the Right to a Jury Trial*, 57 NEB. L. REV. 863, 875–76 (1978). *See generally* Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions*—Rachal v. Hill, 71 COLUM. L. REV. 1329, 1340–43 (1971).

[114] 565 F.2d at 823–24; *see* note 72 *supra* and accompanying text.

[115] *See* Note, *Right to Jury Trial and Collateral Estoppel in Securities Litigation*, 42 ALB. L. REV. 733, 741 (1978); notes 46 & 70 *supra* and accompanying text.

[116] *E.g.*, RESTATEMENT OF JUDGMENTS § 68, Comment e at 9 (Tent. Draft No. 4, 1977); *see* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 (1955).

[117] *See* note 35 *supra* and accompanying text.

[118] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12, 206–14 (1976). The Court in *Hochfelder* expressly held that in rule 10b-5 civil actions, intent must be proved. However, the Court made no determination as to the requirement in injunctive proceedings. 425 U.S. at 194

would not apply as to state of mind.[119] Only the fact of whether a statement was false and misleading would be estopped from being relitigated.[120] Thus, whether the falsity arose through negligence or intent would still be an open question in the subsequent civil suit.

In allowing offensive collateral estoppel in the federal system, *Parklane Hosiery* solidified the concept that a litigant have only one fair and full opportunity in the courts. However, Congress should consider passing legislation whereby administrative proceedings would not have collateral estoppel effect but would merely be treated as rebuttable evidence of a violation.[121] With such an approach, not only would the resources and expertise of the SEC, in the form of its findings, be utilized in the subsequent suit, but also the defendant's right to a jury trial would remain substantially intact.

Significantly, the SEC and other agencies can partially avoid both the overreaching problem created by the *Parklane Hosiery* decision, and the conflict between the offensive application of collateral estoppel and the seventh amendment right to a jury trial. When requested by a defendant, an administrative agency could consent to a jury trial in the injunctive action pursuant to rule 39 (c) of the Federal Rules of Civil Procedure.[122]

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n.12. A number of federal courts have interpreted the application of the rule in injunctive situations as only requiring a showing of negligence by the defendant. *See, e.g.*, SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976). In such jurisdictions, the SEC would have to prove scienter in the injunctive action if it intended for that decision to be the basis for a possible future application of collateral estoppel as to state of mind. *See* SEC v. Commonwealth Chemical Sec., Inc., 574 F.2d 90, 96 n.4 (2d Cir. 1978). However, litigation of intent in an injunctive proceeding, being merely hypothetical, would be improper.

[119] *See, e.g.*, Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990, 994–95 (S.D.N.Y. 1971) (summary judgment denied because issues of fact, including scienter, remained to be determined).

[120] *Id.*

[121] This treatment would be similar to that afforded in the current antitrust laws such as section 5(a) of the Clayton Act. 15 U.S.C. § 16(a) (1976). For an excellent discussion of the use of certain prior judgments as prima facie evidence in subsequent antitrust actions brought under section 5 of the Clayton Act, see Shores, *Treble Damage Antitrust Suits; Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 IOWA L. REV. 434 (1968). *Cf.* Currie, *supra* note 94, at 320–21 (treatment of prior judgment as evidence, not collateral estoppel).

[122] Rule 39(c) of the Federal Rules of Civil Procedure states:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or . . . with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Fed R. Civ. P. 39(c).

Consequently, a corporation cannot have a jury trial in an injunctive action by the SEC if the SEC does not consent to it. 99 S. Ct. at 655 n.24; SEC v. Commonwealth Chemical Sec., Inc., 574 F.2d 90, 96–97 (2d Cir. 1978); SEC v. Everest Management Corp., 475 F.2d 1236, 1240 n.5 (2d Cir. 1972).