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Civil Procedure--The Offensive Use of Collateral Estoppel Where the Initial Action Was a Nonjury Proceeding Not Violative of the Seventh Amendment

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RECENT DEVELOPMENT

CIVIL PROCEDURE—THE OFFENSIVE USE OF COLLATERAL ESTOPPEL WHERE THE INITIAL ACTION WAS A NONJURY PROCEEDING NOT VIOLATIVE OF THE SEVENTH AMENDMENT. *Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645 (1979).

I. INTRODUCTION

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[1]

The merits of a trial by jury have been a source of constant debate since the Constitution was written.[2] The courts have attempted to define the scope and limitations of what some now describe as a right which is a "luxury that can no longer be afforded,"[3] but as dockets have become more crowded the debate has grown in intensity and the expansion or contraction of the right to trial by jury has continued to be a subject for litigation.

The United States Supreme Court in its recent decision, *Parklane*

1. Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

2. The seventh amendment provides: "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. *See generally* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). The right of trial by jury is of ancient origin and was hailed by Blackstone as the "glory of the English law" and "the most transcendent privilege which any subject can enjoy." 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (R. Bell ed. 1771-1772). The Supreme Court has voiced numerous eulogies to the jury, but a debate exists over the benefits of a civil jury system balanced against the costs to the public in terms of crowded dockets, higher damage awards, and escalating administrative costs. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2301 (1971).

3. C. WRIGHT & A. MILLER, *supra* note 2, § 2301, at 10. *See also* De Parcq, *Thoughts on the Civil Jury*, 3 TULSA L.J. 1 (1966); James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Sebille, *Trial by Jury: An Ineffective Survival*, 10 A.B.A.J. 53 (1924); Summers, *Some Merits of Civil Jury Trials*, 39 TUL. L. REV. 3 (1964).

Hosiery Co. v. Shore,[4] apparently has narrowed the scope of the seventh amendment right to a jury trial by affirming a court of appeals opinion based on the doctrine of collateral estoppel.[5] By allowing a plaintiff the use of this doctrine, the Court has eliminated a defendant's right to a trial by jury on issues that could be subject to such right except that they were decided in previous nonjury litigation.

II. THE FACTS

Parklane Hosiery Company was accused, in the original stockholders' class action suit, of issuing a materially false and misleading proxy statement in connection with a merger and of being in violation of federal securities laws and Securities and Exchange Commission (SEC) regulations.[6] The shareholders asked for damages, a rescission of the merger resulting from the alleged misleading information, and recovery of costs.[7] Before this action was litigated, however, the SEC sued the corporation for violations based on the same allegations of a materially false and misleading proxy statement and sought injunctive relief.[8] In a nonjury trial,[9] a federal district court granted the SEC a declaratory judgment which the court of appeals later affirmed.[10]

Based upon the holding in the SEC decision, the stockholders moved for a partial summary judgment against Parklane, asserting that the petitioners were collaterally estopped from relitigating the issues that had been resolved against them in the earlier SEC suit. The district court denied this motion, stating that it would deprive petitioners of their seventh amendment right to a jury trial.[11] The Court of Appeals for the Second Circuit reversed and held that collateral estoppel

4. 99 S. Ct. 645 (1979).

5. Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977).

6. According to the complaint, the proxy statement had violated §§ 10(b), 13(a), 14(a), and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(a), 78n(a), 78j(b), 78t(a) (1976). 565 F.2d 815 (2d Cir. 1977).

7. 565 F.2d at 817.

8. SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 479 (S.D.N.Y. 1976).

9. The petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC, as the Securities Exchange Act of 1934 provides for prompt enforcement actions by the SEC unhindered by private parallel actions. 15 U.S.C. § 78u(g) (1976). Furthermore, in SEC v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972), the court stated that "the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues." *Id.* at 1240.

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

11. The court based its denial of the motion on Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970). 565 F.2d at 818.

could be applied "offensively"[12] by a plaintiff in a subsequent suit and that this use of the doctrine would not violate the other party's right to a jury trial on the issues in question.[13] This court stated, "the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury."[14] Because the holding was in conflict with a position taken by the Court of Appeals for the Fifth Circuit in *Rachal v. Hill*,[15] the Supreme Court granted certiorari.[16] The Court in the present case examined and affirmed the Second Circuit's holding, resulting in a narrowing of the scope of the seventh amendment right to a trial by jury.[17]

III. Discussion

The Supreme Court addressed two major issues posed by the lower court's decision:

(1) Whether a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" under the general law of collateral estoppel to prevent a defendant from relitigating issues resolved in the earlier proceeding;[18]

(2) Whether the use of offensive collateral estoppel in this case would violate the petitioner's seventh amendment right to a trial by jury.[19]

In an 8-1 decision, the Court in *Parklane* agreed with the Second Cir-

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12. Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue which the defendant had previously litigated unsuccessfully in an action with another party. A similar type of collateral estoppel is called "defensive" use and occurs when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff had previously litigated and lost against another defendant. Parklane Hosiery Co. v. Shore, 99 S. Ct. at 649 n.4. Notice that in both the offensive and defensive use situations, the party against whom the estoppel is asserted had litigated and lost in an earlier action. For a more extensive overview of the effects of these doctrines, see Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

13. 565 F.2d at 824.

14. *Id.* at 819.

15. 435 F.2d 59 (5th Cir. 1970).

16. The *Rachal* court held that use of the doctrine of collateral estoppel in a very similar factual situation violated the defendant's seventh amendment rights. See Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971); 40 U. CINN. L. REV. 373 (1971).

17. 99 S. Ct. at 645.

18. *Id.* at 649.

19. *Id.* at 652.

cuit and held that the respondents could offensively apply the doctrine of collateral estoppel without violating the petitioner's right to a jury trial.[20] A discretionary test was established for courts to use in future suits involving offensive collateral estoppel.[21] The overall eroding effect of *Parklane* on the right to a jury trial cannot accurately be determined until this test is applied in several cases. Following is an analysis of both the majority opinion and Justice Rehnquist's dissent in this case.

In determining that a plaintiff's offensive use of collateral estoppel could be applied in preventing a defendant from relitigating issues previously litigated and lost against another plaintiff, the Court looked at the general purposes and effects of collateral estoppel.[22] The significance of the law of collateral estoppel is that it precludes the repeated controversy of matters that already have been judicially determined.[23] One court said it is a "reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues."[24] It, however, does not act as a complete bar to subsequent action, and certain elements must be met before its application will be allowed.[25] The most fundamental requirement is that the question of fact or law must have been actually litigated previously. Furthermore, the losing party must have had a full and fair opportunity to litigate and the incentive to do so before he will be estopped from relitigating the issue.[26]

Historically, the use of collateral estoppel was limited by another element requiring both parties to have been bound by the prior judgment before either party could estop the other from relitigating an issue.[27] The modern trend has been to discard this mutuality

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20. *Id.* at 654-55.
21. *See* note 36 *infra* and accompanying text.
22. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." 99 S. Ct. at 649 (footnote omitted) (citing Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 328-29 (1971)).
23. J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.441, at 3779 (2d ed. 1974).
24. Tillman v. Nat'l City Bank, 118 F.2d 631, 634 (9th Cir. 1941), *cert. denied*, 314 U.S. 650 (1941).
25. See Comment, *Subsequent Use of Civil Adjudications of Obscenity*, 13 TULSA L.J. 146, 164-65 (1977).
26. *Id.* at 166-67.
27. 40 U. CINN. L. REV. 373, 376 (1971). In a frequently cited article commenting on the doctrine of mutuality, Professor Currie stated:

> There is no virtue in the mutuality requirement as such. . . . In general, one who was not a party to the prior action should be allowed to plead the former judgment against one who was a party, or in privity with a party, to the prior action, and this is true

requirement and to preclude a party from relitigating any issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the prior action.[28] Justice Traynor criticized the mutuality doctrine in *Bernhard v. Bank of America National Trust & Savings Association*,[29] the landmark case wherein the California Supreme Court discarded the rule. In a decision frequently quoted in subsequent federal cases abandoning the doctrine, Justice Traynor observed: "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."[30]

By abandoning the mutuality requirement in the use of collateral estoppel, the courts have opened the door for expanding encroachment on the seventh amendment right to a jury trial. For example, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[31] the Supreme Court held that the mutuality requirement was unnecessary in a case involving the defensive use of collateral estoppel. The plaintiff was estopped from reasserting a claim that his patent was valid when he previously had lost this validity argument in a federal court trial with another defendant.[32] The mutuality requirement was abandoned on the basis that the only safeguard needed for protecting the litigants from an unfair application of estoppel was a test to determine "whether or not the party against whom an estoppel is asserted had a full and fair opportunity to litigate."[33] This "full and fair opportunity" rule has become the contemporary law of collateral estoppel and was the ultimate basis for the discretionary rule devised by the Court in *Parklane* for determining the applicability of offensive collateral estoppel.[34]

Before extending the *Blonder-Tongue* rule to the present case involving an offensive use of collateral estoppel, the Supreme Court

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> irrespective of whether the plea is asserted as the basis for a claim or as a defense. This principle furthers the policy against repeated litigation of the same issue by the same party.

Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 308 (1957). *See also* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Annot., 31 A.L.R.3d 1044 (1970).

28. 40 U. Cinn. L. Rev. 373, 377 (1971).

29. Bernhard v. Bank of Am. Nat'l Trust & Sav. Assoc., 19 Cal. 2d 807, 122 P.2d 892 (1942).

30. *Id.* at 812, 122 P.2d at 895.

31. 402 U.S. 313 (1971).

32. *Id.*

33. *Id.* at 329.

34. *See* note 36 *infra* and accompanying text.

looked closely at the differences between the offensive and defensive use situations. They found that refusal to allow the use of offensive collateral estoppel could be justified on the basis of two factors: (1) offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does because potential plaintiffs may adopt a "wait and see" attitude and increase, rather than decrease, the total amount of litigation,[35] and (2) offensive use may be unfair to the defendant because he may have had little incentive in the first suit to defend vigorously, especially if the suit was for small or nominal damages, or if future suits were not foreseeable.[36] The Court established a discretionary approach for federal courts to deal with these factors by not expressly precluding the use of offensive collateral estoppel and by allowing the trial courts broad discretion in determining when it should be applied. The Court stated that the general rule should be

> that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.[37]

In *Parklane*, however, the Court concluded that none of the justifying factors existed for refusing to allow the doctrine to be applied. First, there was no private plaintiff who might have been waiting on the sidelines to gain the advantages of the first litigation without joining in that action. The respondent in this case could not have joined in the SEC action even had he so desired.[38] Second, the seriousness of the allegations in both suits, plus the fact that respondent's suit was actually filed before the SEC action, prevented the unfairness argument from being

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35. 99 S. Ct. at 651. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive.

Id. (citations omitted) (footnote omitted). In using offensive collateral estoppel a plaintiff can sit back and rely on a previous judgment against a defendant, but will not be bound if the defendant wins. *Id.*

36. *Id.* Unfairness may result if: (1) the first action involves small or nominal damages, but the subsequent action involves much more, (2) the judgment relied upon as a basis for estoppel is inconsistent with one or more previous judgments in favor of the defendant, or (3) the second action provides the defendant procedural opportunities unavailable in the first action that could readily cause a different result. *Id.*

37. *Id.*

38. *Id.* at 652. *See also* note 13 *supra* and accompanying text.

applicable.[39] In conclusion, the Court held "[s]ince the petitioners received a 'full and fair' opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statements were materially false and misleading."[40]

The second issue addressed by the Court in *Parklane* was whether the use of offensive collateral estoppel in this case would violate the petitioners' seventh amendment right to a trial by jury.[41] In determining that this right was not violated, the Court relied extensively on history and on recent cases on the subject of jury trials in civil actions to interpret the meaning of the seventh amendment.

Recent decisional law provided a basis for the proposition that an equitable determination can have a collateral estoppel effect on a subsequent legal action. In *Beacon Theatres, Inc. v. Westover*,[42] the Supreme Court said that the right to a jury trial on a legal claim is not defeated because the claim is initially asserted in an equitable proceeding.[43] It also indicated that a right to jury trial may be foreclosed by the doctrines of res judicata or collateral estoppel if issues common to both the legal and equitable claims were determined by a judge before the jury trial was demanded.[44] In *Katchen v. Landy*,[45] the Court also recognized that an equitable determination by a bankruptcy court could have collateral estoppel effect in a subsequent legal action without violating the seventh amendment.[46]

The petitioners in *Parklane* insisted that an application of the doctrine in the case at bar would violate their right to a jury trial because of historical considerations.[47] Since the scope of the seventh amend-

39. "[I]n light of the serious allegations made in the SEC's complaint against 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." 99 S. Ct. at 652.

40. *Id.*

41. *Id.* at 664.

42. 359 U.S. 500 (1959). For a discussion of the implications of this case, see Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1 (1976); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1 (1967); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. L. REV. 487 (1975).

43. 359 U.S. at 505.

44. *Id.*

45. 382 U.S. 323 (1966).

46. *Id.* at 334.

47. 99 S. Ct. at 653.

ment must be determined by reference to the common law as it existed in 1791,[48] petitioners claimed that the doctrine of mutuality was a requirement in 1791 for an application of collateral estoppel, and that the common law right as preserved must preclude the use of estoppel in their case as there was no mutuality of parties.[49] The Court dismissed this argument by categorizing collateral estoppel as a procedural doctrine not bound by the 1791 common law.[50] Using the rationale and words of its holding in *Galloway v. United States*,[51] where the procedural theory of directed verdicts was questioned as unconstitutional, the Court restated its views of the seventh amendment:

> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were the rules of the common law then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystalized [*sic*] in a fixed and immutable system . . . .
>
> The more logical conclusion, we think, and the one which both history and the previous decision here support, is 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.[52]

The *Parklane* Court then held that, "if . . . the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the SEC action, nothing in the Seventh Amendment dictates a different result, even though because of lack of mutuality there would have been no collateral estoppel in 1791."[53] The judgment of the Court of Appeals of the Second Circuit was affirmed,[54]

48. Dimick v. Schiedt, 293 U.S. 474 (1935). "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Id.* at 476. *See also* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 642 (1973).

49. 99 S. Ct. at 654. The Court responded, "[t]he petitioners have advanced no persuasive reason, however, why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present." *Id.*

50. *Id.* "[M]any 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." *Id.*

51. 319 U.S. 372 (1943).

52. 99 S. Ct. at 654 (quoting Galloway v. United States, 319 U.S. 372, at 390-92 (1943)).

53. 99 S. Ct. at 654-55.

54. *Id.* at 655.

and the intercircuit conflict was resolved against the Fifth Circuit's opinion in *Rachal v. Hill.*

Justice Rehnquist, in his dissenting opinion, viewed an offensive application of the doctrine of collateral estoppel as unfair if the party to be estopped had not had an opportunity to have the facts of his case determined by a jury.[55] Since in this case petitioners were not entitled to a jury trial in the SEC suit,[56] they should not be estopped from relitigating the issues before a jury in the private action. He claimed to have based his reasoning on several factors, but simply reiterated arguments expounding the virtues of jury trials.

First, the dissent stated that even if there is no seventh amendment violation, the use of collateral estoppel in this case "runs counter to the strong federal policy favoring jury trials."[57] Citing *Beacon Theatres, Inc. v. Westover,*[58] *Jacob v. New York,*[59] *Simler v. Conner,*[60] and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[61] as representative Supreme Court cases expressing a strong federal policy in favor of juries, Justice Rehnquist disclosed his fears that the *Parklane* decision would be a "wholesale abrogation of jury trials"[62] and would deprive a large number of defendants in private actions of their rights to trials by jury.[63]

Second, Rehnquist believed that the estoppel was unfair because "the opportunity for a jury trial in the second action could easily lead to a different result from that obtained in the first action before the court."[64] Rehnquist again directed his argument toward the virtues of a jury trial and found the majority's characterization of the jury as a "neutral" procedural factor to be contrary to his personal beliefs.[65] He

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55. *Id.* at 652.
56. *Id.*
57. *Id.* at 662.
58. 359 U.S. 500 (1959). "Only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.* at 510-11, *quoted in* 99 S. Ct. at 662 (Rehnquist, J., dissenting).
59. 315 U.S. 752, 752-53 (1942). "The right of jury trial in civil cases at common law is . . . [a] right so fundamental and sacred to the citizen . . . [it] should be jealously guarded by the courts." 99 S. Ct. at 662.
60. 372 U.S. 221 (1963).
61. 356 U.S. 525, 537-39 (1958) (cited to show that strong federal policy in favor of juries requires jury trials in diversity cases, regardless of state practice).
62. 99 S. Ct. at 662.
63. *Id.*
64. *Id.* at 663.
65. "As is evident from the prior brief discussion of the development of the civil jury trial guarantee in this country, those who drafted the Declaration of Independence and debated so passionately . . . would indeed be astounded to learn that the presence or absence of a jury is

argued,

> 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. The Court can cite no authority in support of this curious proposition. The merits of civil juries have been long debated, but I suspect that juries have never been accused of being merely "neutral" factors.
>
> Contrary to the majority's supposition, juries can make a difference . . . .[66]

Rehnquist was disturbed by a "nagging sense of unfairness"[67] about the *Parklane* holding which he believed was a continuation of the process of judicial erosion of the essential guarantee of a right to jury trial in civil cases provided by the seventh amendment. In a historical review of the background of the inclusion of the jury trial right in the Bill of Rights, Rehnquist stated, "[t]he 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."[68] He felt that the Court had expanded the existing rationale beyond its reasonable limit and infringed upon the defendant's rights in a manner far greater than it had sanctioned ever before.[69] He argued that application of the principles expounded in *Galloway* only weakened and subverted a fundamental right.[70] He was unwilling to accept the Court's presumption that the complete extinguishment of the petitioner's right to trial by jury could be justified as a mere procedural incident or detail. He viewed the development of nonmutual estoppel as a "substantial departure from the common law and its use in this case completely deprives petitioners of their right to have a jury determine contested issues of fact."[71]

He concluded by claiming that the ultimate irony of the decision

merely 'neutral' . . . ." *Id.* Rehnquist was referring to the majority's statement that "the presence or absence of a jury as a factfinder is basically neutral . . . ." *Id.* at 652 n.19.

66. *Id.* at 663. Rehnquist attempted to use an emotional argument to overcome what he termed the majority's "antiseptic analysis of the issues in this case." *Id.* at 655.

67. He admitted difficulty at feeling outraged with respect to a corporate defendant in a securities fraud action, but still did not feel the petitioners were treated fairly. *Id.* at 655.

68. *Id.* at 657.

69. *Id.* at 660.

70. "In the instant case, resort to the doctrine of collateral estoppel does more than merely contract the right to a jury trial: It eliminates the right entirely and therefore contravenes the Seventh Amendment." *Id.* at 660.

71. *Id.* at 661.

was that it would not even serve the supposed purpose of the doctrine of collateral estoppel, which is to promote judicial economy.[72] In *Parklane* the petitioners were still entitled to a jury determination of whether the respondents had been damaged by the alleged misrepresentation, and if so, the amount of damages. Therefore, a jury would be empaneled anyway, and the time saved by not retrying the issue of whether the proxy was materially false and misleading before the jury was likely to be negligible.[73]

The decision in *Parklane* was both necessary and just. It certainly can be stated that the holding represents an encroachment on a previously allowed right to trial by jury.[74] It also can be said that the right should never have been allowed and that the limitation is appropriate in a time of growing concern over crowded dockets, the size of judgments, and the costs of litigation.[75] The Court reasoned through a serious analysis of history, precedent, and policy before concluding that the petitioners in *Parklane* could not reasonably demand a jury trial on issues that previously had been fully litigated.[76] Why should the time of the court and a jury be taken up with relitigation of an issue already fully tried in a proceeding in a coordinate court whose procedures were comparable in every respect except the availability of a jury?[77] The benefits of allowing a jury trial in this situation were outweighed by the costs to the public, and perhaps the trend of resolving every close question of this type in favor of the jury trial right has finally been curtailed.[78]

The traditional method of determining whether a litigant has the right to a jury trial in a federal court is often termed the "historical approach." Under this approach it must be decided whether the particular case or issue in question would have been tried at law or equity in 1791, the year in which the seventh amendment was ratified.[79] This

72. *Id.* at 664. *See generally* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

73. 99 S. Ct. at 664.

74. *See, e.g.*, Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970).

75. *See generally*, Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971).

76. 99 S. Ct. at 645.

77. For a negative answer, *see* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 457 (1971).

78. *Cf. Id.* at 442. *See also* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 642 (1973).

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

historical test influenced the Supreme Court's decision in *Parklane* and is important to an analysis of this case.

The Court recognized that the "thrust of the Seventh Amendment was to preserve the right to jury trial as it existed in 1791," but proceeded to categorize the collateral estoppel issue as a procedural device that was not preserved under the seventh amendment right.[80] Justice Rehnquist, dissenting, found this portion of the majority opinion to be particularly distasteful in view of its consequences:

> To say that the Seventh Amendment does not tie federal courts to the exact procedure of the common law in 1791 does not imply, however, that any nominally "procedural" change can be implemented, regardless of its impact on the functions of the jury. For to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment . . . .
>
> The guarantees of the Seventh Amendment will prove burdensome in some instances . . . . But, . . . the onerous nature of the protection is no license for contracting the rights secured by the Amendment.[81]

The fault in this reasoning lies in the assumption that collateral estoppel would not have been allowed at common law, and that the petitioner would definitely have had a right to litigate his issues had he been in court in 1791. The language of the amendment has consistently been construed to mean its single purpose was to preserve the essentials of the jury trial in actions at law,[82] but, where the action may have been resolved in a court of equity (Court of Chancery in 1791),[83] then the jury trial right does not have to be preserved. The specific issue of collateral estoppel must be viewed in light of equity and law court decisions to determine whether it can be used to prevent a jury trial today.

In classifying collateral estoppel as a procedural device which has developed since 1791,[84] the Court in *Parklane* relied on its earlier decision in *Galloway v. United States*[85] in which it stated that the amendment was designed to preserve only the most fundamental elements of

80. 99 S. Ct. at 652 (citing Curtis v. Loether, 415 U.S. 189, 193 (1974)).
81. 99 S. Ct. at 659.
82. *See* Dimick v. Schiedt, 293 U.S. 474, 490 (1935) (Stone, J., dissenting).
83. *See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 451 (1971).
84. 99 S. Ct. at 654.
85. 319 U.S. 372 (1943).

the basic institution of jury trials, and was not designed to protect procedural details.[86] The Court also correctly referred to *Beacon Theatres*[87] and *Katchen v. Landy*[88] as precedent for the proposition that an equitable determination could have collateral estoppel effect in a subsequent legal action without violating seventh amendment rights.[89] A combination of ideas from *Galloway* and *Katchen* provided the Court with an adequate logical basis for its extension of the application of collateral estoppel to *Parklane*. The *Restatement of Judgments* also illustrates this general rule of collateral estoppel: "Where in a proceeding in equity a question of fact is actually litigated and determined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding at law or equity on a different cause of action."[90] It was the Court's responsibility to scrutinize this "seeming curtailment of the right to a jury trial"[91] with utmost care. Even Justice Rehnquist's emotional plea for jury trial rights[92] does not provide evidence that the majority neglected its scrutinizing duty before encroaching upon these rights. Among legal scholars and commentators alike, there is no concensus on the desirability of jury trials in civil actions generally,[93] so this decision, no matter how well reasoned, will offend some staunch advocates of a broad reading of the seventh amendment.

The policy rationale underlying this decision provides a strong basis for recognizing its potential as an important case in the line of seventh amendment litigation. By allowing trial courts discretion to determine the applicability of offensive collateral estoppel,[94] the Court has provided alternatives based on fairness to the parties involved in each individual suit.[95] The Court expressly stated that each party must have been given a full and fair opportunity to litigate his claims before

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86. *Id.* at 392.
87. 359 U.S. 500 (1959).
88. 382 U.S. 323 (1966).
89. *See* notes 42-45 *supra* and accompanying text.
90. RESTATEMENT OF JUDGEMENTS § 68, Comment j (1942). Note that this statement of the general principle is limited by a mutuality of parties requirement.
91. Dimick v. Schiedt, 293 U.S. 474, 485 (1934).
92. 99 S. Ct. at 655-88.
93. *See* J. FRANK, COURTS ON TRIAL: MYTH & REALITY IN AMERICAN JUSTICE (1950). For criticisms of jury trial, *see, e.g.*, Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956); Sebille, *Trial by Jury: An Ineffective Survival*, 10 A.B.A.J. 53 (1924). The system is defended in De Parcq, *Thoughts on the Civil Jury*, 3 TULSA L.J. 1 (1966); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Summers, *Some Merits of Civil Jury Trials*, 39 TUL. L. REV. 3 (1964).
94. 99 S. Ct. at 651.
95. *Id.* at 652.

collateral estoppel could be applied.[96] This reliance on individual facts and a fairness doctrine provides judges in future suits discretion to forbid wasting the court's time and the public's and parties' money. No rights are lost by a party who has actually litigated an issue before. In the *Parklane* case, the issues in question were fully litigated in a previous governmental action where the defendant not only had a full and fair opportunity to litigate, but had a strong incentive to defend vigorously his actions.[97] A jury trial of these same issues is not necessary when they already have been aired in a previous adversary proceeding.

IV. CONCLUSION

The Supreme Court in *Parklane* wisely has established a discretionary rule for federal trial courts to use in determining the applicability of offensive collateral estoppel. Situations where this question may arise are rare, but the decision seems to reverse a trend of court decisions favoring jury trials. The seventh amendment never was intended to provide a jury trial right for every matter that comes before a court, although courts in the past often have been reluctant to deny a jury trial when the question arose. *Parklane* is based on reason, common sense, and fairness; so, although the result is a "seeming curtailment of the right to a jury trial,"[98] it can be said that it has been "scrutinized with utmost care."[99]

Nancy L. Woods

96. *Id.*
97. *Id.* at 651.
98. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (citations omitted).
99. *Id.*