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Offensive Collateral Estoppel under the Full and Fair Opportunity Test

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COMMENTS

OFFENSIVE COLLATERAL ESTOPPEL UNDER THE FULL AND FAIR OPPORTUNITY TEST

Since the landmark decision of *Bernhard v. Bank of America*,[1] there has been much controversy over whether, and under what circumstances, the doctrine of collateral estoppel should apply in the absence of "mutuality". The question that has raised the most problems in the courts is whether collateral estoppel should be used "offensively". Until recently it had been assumed that there was a fundamental difference between defensive and offensive collateral estoppel, and that offensive use could always be denied in the absence of mutuality. However, this assumption was refuted by *Parklane Hosiery v. Shore*,[2] in which the United States Supreme Court sanctioned the offensive use of collateral estoppel. When *Parklane Hosiery* is combined with *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[3] the result is that the United States Supreme Court has now endorsed both defensive and offensive collateral estoppel, and has replaced the requirement of mutuality with the test of "whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate"[4] in the prior action.

Because of the possible dangers connected with offensive collateral estoppel, the commentators have developed several objective methods of analysis which would limit the opportunities in which collateral estoppel could be applied offensively.[5] The courts have by and large ignored these methodologies, and instead have chosen to analyze each case in which offensive collateral estoppel is averred by subjectively examining the circumstances of the prior case from

1. Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 122 P.2d 892 (1942).
2. Parklane Hosiery v. Shore, ____U.S.____, 99 S.Ct. 645 (1979).
3. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).
4. *Id.* at 329.
5. *See* Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281 (1957); Currie, Civil Procedure: The Tempest Brews, 53 CAL. L. REV. 25 (1965); Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 COLUM. L. REV. 1457 (1968); Comment, Mutuality of Collateral Estoppel, 63 N.W. U. L. REV. 209 (1968).

which the estoppel is said to arise. As pointed out in *Blonder-Tongue*, "[N]o one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity."[6] Consequently, whenever collateral estoppel is asserted offensively, the court should follow the Supreme Court's directive, by carefully scrutinizing the circumstances surrounding the prior action, in order to correctly apply the full and fair opportunity test. This comment discusses the development of the full and fair opportunity test, surveys the cases in which the test has been applied to an offensive assertion of collateral estoppel, and enumerates the factors which should be considered in the full and fair opportunity test.

WHAT IS COLLATERAL ESTOPPEL?

Res judicata is a concept that is often misunderstood by courts and practitioners alike. Much of the misunderstanding has occurred because courts often use the term "res judicata" to encompass both of two distinct effects of a prior adjudication. It is important to distinguish between the two concepts. The first doctrine is true res judicata or claim preclusion. The second is collateral estoppel, or issue preclusion. Judge Learned Hand made a classic statement of the difference between the two doctrines in *Irving National Bank v. Law*:[7]

> A judgment may be a merger or bar, or it may be an estoppel. For the first, the cause of action must be the same; for the second they may be as different as possible. On the other hand, the merger or bar extends, not only to matters pleaded, but to all that might have been, while the estoppel extends only to facts decided and necessary to the decision.

Under the doctrine of res judicata, a final judgment on the merits is an absolute bar to further action by the same parties or their privies on the same cause of action,

6. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, at 333-334.
7. Irving National Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926).

regardless of what issues were actually litigated.[8] Thus, if there is a judgment on the merits for the defendant, the entire cause of action is extinguished, or "bar" occurs.[9] If there is a judgment for the plaintiff, a "merger" of the entire cause of action in the judgment occurs.[10] In either case, none of the grounds for, or defenses to recovery in relation to the "claim" can be relitigated between the same parties or their privies.

On the other hand, collateral estoppel applies when a different cause of action is involved in the subsequent litigation. Once an issue is actually litigated and necessarily determined, that determination is conclusive in a subsequent suit involving a party to the prior litigation.[11] In other words, a party is precluded from contesting an issue if it has already been litigated in a prior action, even though the prior action involved a different cause of action.[12]

The Wyoming Supreme Court has recognized that there is a difference between res judicata and collateral estoppel, although it has used the two terms interchangeably, and prefers to refer to both concepts by use of the term "res judicata".[13] Therefore, caution should be exercised in reading a case which discusses "res judicata" in order to ascertain how the term is being used. For purposes of this comment, res judicata is used in the limited sense to mean only claim preclusion, and collateral estoppel is used to specifically mean issue preclusion or estoppel by judgment.

Mutuality of Estoppel

Traditionally, the availability of collateral estoppel has been limited by the mutuality doctrine, which requires one

8. *See* 1B MOORE'S FED. PRACTICE ¶ 0.405(1), at 621-624 (2d ed. 1974); Montana v. United States, ____ U.S. ____, 99 S.Ct. 970, 973 (1979); Roush v. Roush, 589 P.2d 841, 843 (Wyo. 1979).
9. Scott, Collateral Estoppel by Judgment, 56 HARV. L. REV. 1, 2 (1942).
10. *Id.* at 2.
11. *Id.* at 3, Montana v. United States, *supra* note 8, at 974.
12. 1B MOORE'S FED. PRACTICE ¶ 0.441(2), at 3776-3780 (2d ed. 1974); Salt Creek Freightways v. Wyoming Fair Emp. 598 P.2d 435 (Wyo. 1979).
13. *See* Salt Creek Freightways v. Wyoming Fair Emp., *supra* note 12, at 438; Roush v. Roush, *supra* note 8, at 843; Bard Ranch Co. v. Weber, 557 P.2d 722, 728 (Wyo. 1967); Willis v. Willis, 48 Wyo. 403, 49 P.2d 670 (1935), *reh. denied*, 49 Wyo. 296, 54 P.2d 814 (1936).

to have been either a party or in privity with a party to the suit in which judgment was rendered in order to invoke the conclusive effect of a prior judgment.[14] Mutuality prevents a litigant from asserting the plea of collateral estoppel unless he would have been bound if the judgment had gone the other way.

The mutuality requirement was assaulted and struck down by Justice Traynor in the case of *Bernhard v. Bank of America.*[15] Justice Traynor pointed out that no satisfactory rationalization had ever been advanced for the requirement of mutuality, and concluded that there was no compelling reason to require the party invoking collateral estoppel to have been a party, or in privity with a party to the earlier litigation.[16]

It is not clear whether mutuality of estoppel is a requirement in Wyoming. In several cases, the court has made broad statements which appear to recognize the traditional doctrine of mutuality.[17] But, in all of the recent cases, the validity of mutuality was not before the court for determination, and the statements approving mutuality were dicta. This was pointed out in *Rust v. First National Bank of Pinedale,*[18] where the federal court rejected the mutuality requirement. Judge Brimmer noted that the mutuality rule has been eroded in recent years and that the modern trend is to abandon the doctrine.[19] In spite of the cases which appear to recognize mutuality, Judge Brimmer concluded that the Wyoming Supreme Court would no longer adhere to the requirement of mutuality:[20]

> It is inconceivable that the Supreme Court of this state could so unequivocally approve of the policies which favor a rule for non-mutuality, and yet, at the same time, adopt the opposite doctrine, partic-

14. 1B MOORE'S FED. PRACTICE ¶ 0.412(1), at 1801 (2d ed. 1974).
15. Bernhard v. Bank of America Nat. Trust & Savings Assn. *supra* note 1.
16. *Id.* at 895.
17. *See* Salt Creek Freightways v. Wyoming Fair Emp., *supra* note 12, at 443 (Dissenting Opinion),; Roush v. Roush, *supra* note 8, at 843; Bard Ranch Co. v. Weber, *supra* note 13, at 727.
18. Rust v. First National Bank of Pinedale, 466 F. Supp. 135 (D. Wyo. 1979).
19. *Id.* at 138.
20. *Id.* at 139. Since it was a diversity case the federal court was obligated to follow the law of Wyoming.

ularly in light of the United States Supreme Court's pronouncements in *Blonder-Tongue*, and *Parklane Hosiery*, the near universal trend toward abrogation of the mutuality requirement, and the extremely sound reasoning advanced in support thereof.

It is clear that the Tenth Circuit no longer requires mutuality of estoppel. As stated in *Brown v. DeLayo*,[21] "The application of collateral estoppel in federal courts is not grounded upon the 'mechanical requirements of mutuality.' (citation omitted.) The test is whether a litigant has had a 'full and fair opportunity for judicial resolution' of the issue."

Defensive v. Offensive Estoppel

At this point it is necessary to distinguish between the defensive and offensive uses of collateral estoppel. Defensive use is the assertion of the plea of collateral estoppel by a defendant who was not a party to the prior litigation. As an example, assume the following sequence of events:

1) A v. B. B wins.

2) A v. C. C asserts A is collaterally estopped by the judgment in Action 1.

Offensive use is the assertion of the plea by a non-party claimant. As an example, assume the following:

1) A v. B. A wins.

2) C v. B. C asserts B is collaterally estopped by the judgment in Action 1.[22]

The Full and Fair Opportunity Test

The United States Supreme Court has spoken twice in regard to the defensive and offensive uses of collateral estoppel. In *Blonder-Tongue Laboratories, Inc. v. University*

21. Brown v. DeLayo, 498 F.2d 1173, 1175-1176 (10th Cir. 1974). *See also* Peffer v. Bennett, 523 F.2d 1323 (10th Cir. 1975).
22. It is implicit in the terms offensive and defensive collateral estoppel that the plea is being asserted by one who was not a party to the prior action.

of Illinois Foundation,[23] the Supreme Court approved of the defensive use of collateral estoppel, by holding that a patentee whose patent has previously been declared invalid by a federal court should not be allowed to relitigate the patent's validity against another alleged infringer.[24] *Blonder-Tongue* has been read narrowly as applying only to patent litigation, and indeed Justice White stated that the mutuality doctrine was not "before us for wholesale approval or reflection."[25] Yet the tenor of the opinion was critical of the mutuality requirement, and the Court recognized that the judge-made doctrine has been rejected by an increasing number of courts as unsound.[26] Much of the opinion was devoted to policy considerations, as the Court analyzed the abrogation of mutuality in terms of considerations relevant to the patent system, the economic costs of patent litigation, and the burden imposed on the federal courts by allowing relitigation of patent validity. In the final analysis, the Court believed that "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."[27] This significant safeguard should also be sufficient in areas other than patent litigation.

The Supreme Court allowed the offensive use of collateral estoppel in *Parklane Hosiery v. Shore*,[28] which involved a stockholders' class action for an alleged volation of SEC regulations. Before the suit came to trial the SEC sued the defendant with essentially the same complaint for injunctive relief. The district court entered a declaratory judgment for the SEC.[29] The plaintiff in the civil action then moved for a partial summary judgment on the ground that the defendant was collaterally estopped from relitigating the issues decided against it in the SEC action. Thus, the Court was faced with the question of whether a prior judgment

23. Blonder-Tongue Laboratories, Inc. v. University of Illinois, *supra* note 3.
24. *Id.* at 349-350. The decision was unanimous.
25. *Id.* at 327.
26. *Id.* at 350.
27. *Id.* at 329.
28. Parklane Hosiery v. Shore, *supra* note 2.
29. *See* Securities and Exchange Commission v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

could be used offensively as an estoppel.[30] Even though the Court recognized that several reasons have been advanced why the offensive use of collateral estoppel should be treated differently, it allowed offensive use under the facts of the case:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. . . . Since 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 . . .[31]

The Court in *Parklane Hosiery* utilized the approach of examining the circumstances surrounding the prior case in reaching its conclusion that the defendant had been afforded a full and fair opportunity to litigate.[32]

As a result of the developments in the law, mutuality is no longer a viable criterion of whether collateral estoppel should be applied. It is a court-produced limitation which no longer serves a useful purpose. It has been suggested that mutuality was originally developed merely to serve as an arbitrary standard in order to prevent the application of collateral estoppel in situations where it might work unjust results.[33] But now the concept is an anachronism. Mutuality has been replaced with the test of whether "the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding

30. Parklane Hosiery v. Shore, *supra* note 2, at 649.
31. *Id.* at 651-652.
32. A second issue in Parklane Hosiery was whether the offensive use of collateral estoppel would violate the defendant's Seventh Amendment right to a jury trial since the SEC action was equitable and the subsequent private action was legal. The majority, in an eight to one decision, concluded that it would not violate the Seventh Amendment to estop the defendant when he had not had an opportunity to have the facts of his case determined by a jury. The cases of Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. den.* 403 U.S. 904 (1970), and McCook v. Standard Oil Co. of California, 393 F.Supp. 256 (C.D.Cal. 1975), which reached the opposite conclusion on this issue are no longer the law.
33. *See* Note, *Civil Procedure—Abandonment of the Mutuality Requirement*, 22 ARK. L. REV. 491, 495 (1968).

and that application of the doctrine will not result in an injustice under the particular circumstances of the case."[34]

In the federal courts, at least, the general rule is now in favor of issue preclusion without regard to whether mutuality is present.[35] In cases where a non-party to the prior action is not allowed to assert collateral estoppel, it is not because mutuality is lacking, but because of special circumstances surrounding the prior action that would make it unfair to estop his opponent.

It is now almost universally recognized that four requirements must be satisfied in order for collateral estoppel to apply:[36] 1) the earlier action must have resulted in a final judgment on the merits; 2) the party against whom the plea is asserted must have been a party or in privity with a party in the earlier action;[37] 3) the issue decided in the prior adjudication must have been identical to the issue presented in the action in question; and 4) the party against whom the plea is asserted must have had a full and fair opportunity to litigate the issue in the prior adjudication.

THE DANGERS OF OFFENSIVE ESTOPPEL

The courts and commentators have distinguished between defensive and offensive collateral estoppel and are hesitant to allow offensive use. In discussing the propriety of allowing either defensive or offensive use, it is appropriate to focus on the policy reasons underlying collateral estoppel. The doctrine of collateral estoppel has the following goals: 1) to protect parties to a lawsuit from the expense and vexation attending the litigation of a dispute more than once; 2) to protect the public's interest in preserving judicial resources by preventing the relitigation of issues once decided; 3) to foster reliance on judicial action by minimiz-

34. Butler v. Stover Brothers Trucking Co., 546 F.2d 544, 551 (7th Cir. 1977).
35. *See* Montana v. United States, *supra* note 8, at 978.
36. Peffer v. Bennett, *supra* note 21, at 1325.
37. The requirements of due process prohibit estopping a party unless he had a chance to be heard in a prior litigation. Hansberry v. Lee, 311 U.S. 32, 40 (1940). For applications of this limitation in the context of collateral estoppel, *see* Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), *cert. den.* 416 U.S. 956 (1974), and Gerrard v. Larsen, 517 F.2d 1127, 1133 (8th Cir. 1975).

ing the possibility of inconsistent decisions; and 4) to preserve the policy in our system of law that no one should be deprived of his right to be heard.[38]

The policy of protecting parties from multiple litigation is inapplicable in both the defensive and offensive situations. The party asserting the plea has not been involved in any previous litigation. The party against whom the plea is asserted has no desire to be protected, conversely he wants to relitigate the issue.[39] When asking who may assert the plea of collateral estoppel the interests of preserving judicial resources and of minimizing the possibility of inconsistent decisions are the ones being served, and the question will be whether the interests of the state are strong enough to allow preclusion by a non-party.[40] When asking against whom may the plea be asserted the interest being served is the right of a party to be heard, and the question will be whether the party had a full and fair opportunity to contest the issue in the prior action.[41] The questions of whether inconsistent results will be prevented, and whether a reduction in the amount of litigation will result from the application of collateral estoppel should be easy to answer in any given case. Therefore, the focus should be on the question of whether the party against whom the estoppel is asserted had a full and fair opportunity to be heard.

Most courts have few qualms about allowing defensive collateral estoppel. A rule allowing the defensive use serves the purpose of minimizing unnecessary litigation by giving the plaintiff a strong incentive to join all possible defendants in the first suit, since if he wins, they would not be bound if not parties, and if he loses, he would be bound to them all.[42] Defensive use thus effectuates the policy of

38. *See* Montana v. United States, *supra* note 8, at 974; Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, *supra* note 3, at 328-329; Rust v. First National Bank of Pinedale, *supra* note 18, at 138-139; State of Maryland v. Capital Airlines, 267 F.Supp. 298, 303-304 (D.Md. 1967); In re Estate of Stevenson, 445 P.2d 753, 756 (Wyo. 1968); Rubeling v. Rubeling, 406 P.2d 283, 284 (Wyo. 1965).
39. As pointed out in Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, *supra* note 3, at 328, there is arguably a misallocation of resources when a party who has already had one chance is allowed to relitigate.
40. Comment, *supra* note 5, at 224.
41. *Id.* at 222-223.
42. Parklane Hosiery v. Shore, *supra* note 2, at 650-651.

original consolidation of all parties. Furthermore, there is nothing unfair about precluding a plaintiff from relitigating an issue when he chose the forum and the parties to the action.[43]

On the other hand, many courts are skeptical about allowing offensive use. They see several dangers inherent in the offensive use of collateral estoppel. First, there is the possibility that litigation will actually be increased as a result of offensive use.[44] In cases involving multiple claimants it will be advantageous for a putative plaintiff to adopt a wait-and-see attitude and stay out of the first action filed because he would have nothing to lose and everything to gain. If the plaintiff in the first action loses, a non-party would not be bound by the judgment. But if the named plaintiff won that "test case," all the claimants waiting in the wings would step in and wave the judgment as collateral estoppel in subsequent actions against the defendant. The amount of litigation could increase because consolidation would be discouraged.[45]

Also, there is the possibility that the defendant may not have had an adequate opportunity or ability to defend in the former action.[46] The first suit might involve a small claim, and the defendant would not be able to afford to make an extensive defense.[47] The defendant also might forego an appeal from an adverse judgment.[48] The defendant might be lacking procedural advantages in the first action because of the particular forum chosen by the plaintiff.[49] An issue

43. The following cases allowed defensive estoppel: Lowell v. Twin Disc, Inc., 527 F.2d 767 (2d Cir. 1975), Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973), (contract actions); Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975), *cert. den.* 423 U.S. 1054 (1976), (anti-trust); Brown v. DeLayo, *supra* note 21, P.I. Enterprises, Inc. v. Cataldo, 457 F.2d 1012 (1st Cir. 1972), (civil rights); Federal Savings & Loan Insurance Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973), (mortgage case); and Cardillo v. Zyla, 486 F.2d 473 (1st Cir. 1973), (prior action was criminal).
44. *See* Parklane Hosiery v. Shore, *supra* note 2, at 651.
45. This danger was also recognized in Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557, 564 (1968), Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958), and Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (1965).
46. *See* Parklane Hosiery v. Shore, *supra* note 2, at 651.
47. *See* Reardon v. Allen, *supra* note 45, at 31.
48. *See* Berner v. British Commonwealth Pacific Airlines, LTD, 346 F.2d 532 (2d Cir. 1965).
49. *See* Spettigue v. Mahoney, *supra* note 45, at 562.

which was insignificant in the prior suit, and thus not litigated vigorously, may become critical in a later suit.[50] For these and other reasons, the defendant may not have had a fair opportunity to defend the previous action.

A third danger is the multiple claimant anomally.[51] In multiple claimant cases, the defendant might win any number of judgments, yet any plaintiffs not parties would not be bound.[52] But, if the defendant were to lose a suit, he would then be precluded from contesting the issue against all remaining plaintiffs, if collateral estoppel were applied. The judgment relied on for the estoppel might be inconsistent with numerous previous judgments for the defendant. There is also the possibility that the first judgment was an aberration, such as a compromise verdict, or that the plaintiffs may have colluded to choose an oppressive forum. Yet if collateral estoppel were applied, the defendant would not be able to relitigate against any of the remaining claimants.[53]

One question is how these dangers should be taken into account in the application of the full and fair opportunity test. There are at least two possible alternatives. Either the dangers could become elements to be weighed in the test itself, or the dangers, if present in a case, could lead to an exclusion of the test and a reversion back to the mutuality requirement in that case. The proper approach would be to include these possible dangers; along with the procedural aspects of the prior action, the goals of collateral estoppel, and policy considerations, as criteria to be considered in resolving the ultimate question—whether the party had a full and fair opportunity in the prior action. The result would be a balancing test, whereby a court could reconcile the interest of a litigant to be heard with the societal interest in finality of litigation.

50. Report to the President & the Attorney General of the National Commission for the Review of Antitrust Laws & Procedures, 80 F.R.D. 509, 593 (1979).
51. This danger was first exposed by Currie in 9 Stan. L. Rev., *supra* note 5, at 281. See Currie's famous railroad hypothetical, which is set forth in Parklane Hosiery v. Shore, *supra* note 2, at 651 n. 14.
52. Hansberry v. Lee, *supra* note 37, at 40.
53. *See* Nevarov v. Caldwell, *supra* note 45, at 115-116.

THE CASE LAW

The full and fair opportunity test has evolved in the courts on a case-by-case basis. When collateral estoppel has been availed of offensively, the courts have closely inspected the circumstances surrounding the prior action in order to determine whether the defendant was afforded a full and fair opportunity to litigate the issue. Many factors have influenced the courts' decisions, and these factors are brought out in the survey of the cases. Professor Currie was originally unsure that courts would be willing to undertake this individualized inquiry, but later retracted his reservations, with apologies for his lack of faith in the judicial systems.[54] Under the case-by-case approach the defendant has the burden of proving that he did not have a full and fair chance in the first action, as an affirmative defense.[55]

One argument against applying the case-by-case approach is that it might lead to increased litigation, because there would be no certainty. But it has been suggested that the type of litigation involved in determining whether a party had a full and fair opportunity would be less time consuming than a trial on the merits since it would be decided on a motion for summary judgment.[56] Moreover, certainty should develop through the principles of stare decisis as more cases are decided.

Contract and SEC Cases

It is proper to begin by discussing an area in which offensive estoppel has usually been allowed. Contract cases are such an area. The leading case is *Zdanok v. Glidden*,[57] where the issue was the construction of a collective bargaining agreement. In the previous case, which was a test case involving five employees, the contract had been construed

54. Currie, 53 CAL. L. REV., *supra* note 5, at 28.
55. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, at 333, and Hart v. American Airlines, 61 Misc.2d 41, 304 N.Y.S.2d 810, 813 (1969).
56. Note, Collateral Estoppel: The Demise of Mutuality, 52 CORNELL L. Q. 724, 730 (1967).
57. Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964). A holding in Zdanok that had nothing to do with collateral estoppel was overruled in Local 1251 International U. of U.A.A. & A.I.W. v. Robertshaw Controls Co., 405 F.2d 29, 33 (2d Cir. 1968).

against the defendant. The court held that the defendant was estopped from contesting liability in a later action, which involved 160 plaintiffs.[58] Several factors led to the court's offensive application of collateral estoppel.[59] The defendant had been able to choose the forum for the first case. The defendant had not been unfairly surprised by the second action so that he would have defended more diligently if the two actions had been combined from the outset, since he was aware that the second action was lurking in the wings. Perhaps most importantly, the issue was the construction of a written contract by a judge, which should not vary from forum to forum, rather than a factual issue such as negligence, which would be subject to varying interpretations by different juries.

In contract cases, the assumption is that there is only one "correct" construction of a written contract. Thus, collateral estoppel should be allowed offensively because the threat of inconsistent results is less probable and litigation can be effectively reduced by estopping the defendant.

SEC cases should also be appropriate for the offensive use of collateral estoppel in many instances. In *Fink v. Coates*,[60] offensive estoppel was denied. The case involved a tort action based on an alleged violation of the SEC Act of 1934. The defendants had been held liable in a previous suit. The plaintiffs argued that collateral estoppel should be applied in their favor and cited *Zdanok* to support their contention.[61] The court distinguished *Zdanok*.[62] In *Zdanok*, the prior judgment had been fully appealed at the time collateral estoppel was applied. Here, the prior action was still on appeal. In *Zdanok*, the defendant chose the forum in the prior action. Here, the defendant was unsuccessful in an attempt to obtain a transfer to another forum. *Zdanok* involved the interpretation of a written contract, which should not differ from forum to forum. *Fink* was a tort action and the resolution of the legal issue of subjective in-

58. *Id.* at 956.
59. *Id.*
60. Fink v. Coates, 323 F. Supp. 988 (S.D.N.Y. 1971).
61. *Id.* at 989.
62. *Id.* at 989-990.

tent might vary between forums. But perhaps the real reason for the decision in *Fink* was doubt as to what was actually decided in the prior action because of a lack of findings of fact or conclusions of law.[63]

Parklane Hosiery adopted the *Fink* rule of granting the trial courts broad discretion to determine when collateral estoppel should be applied offensively.[64] The Supreme Court recognized that collateral estoppel could be unfair to a defendant if used offensively, but allowed it because none of the dangers were present.[65] The plaintiff could not have joined in the prior injunctive action initiated by the SEC. Because of the serious allegations in the SEC's complaint, and the fact that the defendant was already aware of the plaintiff's action, the defendant had every incentive to litigate vigorously. For these reasons, the Court decided the defendant had a full and fair opportunity to litigate its claim in the prior action.[66] *Parklane Hosiery* suggests that offensive estoppel would be proper in cases where the government has intervened and won after a private suit has been filed.

Cases Involving Policy Considerations

In several cases the courts have purported to base their decision on whether or not to apply collateral estoppel on policy reasons; and in some situations, particulary where a plaintiff has been attempting to estop a government defendant on a matter of law, the courts have reverted back to the mutuality requirement. A better approach would be for the courts to incorporate the policy considerations into the full and fair opportunity test, so that estoppel would not be automatically precluded in every case.

In *Divine v. Commissioner*,[67] the Second Circuit did not apply collateral estoppel offensively in a tax case, and stated that its decision must rest on policy considerations.[68]

63. *Id.* at 990. The court, which was wary of offensive collateral estoppel, seized upon this lack of findings as a way to justify its desired result.
64. Parklane Hosiery v. Shore, *supra* note 2, at 651.
65. *Id.* at 652.
66. *Id.*
67. Divine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974).
68. *Id.* at 1048.

The issue in the case was whether a corporation had any accumulated earnings and profits so that cash distributions made to its shareholders were dividend income to the shareholders, rather than a return of capital. The shareholders had treated the distributions as a nontaxable return of capital on their tax returns. The Commissioner of Internal Revenue had treated the distributions as taxable dividends, and had mailed deficiency notices to the shareholders. Several shareholders filed suit challenging the alleged deficiencies. In an earlier action the Seventh Circuit had held for the shareholder.[69] Despite this adverse decision, the Commissioner wanted to contest precisely the same legal issue in the second action, which arose out of the same transaction. The plaintiff argued the Commissioner should be estopped from relitigating, and cited *Blonder-Tongue* and *Zdanok*.[70] The plaintiff did not contend that the Commissioner should be estopped from litigating the tax issue in all cases. He only argued that the court should proceed to apply the full and fair opportunity test.[71] The court distinguished these cases, and said the tests in them were intended to apply only to certain classes of issues which for policy reasons it has been decided should be litigable only once.[72]

Zdanok was distinguished as involving an issue not "subject to varying appraisals"[73] of the facts by different juries. Presumably, the construction of the contract would be the same in any forum. The court said the tax issue involved was "subject to varying appraisals", since the tax law is unusually complex, with a resulting judicial conflict over the interpretation of the law itself, rather than how the "law" should be applied to specific facts.[74]

Blonder-Tongue was distinguished as being limited to patent litigation. The court felt that the Supreme Court had precluded relitigation of patent validity for policy reasons:[75]

69. *See* Luckman v. Commissioner, 418 F.2d 381 (7th Cir. 1969).
70. Divine v. Commissioner, *supra* note 67, at 1046.
71. *Id.* at 1047.
72. *Id.*
73. *Id.* at 1048.
74. *Id.*
75. *Id.*

1) patent litigation consumed a disproportionate amount of the federal courts' time; 2) it had proven to be extraordinarily expensive to the litigants; and 3) allowing relitigation would produce anticompetitive results in the marketplace. The court argued that these reasons were not necessarily relevant in the realm of tax litigation.

The court further distinguished the tax laws.[76] There is an extraordinary desire for uniformity and certainty in the administration of the tax laws, because the issues are of importance to the public, not just the particular litigants. Uncertainty in the tax laws can only be resolved by the Supreme Court, which will not grant certiorari until two or more circuits have adopted conflicting positions. The application of collateral estoppel would decrease the chances of a conflict occuring as soon as possible with the result that tax issues would remain unresolved for substantial periods. In effect, the court was encouraging inconsistent results as a means of achieving certainty in the long run. The court's argument was premised on the proposition that the practice of the Commissioner to assert that a Court of Appeals decision with which he disagrees has no binding effect in other circuits is proper.[77] What the court overlooked was the fact that if collateral estoppel were applied the Commissioner could no longer take this position. If the Commissioner were estopped uniformity would result, and it follows that there would be no uncertainty for the Supreme Court to resolve.

The commentators have disagreed as to whether the court in *Divine* was correct in requiring mutuality in federal tax litigation.[78] The better view is that the application of mutuality cannot be justified by policy considerations unique to tax litigation.[79] Policy considerations might explain why offensive estoppel was not allowed in a case, but the result should not turn on the fact that mutuality was lacking.

76. *Id.* at 1049-1050.
77. *Id.* at 1049.
78. *See* Comment, *Divine v. Commissioner:* Collateral Estoppel and the Mutuality Requirement in Federal Tax Litigation, 60 IOWA L. REV. 1420 (1975), for the view that *Divine* was correct; and Note, Collateral Estoppel: Loosening the Mutuality Rule in Tax Litigation, 73 MICH. L. REV. 604 (1975), for the view that *Divine* was incorrect.
79. Note, 73 MICH. L. REV., *supra* note 78, at 618.

What really bothered the court in *Divine* was the fact that the plaintiff was attempting to estop the Commissioner on a matter of law. The court was concerned that the Commissioner might be estopped in another case involving the same tax issue, but where the facts were quite dissimilar.[80] Indeed, the allowance of offensive estoppel on a matter of law could have a very broad impact. The Commissioner is the defendant in all deficiency suits, and therefore will have been a party to the previous suit. If estoppel were allowed the door would be open for innumerable taxpayers to preclude the Commissioner once a legal issue has been decided against him. The positive results would be that all taxpayers would be treated uniformly, and there would be a tremendous reduction in litigation. On the other hand, the decision on which the estoppel is based could be wrong, or it could be inconsistent with previous decisions in other circuits.

These competing interests can be resolved by the full and fair opportunity test. Professor Scott has suggested that collateral estoppel should not be applied to questions of law unless the successive actions involve the same question of law, and arise out of the same transaction or involve the same subject matter.[81] This approach would alleviate the problem that troubled the court in *Divine*, and is preferable to the strict requirement of mutuality that was imposed there. In *Divine*, two shareholders in the same corporation were treated differently with respect to the same transaction, because of the imposition of the mutuality requirement.[82] Since the Commissioner had already had an adequate opportunity to litigate the legal issue in respect to the transaction involved, he should have been estopped in *Divine*. Under Professor Scott's limitation, the Commissioner would have been estopped in *Divine*, but would not have been susceptible to estoppel on that legal issue in subsequent cases involving a different transaction.[83] The proper result could

80. Divine v. Commissioner, *supra* note 67, at 1050.
81. Scott, 56 HARV. L. REV., *supra* note 9, at 10.
82. As was pointed out in Note, 73 MICH. L. REV., *supra* note 78, at 614, that situation is much worse than if taxpayers were treated differently in the various circuits.
83. In the next factual situation posing the same legal issue, stare decisis could be applied against the Commissioner.

have been reached if the full and fair opportunity test had been applied in light of the policy considerations, rather than the policy considerations triggering an automatic application of the mutuality requirement. As stated in *United States v. Abatti*,[84] there is "no good reason for a per se rule of mutuality in tax cases."

The rationale of *Divine* was extended to a subpoena enforcement action in *United States v. Anaconda Co.*.[85] The Consumer Product Safety Commission brought an action to enforce a subpoena against an aluminum siding manufacturer. In a previous case, the court had decided that the Commission lacked jurisdiction over the same issue involved in the present suit.[86] The defendant argued that the Commission should be collaterally estopped from relitigating the identical issue.[87] The government argued for adoption of a strict mutuality rule. The court compared this situation to *Divine* and said the issue going to the heart of the Commission's jurisdiction was a question of public concern and that inquiry by other circuits would be healthy and should not be foreclosed.[88] The court held that it would" require strict mutuality in the somewhat unusual circumstances of this case."[89]

Anaconda is similar to *Divine* in that both cases involved a complex legal issue which would be present in recurring litigation. But in *Anaconda* the previous action had involved a different transaction. In this context, under the limitation suggested by Professor Scott, it would not have been proper for the resolution of the legal issue to have had a collateral estoppel effect, and the court reached the

84. United States v. Abatti, 463 F. Supp. 596, 603 (S.D.Calif. 1978). Here the full and fair opportunity test was applied by an analysis of the facts of the case, and the court estopped the Commissioner. The full and fair opportunity test was utilized in another tax case, Baily v. United States, 350 F. Supp. 1205 (E.D.Pa. 1972), *Aff'd on reh.*, 355 F. Supp. 325, 328 (E.D.Pa. 1973).
85. United States v. Anaconda Co., 445 F. Supp. 486 (D.D.C. 1977).
86. *See* Kaiser Aluminum & Chemical Corp. v. United States Consumer Product Safety Commission, 428 F. Supp. 177 (D.Del. 1977), where the issue was whether aluminum home wiring systems were "consumer products" within the meaning of the Consumer Product Safety Act, so that the Commission had jurisdiction over them.
87. United States v. Anaconda Co., *supra* note 85, at 494.
88. *Id.* at 496.
89. *Id.*

correct result. Furthermore, the issue was one of obvious public concern because of the possible safety hazards involved. It was proper for the court to hold that a single decision by a district court should not be determinative of this important issue, because of the possibility that the issue might have been decided the wrong way.

Mass Accident Cases

Cases involving a mass accident present the typical situation in which the multiple claimant problem can arise. It could be argued that under the reasoning of *Divine*, strict mutuality should be required in these cases, because of the possibility of inconsistent results, and because the issues involved have an impact on many others, i.e. the numerous claimants who are waiting to file suit. The fallacy of the analysis in *Divine* was that it precluded an application of the policy considerations to the facts of the case at hand. The public policy of preventing needless litigation should be strong enough to allow the utilization of the full and fair opportunity test in the mass tort cases. The test itself would ensure that collateral estoppel is not allowed in cases where the dangers are serious.

Some courts have allowed, and others have refused to allow offensive collateral estoppel in this area. Offensive use was allowed in *United States v. United Airlines*[90] and *Hart v. American Airlines*.[91] Both cases involved wrongful death actions after an airplane crash. In *United Airlines*, the defendant was found to be liable in the first action, which involved twenty-four plaintiffs. In applying collateral estoppel, the court said the issue of liability was tried to the hilt in the first trial, the defendant had no new or different evidence, and it would be a travesty of justice to require the remaining plaintiffs to relitigate the issue of liability after it had been so thoroughly litigated.[92]

90. United States v. United Airlines, Inc., 216 F. Supp. 709 (D.Nev. 1962), *cert. dismissed* 379 U.S. 951 (1964). The decision was approved in United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964).
91. Hart v. American Airlines, *supra* note 55. *Also see* State of Maryland v. Capital Airlines, *supra* note 38, which is a well-written opinion.
92. United States v. United Airlines Inc., *supra* note 90, at 728.

In *Hart*, the prior action, in which the defendant was held to be liable, involved only one defendant, but the court said this did not matter.[93] The court dismissed the defendant's argument that the jury verdict in the prior action might have been an aberration as inconsistent with notions of full faith and credit and the judicial system's faith in jury trials.[94] It should be noted that the court actually precluded the possibility of inconsistent results by allowing collateral estoppel, and thus fulfilled the policy of assuring certainty and faith in the judicial system.

On the other hand, in *Berner v. Commonwealth Pacific Airlines, LTD*,[95] collateral estoppel was not applied offensively in litigation arising out of an airplane crash. The first action had resulted in two trials. The defendant had won a jury verdict in the first trial, but the judge granted the plaintiff's new trial motion. The plaintiff recovered a small judgment in the second trial.[96] The court decided it would be unfair to apply collateral estoppel because the defendant had not appealed the second trial, and whatever errors had been made remained.[97] The court's rationale was that the defendant did not appeal for fear that a third trial would result in higher damages being awarded, and that since *Zdanok* had not been decided at the conclusion of the second trial he did not know he could be estopped.[98]

In most of the mass accident cases in which offensive estoppel has been raised, the plaintiff has won the first action filed, and inconsistent results are possible only if collateral estoppel is not allowed. Thus, the "multiple claimant anomaly" posed by Professor Currie may be more hypothetical than actual.

Perhaps the possibility of inconsistent results should be immaterial in determining whether the defendant had a full and fair opportunity in a prior lawsuit. This notion is sug-

93. Hart v. American Airlines, *supra* note 55, at 815.
94. *Id.* at 815.
95. Berner v. British Commonwealth Pacific Airlines, LTD, *supra* note 48, at 538-541.
96. The plaintiff recovered a $35,000 judgment.
97. Berner v. British Commonwealth Pacific Airlines, LTD, *supra note* 95, at 541.
98. *Id.* at 540. The plaintiff in the second action sought $7,000,000 in damages.

gested by *Blumcraft of Pittsburgh v. Kawneer Co., Inc.*,[99] which involved a defensive use of collateral estoppel in connection with patent litigation. In the first suit, the patent at issue was held to be valid and infringed. In a later suit, the patent was held to be invalid. In the present action, the plaintiff was collaterally estopped from contesting the issue because of the finding in the second action.[100] The plaintiff argued that since there was a finding of validity prior to the finding of invalidity it would be inequitable to estop the third action.[101] On the basis of *Blonder-Tongue*, the court held that the test is not whether the prior finding was "correct", but whether the plaintiff had a full and fair opportunity to litigate, and he did in the second action.[102] The court thus had no discretion to deny estoppel. The case illustrates that the focus should be directed on the previous decision, regardless of the results in any earlier cases.

In any event, there is not a causal relationship between collateral estoppel and inconsistent results. Assume a mass accident with ten claimants who have filed ten different lawsuits against one defendant. If a plaintiff wins the first suit, inconsistent results can occur only if collateral estoppel is not applied. If the defendant wins several actions and then loses one, inconsistent results have already occurred, and collateral estoppel did not cause the problem. The ultimate solution would be to somehow require all ten plaintiffs to join in one suit. Until that can be achieved, collateral estoppel can be applied to save judicial time and resources. It follows that the possibility of inconsistent results should not be an element of the full and fair opportunity test.

It could still be argued that the problem of putative claimants staying out of the first action filed will remain to increase the amount of litigation.[103] But this problem is not really caused by collateral estoppel. There are many reasons why a claimant could want to stay on the sidelines, other than the possibility of asserting another plaintiff's

99. Blumcraft of Pittsburgh v. Kawneer Co., Inc., 482 F.2d 542 (5th Cir. 1973).
100. *Id.* at 549.
101. *Id.* at 547.
102. *Id.* at 546.
103. *See* Parklane Hosiery v. Shore, *supra* note 2, at 651.

judgment against the defendant. Thus, even if collateral estoppel were not allowed offensively it would not cause all claimants to join in the first suit filed.

Automobile Accident Cases

One of the most common situations in which collateral estoppel is available is the automobile accident cases. Such a case typically involves three parties: two plaintiffs suing for either personal injury or property damage, and one defendant. The possibility of inconsistent results cannot be a reason for denying collateral estoppel in these cases, assuming the defendant lost the first action.[104] Inconsistent results can occur only if collateral estoppel is not applied.

The courts that have not allowed offensive estoppel[105] have been concerned with two dangers. First, a possible plaintiff may wait in the wings in the hopes that the first action will establish the defendant's liability. As a result, litigation may be increased.[106] This danger is not serious since usually only two plaintiffs are involved. Unless the defendant can compel the absent claimant to join in the first action, two actions would be necessary regardless of whether collateral estoppel were allowed. Furthermore, if the plaintiff won the first action and collateral estoppel were allowed, litigation would be decreased because the only issue in the second trial would be damages.

Second, courts worry about the unfair burden that can be placed on the defendant. In *Mackris v. Murray*,[107] the court discussed the practice of plaintiff's lawyers to advance a "test case" to quickly establish liability. The court used a hypothetical in which one plaintiff filed a $50 property damage suit to establish the liability of the defendant, then the second plaintiff filed a large personal injury suit. It would not be economically feasible for the defendant to make

104. If the defendant won the first action, collateral estoppel would not be an issue.
105. *See* Spettigue v. Mahoney, *supra* note 45, Nevarov v. Caldwell, *supra* note 45, Reardon v. Allen, *supra* note 45, Pomeroy v. Waitkus, 183 Col. 344, 517 P.2d 396 (1974), and Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968).
106. *See* Reardon v. Allen, *supra* note 45, at 32.
107. Mackris v. Murray, *supra* note 105, at 81.

an extensive defense to the small claim. The defendant could not afford to appeal from an adverse judgment for an insignificant amount in order to keep the issue of his negligence open. This danger is real and a court should consider the size of the claim in the prior action in applying the full and fair opportunity test.

On the other hand, many courts have allowed estoppel to be asserted offensively in this area.[108] These cases indicate that courts survey the particular facts of each individual case and are willing to allow offensive estoppel when the dangers are not present.

On the basis of *Divine*, it could be argued that if the issue is subject to varying appraisals, as is the issue of negligence, the full and fair opportunity test should not be applied. This argument should not be valid after *Interboro Mutual Indemnity Insurance Co. v. United States*,[109] which involved the issue of negligence. The case involved an action against the government for property damage resulting from a car collision, under the Federal Tort Claims Act. In a previous action the government had been held liable for personal injuries stemming from the accident. The court distinguished *Divine* as involving "complicating factors", applied the full and fair opportunity test, and estopped the government.[110] The court limited *Divine* to the proposition that collateral estoppel will not be appropriate when overriding policy questions are present.[111] The fact that an issue is one which is subject to various interpretations in different tribunals is an element of the test itself.

The correct application of the full and fair opportunity test is illustratetd by *Butler v. Stover Brothers Trucking*

108. *See* Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975), Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243 (E.D.N.Y. 1977), Gorski v. Commercial Ins. Co. of Newark, 206 F. Supp. 11 (E.D. Wis. 1962), B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 137, 225 N.E.2d 195 (1967), and McCourt v. Algiers, 44 Wis.2d 607, 91 N.W.2d 194 (1956).

109. Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243 E.D.N.Y. 1977).

110. *Id.* at 1247.

111. *Id.* at 1247. The policy in *Divine* was that different circuits should not be bound by one circuit's interpretation of the tax code. As pointed out, this policy limitation should not apply when the subsequent case involves the same transaction and the same issue that was litigated in the prior suit.

Co.[112] *Butler* involved a three-way truck collision. A jury had found the defendant guilty of negligence in a prior action, which had been filed by the estate of one of the drivers. In that action the defendant had been precluded from testifying because of the invocation of the Illinois Dead Man Act. The plaintiff in the present action moved for a summary judgment on the question of the defendant's negligence, and asserted the defendant should be collaterally estopped.[113] The court held that the mutuality requirement was inapplicable, and proceeded to apply the full and fair opportunity test.[114] The court recommended a case-by-case analysis as the need is not for symmetry in the law, but for substantial justice, which depends on the realities surrounding the parties.[115] The court in *Butler* found unique circumstances and did not allow collateral estoppel.[116] The defendant was not permitted to fully litigate the issue of his negligence in the prior action because of the Dead Man Act. If the plaintiff in the present action had been present in the prior action the defendant could have testified against him. The court decided it would be unfair, and would subvert the policy of the Dead Man Act to allow the second plaintiff the benefit from the statute through collateral estoppel. The court concluded:[117]

> In so holding, we do not forget the importance of preventing repetitive litigation. The doctrine of collateral estoppel should not, however, be used as a club to attain that goal but as a fine instrument that protects 'the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation'.

CONCLUSION

A litigant has a constitutional right to be heard, but in light of the judicial system's limited resources, litigants should be limited to only one adequate opportunity to be heard. Initially, the mutuality requirement was devised as

112. Butler v. Stover Brothers Trucking Co., *supra* note 35.
113. *Id.* at 548.
114. *Id.* at 551.
115. *Id.*
116. *Id.*
117. *Id.* at 551-552.

an absolute limit on collateral estoppel to ensure that the right to be heard was fulfilled in every case. But it is now generally accepted that:[118]

> The fate of the mutuality rule as applied to collateral estoppel is the same as its fate in other fields of law: as a principle of justice it has been shown to be a tinkling cymbal, an empty and fatuous formula productive of more harm than good. But in operation it encompassed some sound results.

Sound results are now achieved with the full and fair opportunity test. When collateral estoppel is asserted offensively the court should carefully examine the circumstances surrounding the previous case in order to balance the defendant's right to a full and fair opportunity to litigate the issue with the right of the courts to be free from repetitive litigation.

As the courts have been faced with more offensive estoppel questions, certain factors have emerged in recurring fashion, and these factors have become elements of the full and fair opportunity test. These factors are loosely grouped into four categories:

1. Procedural aspects of the prior action. In applying the full and fair opportunity test a court should look at whether the defendant chose the forum or had the initiative in the prior action; whether the defendant had an opportunity to appeal the prior decision; whether the plaintiff could have joined in the earlier action; whether the defendant had an incentive to litigate vigorously because he was aware of the pendency of the second suit, or because of the seriousness of the allegations in the first suit; whether the amount of litigation was extensive in the prior suit; and whether the second action affords the defendant certain advantages which were unavailable in the prior action, such as new evidence or differences in the applicable law.

2. Goals of collateral estoppel. The courts should determine whether the goals of preventing needless litigation

118. Currie, 9 STAN. L. REV., *supra* note 5, at 322.

or minimizing inconsistent results will be fostered by an application of offensive estoppel.

3. Dangers of offensive estoppel. Two dangers are relevant in the offensive situation. One is the problem of claimants waiting in the wings because they have nothing to lose and everything to gain by staying out of the first action filed. The other is the practice of plaintiffs of using a test case to quickly establish the defendant's liability. Courts will be less likely to estop a defendant if to do so would result in increased litigation or would place the defendant in the unfair position of having to vigorously litigate a case for an insignificant amount.

4. Policy considerations. Certain classes of issues should be litigable more than once because of an overriding public concern. This is the only area where strict mutuality can be justified, and the exception is limited to two situations. One is that issues of law should be relitigated so long as the subsequent action involves a different factual situation than was involved in the prior action. Typically, an issue of law which has a far-reaching impact on others will be involved, and the government will be the defendant. The other exception is that a governmental regulatory agency should not be precluded from relitigating a legal issue going to the heart of its power. Other classes of issues, such as are involved in patent litigation, should be litigable only once because of policy reasons.

Under the objective standard of mutuality, collateral estoppel could never be asserted in a situation where it would be unfair to the defendant. The cost was that offensive estoppel was denied in many instances where it would have produced good results. Under the subjective full and fair opportunity test, estoppel still will not be allowed in a case where it would be unfair to the defendant, but will be available in the other cases to produce beneficial results.[119]

MICHAEL A. DEAHL

119. Offensive estoppel has been allowed in the following cases: Speaker Sortation Systems v. United States Postal Service, 568 F.2d 46 (7th Cir. 1978),

(equitable lien); Garcy Corp. v. Home Insurance Co., 496 F.2d 479 (7th Cir. 1974), Serguros Tepeyac, S.A., Compania Mexicana v. Jernigan, 410 F.2d 718 (5th Cir. 1969) *cert. den.* 396 U.S. 905 (1969), New Rork News, Inc. v. New York Typographical Union No. 6, 374 F. Supp. 121 (S.D.N.Y. 1974), (contract); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3rd Cir. 1974), (anti-trust); and Aetna Casualty & Surety Co. v. Jeppeson & Co., 440 F. Supp. 394 (D.Nev. 1977).