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Recent Decisions: Judgements: Mutuality as an Element of Collateral Estoppel

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> this may fairly and properly be done no part of the language used can be superfluous or unmeaning.[9]

Applying this reasoning to the contract, one might well ask why the scrivener used the word *applicable* when he meant payable. If *applicable* is to have a meaning of its own, it cannot mean the same thing as *payable.*

It may be concluded that Wisconsin would not reach the result of the Virginia case that a motorist who is insured, but whose carrier has become insolvent, is uninsured. The uninsured motorist provision of the standard contract does not on its face provide for such a result. Since the language is not ambiguous, there is no room for the application of the rule that a contract of insurance must be construed against the insurer. MARY C. CAHILL

Judgments: Mutuality as an Element of Collateral Estoppel: *Zdanok v. Glidden Co.*[1] and its companion case, *Alexander v. Glidden Co.*[2] both arose out of a collective-bargaining agreement between defendant and a local of the General Warehousemen's Union which represented employees at defendant's food processing plant in Elmhurst, New York. After the contract had expired, defendant moved its plant to Bethlehem, Pennsylvania.

Zdanok and four other former Elmhurst employees[3] brought an action in the Supreme Court of New York for New York County, which was removed by the defendant Glidden on the basis of diversity of citizenship to the United States District Court for the Southern District of New York. There, judgment was had against the plaintiffs on the merits. On appeal, the Second Circuit construed the contract as entitling plaintiffs to be employed at the defendant's Bethlehem plant, retaining seniority and reemployment rights acquired at the Elmhurst plant, and remanded the case to the district court for determination of plaintiffs' damages.

Alexander and a large number of other Elmhurst employees[4] commenced an action in the same federal district court substantially identical in issue with the *Zdanok* case. The two actions (*Zdanok* and *Alexander*) were consolidated for trial.

Defendant attempted, in the *Alexander* case, to offer evidence relating to the intent of the parties in negotiating the contract, seeking a "de novo" construction for purposes of that case. Although admit-

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[9] *Id.* at 333.
[1] 327 F. 2d 944 (2d Cir. 1964).
[2] *Ibid.*
[3] These were the plaintiffs in the original action, Zdanok v. Glidden Co., 216 F. Supp. 476 (S.D. N.Y. 1963).
[4] These plaintiffs joined with the original action on remand to the district court, Alexander v. Glidden Co., 216 F. Supp. 476 (S.D.N.Y. 1963).

ting the evidence, the district court deemed itself bound by the court of appeals' interpretation of the contract. Defendant appealed, strongly insisting that the interpretation of the contract in the prior decision should not govern in light of the new evidence. The court of appeals held that defendant's contractual liability had been litigated as fully as the parties wished, and therefore defendant was estopped from asserting new evidence on this question. The *Alexander* employees, although not parties to the original action, had expected their rights to be governed by the court's interpretation of the contract in the *Zdanok* action.

The court recognized that

> . . . such a holding would have seemed impossible fifty years ago: If in the Zdanok action the contract were construed as Glidden contends, this would not preclude the Alexander plaintiffs from offering extrinsic evidence to support their construction of the contract, since they had not had their day in court. Because it was thought that estoppels must be "mutual" . . . Glidden would likewise not be precluded from offering new evidence against the Alexander group.[5]

But the need for the mutuality of estoppel has been much eroded in recent years.

Collateral estoppel is basically a device for preventing a party who has had a full and fair opportunity to litigate certain issues in a prior action from relitigating the same issues in a later trial. It differs from res judicata in that its estopping effect does not ordinarily or necessarily reach the ultimate question of liability or nonliability, but is limited to separable issues of fact previously litigated. The "offensive" use of the doctrine is distinguished from its "defensive" use simply by the fact that, in the former case, the estoppel is asserted either to dispense with proof of an element of a claim, or in bar to a defense to a claim; whereas, in the latter case, the doctrine is used to defeat a claim.[6]

In 1913, a judgment was held to be conclusive evidence between the *same* parties in a subsequent suit involving any controverted point upon the determination of which the earlier verdict was rendered, even though the form of the second action was different.[7] This basic theory of estoppel by judgment was based on an 1876 case,[8] where a basic distinction was drawn between the effect of a judgment as estoppel against the prosecution of a second action *on the same claim* and its effect in a later action between the same parties *on a different claim.* If the former, the judgment was conclusive as to every ground of recovery actually presented or which *might have been presented.* If the

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[5] Zdanok v. Glidden Co., *supra* note 1, at 954.
[6] RESTATEMENT, JUDGMENTS § 68, comment *a* at 294-95 (1942).
[7] Tudor v. Kennett, 87 Vt. 99, 88 Atl. 520 (1913); RESTATEMENT, JUDGMENTS § 68 (1942).
[8] Cromwell v. County of Sac, 94 U.S. 351 (1876); RESTATEMENT, JUDGMENTS § 68, comments *c* and *d* at 296-301 (1942).

latter, it was conclusive *only* as to matters in issue or points actually controverted.

By 1918, the doctrine was further extended so as to estop not only parties to the original action, but also those in privity with the original parties. The theory was that the closeness of the privity afforded full opportunity to litigate the matter on the first trial.[9] However, until 1940, some courts continued to hold that the plea was available only if the estoppel was technically mutual; *i.e.,* when the party seeking to utilize the plea would himself have been estopped had the prior judgment been returned against him.[10]

Meanwhile, occasional decisions found limited exceptions to the doctrine of mutuality. Thus, in a 1937 case,[11] where the liability of the defendant was found to be altogether dependent on the culpability of a defendant exonerated in a prior suit on the same facts, the exoneration was conclusive against the same plaintiff in the subsequent action. In this instance, the party against whom the plea of estoppel was raised was a party to the prior action, and therefore had a full opportunity to litigate the issue of the defendant's responsibility. This same exception was recognized in the 1940 case[12] mentioned above, but that court pointed out that this exception does *not* apply where the defendant in a subsequent action lost as *plaintiff* in the original action and later a new party, even though in privity to the original defendant, asserts the plea of estoppel. A strong dissent there suggested a more liberal rule that

> . . . where identical issues of liability upon a given set of facts are put at issue in two successive suits, and where a full and complete trial of those issues has been had and there are no circumstances of record in the second suit which might reasonably justify a court in reaching a result contrary to the prior decision, estoppel by judgment becomes applicable provided the one *against* whom the prior judgment is invoked was a party to—at least a plaintiff—in the prior action.[13]

The most significant liberalization of the doctrine of mutuality came in a 1942 case[14] which not only adopted the earlier dissenting view, but went much further. The criteria determining *who may assert a plea* of estoppel were held to differ fundamentally from those determining *against whom the plea may be asserted.* Due process forbids the assertion of the plea *against* a party unless he was bound by the earlier litigation; but no reason was discerned for requiring the party *asserting*

[9] Postal Tel. Cable Co. v. Newport, 274 U.S. 464 (1918); RESTATEMENT, JUDGMENTS § 83, comment *a* at 389-90 (1942).
[10] Elder v. New York & Pa. Motor Expr. Inc., 284 N.Y. 350, 31 N.E. 2d 188 (1940).
[11] Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E. 2d 758 (1937); RESTATEMENT, JUDGMENTS § 84, comment *c* at 393-96 (1942).
[12] Elder v. New York & Pa. Motor Expr. Inc., *supra* note 10.
[13] *Id.* at 353, 31 N.E. 2d at 192.
[14] Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

the plea to have been bound by the prior litigation. To determine the validity of the plea, the court suggested three pertinent questions:

> 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?[15]

Technically, this decision authorized either offensive or defensive use of the plea of estoppel. The court stated:

> Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other.[16]

Although there was *not* an "offensive" use of the plea in this case, some authorities have since interpreted the decision as allowing just such a use.[17]

The offensive plea of estoppel by a "stranger" in a subsequent suit against a party or a privy to the original action has been slow to gain acceptance.[18] In the main case,[19] special circumstances prompted the court to overlook objections to a "stranger's" offensive use of the plea, though it was conceded that such liberality has been criticized. The court cites Professor Brainerd Currie's objection

> . . . that the abandonment of the mutuality requirement is sound except (1) "where the result would be to create an anomaly such as would occur in the railroad type of situation where the party against whom the plea is asserted faces more than two successive actions," or (2) where "by reason of his former adversary's possession of the initiative," he has not "had a full and fair opportunity to litigate the issue effectively."[20]

But the court allowed the offensive use of the plea because

> . . . Glidden's opportunity to litigate the Zdanok case was both full and fair. . . . Although the plaintiffs . . . could . . . have subjected Glidden to . . . a series of actions . . . such a course offers little advantage where the matter in issue is not a factual question of negligence subject to the varying appraisals of the facts by different juries, but the construction of a written contract by a judge. . . . [N]othing . . . turned on personal sympathy or any

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[15] *Id.* at 812, 122 P. 2d at 895.
[16] *Id.* at 813, 122 P. 2d at 896.
[17] Zdanok v. Glidden Co., *supra* note 1, where Justice Friendly recognized such an authorization; Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957), where Professor Currie also saw such an authorization.
[18] Nevarrow v. Caldwell, 161 Cal. App. 2d 762, 327 P. 2d 111 (1958); Elder v. New York & Pa. Motor Expr. Inc., *supra* note 10; Israel v. Wood Dolson Co., 1 N.Y. 2d 116, 134 N.E. 2d 97 (1956); all of which limited the plea to a defensive use.
[19] Zdanok v. Glidden Co., *supra* note 1.
[20] *Id.* at 956.

> other consideration relating specifically to those five plaintiffs as distinguished from the other employees.
> . . . Glidden cannot reasonably argue that it was unfairly surprised by the entry of the Alexander plaintiffs . . . or that it would have defended more diligently. . . . The Zdanok litigation was prosecuted . . . up to the Supreme Court of the United States. . . . The Alexander action . . . was mentioned in Glidden's brief. . . .[21]

The Wisconsin courts appear to be advanced in their abandonment of mutuality to permit broadened application of collateral estoppel. In 1956, the supreme court found reason to avoid the mutuality doctrine where "countervailing reasons are present."[22] Where plaintiff had previously sued a liability insurer, grounding his action upon the insured's negligence, subsequent relitigation of this issue against the insured was barred, thus clearly recognizing the defensive use of the plea of estoppel by a "stranger."

In 1962, the Seventh Circuit authorized the offensive use of estoppel by a stranger in an action in tort tried under Wisconsin's comparative negligence statute.[23] The original action arose in a Wisconsin state court out of an automobile accident, and only the drivers were parties. The trial court apportioned their negligence 75%-25%. In a later action brought by injured passengers, "strangers" to the first action, in the federal court for Wisconsin's Eastern District, both drivers were held to be estopped by the prior apportionment of their negligence, and the only question left to be tried was the amount of the passengers' damages. This case and others[24] also have shown that collateral estoppel will apply, under principles analogous to those for establishing "full faith and credit," so as to estop a party to prior litigation in another jurisdiction from relitigating the same issues in a different jurisdiction.

Possibilities of future liberalization of collateral estoppel appear to turn heavily upon proper appraisal of the concepts of "close relation" and "countervailing equities." The principal case[25] makes it apparent that neither of the traditional requirements of "closeness"—identity or conventional privity—any longer controls; nor is it of controlling significance that a litigant seeking to reverse the earlier litigation of an issue is prepared to offer new or more convincing evidence on retrial. On the other hand, the cases appear to insist that the issues themselves be strictly identical in the prior and subsequent litigations; that both opportunity and motive for substantial contest of the issue in the prior

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[21] *Ibid.*
[22] McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W. 2d 194 (1956); RESTATEMENT, JUDGMENTS § 96, comment *a* at 473-74 (1942).
[23] Gorski v. Commercial Ins. Co., 206 F. Supp. 11 (E.D. Wis. 1962).
[24] See also: Hudson v. Western Oil Fields Inc., 374 P. 2d 403 (Colo. 1962); RESTATEMENT, JUDGMENTS § 46, comment *d* at 180-81; *id.* § 68, comment *v* at 314-15 (1942).
[25] Zdanok v. Glidden Co., *supra* note 1.

litigation be present; and that some awareness of the vulnerability to the later claim have existed, by reason of the "close relation," when the earlier litigation was being contested.

Liberalized application of collateral estoppel tends to alleviate the need for compulsory counterclaim, joinder, and cross-claim statutes. By one procedural avenue or another, therefore, the courts are moving toward their objectives: the final disposition of complex controversies in a single trial.

DENIS J. WAGNER

Criminal Law: Dismissal of Indictment Obtained in Violation of Constitutional Rights: In *Jones v. United States,*[1] the United States Court of Appeals for the District of Columbia Circuit reversed the conviction of defendant for robbery, holding that, where substantial prejudice results, an indictment obtained in violation of federal constitutional rights must be dismissed. The court saw "neither reason nor authority"[2] for distinguishing between unconstitutional *composition* of a grand jury, which vitiated the indictment in *Cassell v. Texas,*[3] and unconstitutional *proceedings* of a grand jury in *Jones.*

The court observed that defendant did not consent to being brought before the grand jury and was taken there in handcuffs. No one informed him prior to his appearance before the grand jury that he need not testify if taken there, although police and the committing magistrate told him in general terms that he need not incriminate himself. The court also pointed out that when defendant actually faced the grand jury, the warning the prosecutor gave him was inadequate to protect his rights even if his presence had been voluntary. The prosecutor told defendant that he need not answer questions and that his answers could be used against him "at any future trial." However, defendant was not informed that the grand jury might use his answers as a basis for indicting him; nor was he told that he was entitled to consult counsel before being questioned by the grand jury. In light of the fifth amendment guarantee that "no person . . . shall be compelled in any criminal case to be a witness against himself," the court felt that the above procedure could not be justified.

In *Counselman v. Hitchcock*[4] the United States Supreme Court held that a grand jury investigation of a crime is "a criminal case"[5]at which *incriminating* questions need not be answered. In the *Jones* decision, the court declared that implicit in the Supreme Court's action in *Lawn v. United States*[6] was the proposition that the taking of an accused

[1] No. 17688, D.C. Cir., Feb. 6, 1964.
[2] *Id.* at 10.
[3] 339 U.S. 282 (1950).
[4] 142 U.S. 547 (1892).
[5] *Id.* at 562.
[6] 335 U.S. 339 (1958).