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NOTES

CIVIL PROCEDURE — Collateral Estoppel — Collateral Estoppel Applied Offensively Where Plaintiffs Were Not Parties or Privies in Prior Action. Parklane Hosiery Co. v. Shore, 99 S. Ct. 645 (1979). In an effort to promote judicial economy and reduce unmanageable case loads, courts have, over the last forty years, significantly expanded the use of the doctrine of collateral estoppel. Recently, several courts have allowed a plaintiff who was not a party to a prior action to assert the doctrine to prevent a defendant from relitigating issues determined in that prior action. Other courts, however, have been reluctant to allow this “offensive” use of collateral estoppel claiming it is often unfair to a defendant. The recent case of Parklane Hosiery Company v. Shore¹ presented the United States Supreme Court with the question of whether Parklane, which had had issues of fact determined adversely to it in an action for an injunction brought by the Securities and Exchange Commission, could be collaterally estopped from relitigating the same issues in a subsequent stockholder class action seeking damages. In holding that the doctrine could be used, the Court promulgated a two-part test designed to foster judicial economy and consistency of judgments, while assuring that the rights of a defendant are adequately protected. The Court’s test, however, seems inadequate to accomplish these objectives and demonstrates the need for a more effective judicial formulation to regulate the offensive use of collateral estoppel.

I. Background

In order to protect parties from the expense and vexation of relitigating matters already determined, conserve judicial resources² and promote confidence in the judicial system by minimizing the possibility of inconsistent judgments, courts have developed the doctrine of judicial finality, which is comprised of the related but distinct concepts of res judicata and collateral estoppel.³ Under res judicata, or “claim preclusion,”

a final judgment on the merits rendered by a court of competent jurisdiction operates to bar a party from bringing a second suit based on the same cause of action.\textsuperscript{4} Collateral estoppel, or "issue preclusion," prevents an issue actually and necessarily determined adversely to a party in an action before a court of competent jurisdiction from being disputed by such party in a subsequent action based upon a different cause of action.\textsuperscript{5}

Collateral estoppel can be asserted to preclude a party from litigating an issue only where an identical issue has been litigated and in fact determined in a prior action. In addition, the judgment in the prior action must be dependent upon the determination of the issue.\textsuperscript{6} Until recently courts had also required "mutuality" of estoppel before issue preclusion could be invoked. This concept mandated that a party asserting collateral estoppel against another be equally bound by the prior determination.\textsuperscript{7} Thus, only a party to the original action or his privy could assert, or be subject to, collateral estoppel in a subsequent action.\textsuperscript{8}

Within the past forty years the mutuality requirement has been criticized as an irrational limitation on the use of collateral estoppel. The California case of \textit{Bernhard v. Bank of America National Trust and Savings Association},\textsuperscript{9} in which the court held that \"[n]o satisfactory rationalization has been advanced for the requirement of mutuality,\"\textsuperscript{10} was one of the first and most influential decisions abandoning the requirement of mutuality. Following \textit{Bernhard}, a number of courts, both state\textsuperscript{11} and federal,\textsuperscript{12} abandoned the doctrine. In \textit{Bonder-}

\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{7} See generally 1B Moore's \textit{Federal Practice} ¶ 0.441[3] (2d ed. 1979).
\textsuperscript{8} Hansberry v. Lee, 311 U.S. 32 (1940). There, the Supreme Court held that due process requirements would prevent a party from being bound by a determination made in an action to which he was not a party. Thus, the party against whom collateral estoppel is asserted must always have been a party or privy to the prior adjudication. \textit{But see Note, Collateral Estoppel of Nonparties}, 87 \textit{Harv. L. Rev.} 1485 (1974).
\textsuperscript{9} 19 Cal. 2d 807, 122 P.2d 892 (1942).
\textsuperscript{10} Id. at 812, 122 P.2d at 895.
Tongue Laboratories, Inc. v. University of Illinois Foundation, the United States Supreme Court recognized and apparently adopted the recent trend away from mutuality of estoppel.

A number of courts, however, have expressly declined to abandon mutuality and several commentators have vigorously defended the doctrine arguing that a variety of circumstances may make it unfair to allow a nonparty to assert collateral estoppel. Recognizing the potential unfairness involved with nonmutual estoppel, courts that have rejected mutuality have usually allowed assertion of collateral estoppel only where the party against whom it is asserted had a "full and fair opportunity to litigate" the issue in the prior action. Thus, courts have scrutinized the prior litigation to assure that the party to be precluded had litigated with full vigor and had had an opportunity to be heard.


13. 402 U.S. 313 (1971). Subsequent to the Blonder-Tongue decision, there was some question as to whether the Court's rejection of mutuality was limited to the facts of that case. However, that controversy was resolved by the Court in Parklane, where it unequivocally rejected the doctrine. See 99 S. Ct. at 649.


17. See Restatement (Second) of Judgments §§ 68.1, 88 app. (Tent. Draft No. 3, 1976). Section 68.1 sets forth five circumstances in which a party will not be precluded from relitigating an issue where collateral estoppel is asserted by a party to the prior action. Section 88 adds eight situations to the five in § 68.1 and provides that issue preclusion asserted by a stranger to the previous litigation should be denied under any of the thirteen sets of circumstances. For a more thorough discussion, see text accompanying notes 63-69 infra.

18. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) (rejecting mutuality but refusing to allow collateral estoppel due to unfairness); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964); In re Transocean Tender Offer Sec. Litigation, 455 F. Supp. 999 (N.D. Ill. 1978); Currie, Mutual of
Judicial and scholarly uneasiness with the abolition of mutuality has been most acute where collateral estoppel has been used offensively. Some courts and commentators, contending that there are important distinctions to be made between offensive and defensive use of collateral estoppel, have urged that offensive use of collateral estoppel not be allowed in the absence of mutuality. Others have argued that offensive use is proper so long as the defendant had a full and fair opportunity to litigate in the prior action. The Supreme Court encountered this particular controversy in Parklane.

II. The Parklane Opinion

In November of 1974 a stockholder class action was commenced against Parklane Hosiery Company and twelve of its officers, directors and stockholders alleging that a materially false and misleading proxy statement had been issued in connection with a merger plan in violation of the Securities and Exchange Act as well as rules and regulations promulgated by the Securities and Exchange Commission. The plaintiff sought damages and costs in addition to rescission of the merger. In May of 1976 the Securities and Exchange Commission commenced a government enforcement action against Parklane charging that the proxy statement issued by the of-
ficers, directors and stockholders involved in the merger plan was false and misleading in essentially the same respects as alleged by the plaintiff in the stockholder class action. The SEC requested an injunction and other equitable relief.

In the SEC action, which came to trial first, the district court found that the proxy statement was materially false and misleading. With this judgment in hand the plaintiff in the stockholder action moved for partial summary judgment claiming Parklane should be precluded from relitigating issues determined in the SEC action. The motion was denied by the district court, but the Court of Appeals for the Second Circuit reversed, holding that the use of collateral estoppel was proper.

The Supreme Court addressed two major questions: (1) whether a plaintiff who was neither a party nor in privity with a party to a prior action may assert collateral estoppel offensively; and (2) whether preventing a defendant in a legal action from relitigating issues previously resolved in an equitable action is violative of that defendant's seventh amendment right to a jury trial.

With respect to the first issue, the Court noted that a number of factors militate against the offensive use of collateral estoppel. First, offensive collateral estoppel may discourage potential plaintiffs from joining in a single action since a potential plaintiff who sits on the sidelines may reap the benefits of a favorable judgment obtained by another plaintiff while not being bound by an adverse judgment. Thus, a "wait and see" attitude could be fostered and unnecessary multiplicity of suits encouraged. Second, offensive use could be unfair to a defendant. If the first action had been one for an insignificant amount of damages or if future actions were not reasonably

24. 422 F. Supp. at 486.
26. 99 S. Ct. at 652. Since the SEC action sought only equitable relief, the defendants had no right to a jury trial. In the action for damages brought by the stockholders such a right would have existed but for the prior SEC action. Thus, the defendants claimed that treating issues determined in the SEC action as conclusive with respect to the stockholder action denied them their right to a jury trial as to these issues.
27. Id. at 651.
foreseeable, the defendant may not have litigated with as much vigor as he otherwise would have. If the judgment rendered in the first action was inconsistent with other judgments or if some significant procedural device were available to the defendant in the second action which had not been available in the first, preventing the defendant from relitigating issues determined in the prior action would be unjust.28

With the foregoing considerations in mind the Court set forth the following rule:

The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive collateral estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.29

The Court went on to hold that Parklane had a full and fair opportunity to litigate the issues involved in the SEC action30 and that the plaintiff in the stockholder action could not easily have joined in the prior action.31 Therefore, offensive use of collateral estoppel was held to be proper. The Court further held that the seventh amendment did not require that the defendants in Parklane be afforded an opportunity to relitigate before a jury those issues previously determined in the SEC action.32

28. Id.
29. Id. at 651-52.
30. Id. at 652. The Court stated:
First, in light of the serious allegations made in the SEC’s complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the judgment in the Commission action was not inconsistent with any previous decision. Finally, there will in the respondent’s action be no procedural opportunities available to the petitioner that were unavailable in the first action of a kind that might be likely to cause a different result (footnotes omitted).
31. Id. at 652 & n.17. The Court noted that the Second Circuit had expressed a strong policy against allowing stockholders to intervene in an SEC action. SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (2d Cir. 1972). Further, consolidation of a private action with one brought by the SEC without the latter’s consent is prohibited by statute. 15 U.S.C. § 78u(g) (1976).
32. 99 S. Ct. at 654-55.
III. OFFENSIVE USE OF COLLATERAL ESTOPPEL

The general rule set forth by the Court contains a two-part test to be applied by trial courts in determining whether offensive use of collateral estoppel is proper. Offensive use is permissible only if (1) the plaintiff could not easily have joined in the prior action, and (2) it would not be unfair to the defendant to allow its use. The objective of the rule is to regulate the offensive use of collateral estoppel in such a way as to promote judicial economy and consistency of judgments, while at the same time insuring defendant's right to fully and fairly litigate the claims against him. While the Court's two-part test would appear to be a simple, workable approach to the offensive use of collateral estoppel, it falls far short of meeting this objective. Although the potential unfairness limitation, if properly applied, could adequately protect rights of defendants, the Court's application of the rule in Parklane is questionable. The ease of joinder limitation, on the other hand, is fundamentally unsound and may thus present lower federal courts with substantial interpretive difficulties.

A. Ease of Joinder

The Court began with the premise that "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does." The availability of collateral estoppel as an offensive tool creates an incentive for plaintiffs to adopt a "wait and see" posture which, in turn, leads to the unnecessary multiplicity of suits. In the Court's view, restricting the offensive use of collateral estoppel will eliminate this incentive and thereby deter plaintiffs from failing to join in a single action.

The Court correctly recognized that there are important distinctions between plaintiffs who could not easily have joined the prior action due to practical, procedural or jurisdictional considerations, and those who could have effected joinder without significant difficulty. With respect to plaintiffs in the first category, subsequent actions are procedural "necessi-

33. Id. at 651-52.
34. See text accompanying note 2 supra.
35. 99 S. Ct. at 650.
36. Id. at 650-51.
ties" and, presumably, the unavailability of collateral estoppel would have no deterrent effect. For these plaintiffs, then, the use of the doctrine will expedite these "necessary" actions, thereby fostering judicial economy and consistency of judgments. Where plaintiffs could easily have joined in a single action, the Court's refusal to allow offensive use of the doctrine will presumably have a deterrent effect since the subsequent suits are tactical "luxuries" which are less attractive once collateral estoppel is no longer available. Thus, the success of the ease of joinder limitation necessarily depends on whether it will in fact have a deterrent effect on this latter category of plaintiffs.

The fundamental premise underlying the ease of joinder rule is the notion that offensive use of collateral estoppel gives a plaintiff "every incentive to adopt a 'wait and see' attitude [which] will likely increase rather than decrease the total amount of litigation, since the potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."37 However, even if collateral estoppel is unavailable, substantial benefits may await plaintiffs who adopt a "wait and see" posture. If the defendant prevails in the first action a potential plaintiff will have the option of either forging ahead, having learned from his predecessor's mistakes, or choosing not to pursue the claim, thereby saving himself the expense of litigation. If the first plaintiff prevails in the earlier suit, the second plaintiff will have the advantage of proceeding down a lighted path. While the ease of joinder test might discourage some plaintiffs from not intervening in a prior action, other causal factors may be sufficient to render any deterrent impact de minimis. Since the limitation is unlikely to achieve its objective, the ultimate impact of the rule may well be antithetical to principles of judicial economy. Where a plaintiff could easily have joined in a prior action, but did not, the issues previously determined must be relitigated even if the defendant has already had a full and fair opportunity to litigate them. Therefore, the ease of joinder limitation has little to offer in the way of judicial economy.

37. Id. at 651 (citations and footnotes omitted).
The test has even less to offer with respect to consistency of judgments. Each time a court determines that issues must be relitigated, there is the possibility the issue will be determined differently in the second hearing. If this occurs, each litigant will justifiably believe he was treated unfairly; the defendant because he did not prevail in the first action, and the plaintiff because he did not prevail in the subsequent action. This tends to impeach and undercut the validity and reliability of the judicial process as well as expose litigants to inconsistent rights and liabilities.

Since the ease of joinder test appears unlikely to promote judicial economy or consistency of judgments, the question remains: why should it make any difference that a potential plaintiff failed to join in a prior action when the defendant has had a full and fair opportunity to litigate the issues involved in a later action. Perhaps in the end the Court simply objects to the plaintiff being able to engage in "riskless litigation." If so, this is merely a throwback to the doctrine of mutuality which the Court so forcefully criticizes.\(^{38}\)

In light of the foregoing analysis it remains to be determined just how the ease of joinder test is to be interpreted and under what circumstances it should preclude the offensive assertion of collateral estoppel. Unfortunately, the Court's decision provides little guidance to assist lower courts in making this determination.

Since the plaintiff's claim in Parklane necessarily involved issues identical to those involved in the prior action, the Federal Rules of Civil Procedure would presumably have permitted a joinder,\(^{39}\) intervention\(^{40}\) or consolidation\(^{41}\) unless the prior action were a criminal prosecution,\(^{42}\) a government enforcement action,\(^{43}\) an action in which joinder is prohibited or lim-


\(^{39}\) FED. R. CIV. P. 20(a).

\(^{40}\) Id. at Rule 24.

\(^{41}\) Id. at Rule 42(a).

\(^{42}\) The joinder provisions contained in the Federal Rules of Civil Procedure do not apply to criminal actions.

\(^{43}\) See, e.g., United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), holding that there is a strong judicial policy against allowing private intervention into government enforcement actions. See also SEC v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972).
ited by statute, or an action, the determination of which was necessary for the latter plaintiff's claim to mature. Since the first action in *Parklane* was a government enforcement action the Court did not look beyond the mere possibility of joinder when applying its test because "the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired." A rule of law which would prohibit the offensive use of collateral estoppel where the sheer possibility of joinder existed in the first action is advocated by two of the commentators cited by the Court. However, it seems unlikely that the Court intended its rule to be interpreted so narrowly.

First, the Court phased its rule in terms of "ease" rather than "possibility" or "likelihood" of joinder, thus suggesting that other factors should be considered. Second, the Court stated that trial courts must have broad discretion to determine when offensive use of collateral estoppel is proper. Since the question of the possibility of joinder may be answered with virtual certainty, courts would be precluded from exercising any kind of discretion unless other factors were considered. Finally, the Restatement (Second) of Judgments and the Federal Rules of Civil Procedure would appear to favor a broader interpretation. The Restatement seems to endorse the use of a "reasonableness" standard in determining whether a plaintiff could have joined, and the federal rules discourage

44. See, e.g., 15 U.S.C. § 78u(g) (1976) prohibiting consolidation of a private action with one brought by the SEC without the SEC's consent.

45. See, e.g., *Impacts of Collateral Estoppel*, *supra* note 19, at 1049-51. There the author lists ten categories of cases in which there are multiple claimants and identical issues, but where the claims do not ordinarily arise at the same time.

46. 99 S. Ct. at 652.

47. *Impacts of Collateral Estoppel*, *supra* note 19, at 1054; *Semmel*, *supra* note 18, at 1475.

48. 99 S. Ct. at 651.

49. See, e.g., *Restatement (Second) of Judgments* § 88(3) (Tent. Draft No. 2, 1975) which provides that application of collateral estoppel may be denied if the party asserting it "could have effected joinder in the first action between himself and his present adversary." In *Restatement (Second) of Judgments* § 88 app., Comment e (Tent. Draft No. 3, 1976), the reporter qualifies this rule by stating that one may be refused the benefits of "offensive" issue preclusion where he was in such a position that he might reasonably have been expected to join in the prior action. It is interesting to observe that in the reporter's notes to Comment e, at 173, it is stated:

[A] co-defendant in the first action who has succeeded in obtaining severance of the trial of the claim against him may be refused the benefits of preclusion
joinder, intervention or consolidation where inconvenience, prejudice or delay may result.\textsuperscript{50}

Even accepting this broader interpretation, the rule should be applied in light of its ultimate purpose of deterrence. The crucial inquiry, then, should focus on whether the potential plaintiff would have joined in a prior action had collateral estoppel been unavailable. This is the same as asking whether the plaintiff did, in fact, adopt a "wait and see" posture. However, as previously shown, the ease of joinder limitation is unlikely to deter plaintiffs from adopting this posture. Therefore, the limitation should arguably be accorded little, if any, weight in determining whether offensive use of collateral estoppel is proper. Moreover, the broad discretion given trial courts in applying the general rule provides the means by which primary significance may be attached to the potential unfairness aspect of the rule, which appears to be a more rational and time-tested limitation on the use of collateral estoppel.

\textbf{B. Potential Unfairness}

Ever since the demise of the requirement of mutuality in \textit{Bernhard}\textsuperscript{51} courts have been concerned with whether the party against whom collateral estoppel is asserted had a "full and fair opportunity to litigate" the issues involved in the prior action.\textsuperscript{52} Thus, the concerns expressed by the Supreme Court in \textit{Parklane} with respect to potential unfairness in allowing offensive use of collateral estoppel are not new. Further, these unfair situations may well arise irrespective of whether collateral estoppel is applied offensively or defensively.\textsuperscript{53} Therefore,
an abundance of cases and commentaries exist to which trial courts may look when deciding whether offensive use of collateral estoppel would be unfair to a defendant. Between the courts and commentators, all of the unfair situations noted in Parklane, plus a handful of others, have been thoroughly discussed.

Application of the Court's potential unfairness test will most likely prevent use of issue preclusion where:

1. The first action is for nominal damages;
2. The second action was not reasonably foreseeable at the time the prior determination was made;
3. The prior determination is inconsistent with one or more previous judgments in favor of the defendant;
4. The second action affords the defendant procedural opportunities unavailable in the first action which could readily cause a different result;
5. The prior judgment involved an assessment of comparative fault or was the result of a compromise verdict;
6. Treating the prior determination as conclusive would be incompatible with a particular remedial scheme and (7)

54. See, e.g., Restatement (Second) of Judgments Reporter's Note § 88 app. (Tent. Draft No. 3, 1976) for a rather lengthy list of cases and articles dealing with the "full and fair" test. Although the general rule in Parklane is a matter of federal law, analysis of state cases may still be helpful with respect to fairness problems, since many of the same kinds of difficulties encountered in litigation in state courts will arise in federal courts as well.

55. 99 S. Ct. at 651.


57. See, e.g., James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971) (discussing foreseeability but holding subsequent action was foreseeable); The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944); Restatement (Second) of Judgments § 68.1(e)(ii) app. (Tent. Draft No. 3, 1976); Currie, supra note 18, at 289.


the defendant did not have the opportunity or incentive to obtain appellate review of the prior determination.\textsuperscript{62}

In applying the "full and fair" test to \textit{Parklane}, the Supreme Court determined that the first action was sufficiently serious and subsequent actions sufficiently foreseeable to provide the defendants with incentive to fully litigate the matter.\textsuperscript{63} Further, the SEC determination was not inconsistent with any prior judgment.\textsuperscript{64} Finally, the Court held that there were no procedural opportunities available to the defendants "that were unavailable in the first action of a kind that might be likely to cause a different result."\textsuperscript{65} With respect to this last ruling the Court stated in a footnote: "[T]he 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."\textsuperscript{66} This particular holding may prove to be somewhat problematic.

It is true that where the same facts exist, the same law applies, the same discovery devices are available and the same burden of proof and presumptions are present, the mode of a trial, whether before a judge or jury, should not have an impact on the resulting determination. Indeed, in the majority of civil actions this will probably be the case. However, there are cases in which the availability of a jury trial may be expected to have a significant impact on the result. Justice Rehnquist's remarks in his dissenting opinion in \textit{Parklane} are particularly pertinent with respect to this latter type of case.

\textquote{[T]hose who drafted the Declaration of Independence and debated so passionately the proposed Constitution during the ratification period, would indeed be astounded to learn that the presence or absence of a jury trial is merely "neutral" . . . [a]nd I suspect that anyone who litigates cases before juries in the 1970's would be equally amazed to hear of the supposed lack of distinction between trial by court and trial by jury.}\textsuperscript{67}

\textsuperscript{62} See, e.g., Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); Minor v. Lapp, 220 Cal. App.2d 582, 33 Cal. Rptr. 864 (1963); Restatement (Second) of Judgments § 68.1(a) app. (Tent. Draft No. 3, 1976); Semmel, supra note 18, at 1470-71.

\textsuperscript{63} 99 S. Ct. at 652.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id. at n.19.

\textsuperscript{67} Id. at 663.
Thus, although the mode of trial is theoretically neutral, there is a strong argument that in some situations the availability of a jury trial will definitely be a procedural opportunity "of a kind that might be likely to cause a different result."

Further, the holding is contrary not only to a strong federal policy favoring jury trials, but also to the view of the Restatement and of cases which have considered the question of the conclusiveness of equitable determinations in later legal actions. Consequently, courts may be left wondering what factors are to be considered in determining whether the offensive use of collateral estoppel is fair to the defendant, especially since the Restatement, prior federal case decisions and strong federal policies were ignored by the Supreme Court in its application of the rule. This would, in turn, reduce the effectiveness of the "full and fair" test in protecting the rights of defendants against whom collateral estoppel is asserted.

IV. SEVENTH AMENDMENT RIGHTS

After determining that offensive use of collateral estoppel was permissible under the general rule, the Court in Parklane addressed the question of whether the defendants' seventh amendment rights were violated by allowing a determination in an equitable action to be conclusive for purposes of a subsequent legal action. Although this issue is related in some respects to the question of whether such use of issue preclusion is fair to a defendant, the two are distinct. Denying the defendant an opportunity to relitigate the issues before a jury might be unfair although entirely constitutional. Conversely, this situation, while fair, might constitute a violation of a defen-

68. See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) where the Court stated: "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (footnotes omitted).
69. See Restatement (Second) of Judgments § 88 app., Comment d (Tent. Draft No. 3, 1976).
71. 99 S. Ct. at 652.
dant's seventh amendment jury trial rights. Thus, this seventh amendment question must be considered apart from any unfairness problems associated with the offensive use of collateral estoppel.

The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed $20, 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." 72 Seizing upon the word "preserved," several commentators 73 have argued, as did Justice Rehnquist in his Parklane dissent, 74 that a litigant cannot be denied the opportunity for a jury trial if that opportunity would have existed in 1791. Proponents of this view reason that because of the mutuality requirement which attended the doctrine of collateral estoppel in 1791, a defendant who had issues resolved adversely to him in a prior equitable action would have an opportunity to relitigate those issues before a jury in a subsequent legal action brought by a different plaintiff. Since the right to a jury trial existed at the time the seventh amendment was drafted, that right must be preserved even though the mutuality requirement has been abandoned. 75

The majority in Parklane rejected this argument. 76 The Court observed that "at common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity." 77 Thus, any right a defendant would have had to relitigate issues in a legal action brought by a plaintiff who was not party to a prior equitable proceeding in which the issues had been determined, would arise not by virtue of the seventh amendment, but by operation of the requirement of mutuality. The mutuality require-

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72. U.S. Const. amend. VII.
74. 99 S. Ct. at 658-61.
75. Id.
77. 99 S. Ct. at 652.
ment was not designed to preserve jury trial rights. At common law, mutuality was necessary for the assertion of collateral estoppel regardless of whether the prior action was before a jury or to a court. Further, where mutuality of estoppel existed, a prior determination was conclusive whether it was legal or equitable. Therefore, the question of when collateral estoppel may properly be used is one of procedure and does not go to substantive seventh amendment rights.

The Court further argued that “many procedural devices developed since 1791 that have diminished the civil jury’s historic domain have been found not to be inconsistent with the seventh amendment.” Hence, even though the use of collateral estoppel in the absence of mutuality may prevent one from relitigating issues before a jury, previous case law indicates that this is a constitutionally accepted limitation on the right to a jury trial. In light of the foregoing, the majority’s rejection of the “historical inquiry” argument appears to be sound.

A second argument supporting the proposition that the seventh amendment will not allow an equitable determination to be conclusive with respect to a subsequent legal action was advanced by the Court of Appeals for the Fifth Circuit in Rachal v. Hill. There, the court was faced with an issue virtually identical to the one involved in Parklane. Holding that a defendant to a stockholder class action had a right to a jury trial on issues resolved in a prior SEC suit, the court stated:

In light of the great respect afforded in Beacon Theatres . . . , and its progeny, for a litigant’s right to have a legal claim tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages

78. See Shapiro & Coquillette, supra note 76, at 454.
80. 435 F.2d 59 (5th Cir. 1970). See generally Note, Right to Jury Trial and Collateral Estoppel in Securities Litigation, 42 ALB. L. REV. 733 (1978); Seventh Amendment, supra note 73.
for violations of the security laws because of a prior adverse
determination by the district court of the same issue in an
action in which their present adversary was not a party and
which arose in a different context from the present action.\textsuperscript{81}

The majority in \textit{Parklane} summarily dismissed the \textit{Rachal}
argument by stating that the recognition that an equitable de-
termination could have collateral estoppel effect in a subse-
quent legal action was the "major premise" of the \textit{Beacon
Theatres} decision.\textsuperscript{82} In \textit{Beacon Theatres} the Court held that
since the determination of legal issues in an equitable action
"might operate either by way of res judicata or collateral es-
toppel" to preclude a party from having a subsequent jury
trial on those issues,\textsuperscript{83} the legal issues should be tried first so
as to preserve the jury trial right.

Although it is true that prior to \textit{Beacon Theatres} an equi-
table determination would be conclusive in a subsequent legal
action, what the Court apparently failed to consider is that
such a policy is no longer reasonable after the abandonment of
the "equitable clean-up" doctrine. At common law, a litigant
could not complain about being precluded from relitigating le-
gal issues previously determined in an equitable action, since,
had those issues been presented in their legal context in the
prior action, the court could nonetheless have disposed of
them. However, once the "equitable clean-up" doctrine was
rejected, it would appear to be unjust to hold that a defendant
has no right to a jury trial in a legal action with respect to
issues that had been determined in a prior equitable action.
Thus, in \textit{Parklane} the defendants would have had a right to a
jury trial on issues involved in the stockholder class action had
the plaintiff been able to join in the prior SEC suit. However,
since the plaintiff encountered a joinder problem, the defend-
ants lost their seventh amendment right to a jury trial. The
\textit{Parklane} majority seems to have advanced no persuasive rea-
son why a defendant's seventh amendment rights should de-
pend upon his opponent's joinder problems.

\textsuperscript{81} 435 F.2d at 64 (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)).
\textsuperscript{82} 99 S. Ct. at 653.
\textsuperscript{83} 359 U.S. 500, 504 (1959) (citing Beacon Theatres, Inc. v. Westover, 252 F.2d
864 (9th Cir. 1958)).
V. Conclusion

Each part of the two-part rule formulated by the Court in *Parklane* has a distinct objective. The ease of joinder limitation was intended to promote judicial economy and uniformity of judgments by encouraging potential plaintiffs to join in a single action against a common defendant. This limitation, however, will most likely result in the unnecessary relitigation of issues and a greater risk of inconsistent judgments. The potential unfairness limitation was meant to protect the rights of a defendant against whom collateral estoppel is asserted. The right to a jury trial has constitutional as well as procedural significance and should be carefully guarded. The defendants in *Parklane* were precluded from relitigating before a jury those issues resolved in the prior SEC action merely because of a procedural quirk which prevented the stockholders from joining that prior action. Thus, in *Parklane*, the procedural and constitutional rights of the defendants may not have been adequately protected. Therefore, it appears that the objective of the potential unfairness limitation was not achieved. In summary, the impact of the majority opinion is best synthesized by Justice Rehnquist: "The ultimate irony of today's decision is that its potential for significantly conserving the resources of either the litigants or the judiciary is doubtful at best. [Thus, there is] . . . absolutely no reason to frustrate so cavalierly the important federal policy favoring jury decisions of disputed fact questions."  

84.

DAVID D. WILMOTH


I. Introduction

In *Caban v. Mohammed*, the United States Supreme Court, in a five to four split decision, held that an unwed fa-

84. 99 S. Ct. at 664 (Rehnquist, J., dissenting).