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OFFENSIVE COLLATERAL ESTOPPEL: IT WILL NOT WORK IN PRODUCT LIABILITY*

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Collateral estoppel is a doctrine that precludes parties from relitigating an issue that was previously litigated.[1] Traditionally, collateral estoppel had been applied only when it was mutual—one party could assert collateral estoppel against another only if the latter could have asserted it against the former.[2] The doctrine of mutuality, however, has been gradually eroded in the name of expediting trials and conserving judicial resources.[3] The first step in this process was the elimination of the mutuality requirement where a particular plaintiff brought two or more suits against different defendants concerning the same incident. The theory is that the plaintiff has had his day in court and it would be a waste of judicial resources to give him a second chance against a new defendant.[4] For example, in the Bendectin cases,[5] plaintiffs would be precluded from arguing that Bendectin causes birth defects because a court and jury had previously found that it does not.

In the development of the law, it was inevitable that courts would proceed to the next step—prohibiting defendants from relitigating issues that had been decided in a prior case brought by an entirely different plaintiff. This is arguably fair because the defendant, in the prior action, had a full and fair opportunity to present his case. As long

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1. Collateral estoppel, or as it is increasingly called, "issue preclusion," *see, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), precludes the relitigation of an issue of law or fact when the issue was actually raised, litigated, and necessary to the judgment in the prior proceeding. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4416 (2d ed. 1981).

2. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); RESTATEMENT OF JUDGMENTS § 93 (1942).

3. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971).

4. *Id.* at 328.

5. *See, e.g.*, Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985); Watson v. Merrell Dow Pharmaceuticals, Inc., 769 F.2d 354 (6th Cir. 1985); Mekdeci v. Merrell Nat'l Labs., Inc. 711 F.2d 1510 (11th Cir. 1983). Bendictin is an anti-nausea drug which was sometimes given to women in the early stages of pregnancy. *See Richardson-Merrell*, 105 S. Ct. at 2759.

as the issues are exactly the same (*e.g.*, did the defendant enter the intersection on a red light), it would be putting form over substance to require identity of interests.[6]

The latter type of issue preclusion is referred to as the offensive use of collateral estoppel.[7] Offensive collateral estoppel first received judicial attention when the Supreme Court of the United States approved its application in *Parklane Hosiery Co. v. Shore*,[8] a securities fraud case. The Court limited the doctrine's application to cases where its use would not be "unfair" to the defendant.[9] Hence, the doctrine's application rested on a finding that the issues in question were identical to the issues previously litigated, and that the defendant had a full and fair opportunity to litigate these issues in a prior case.[10] The Court recognized that the promotion of judicial economy should not override the important goal of ensuring fairness to the defendant.[11] This article will explain that while the application of offensive collateral estoppel may be appropriate in the context of securities fraud, it is inappropriate in cases involving personal injuries related to the use of products.

Product liability litigation is highly individualized. Facts concerning the individual plaintiff's background, medical history, and the manner in which the product was used are critical. In light of this individualization, issue preclusion essentially robs a defendant of his "day in court." Thus, offensive collateral estoppel results in unfairness to defendants in product injury cases. Furthermore, the nature of product liability litigation is such that the application of offensive collateral estoppel does not serve the goal of promoting judicial economy. Rather, the determination of whether to apply this doctrine, in light of the par-

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6. *See In re* Raiford, 695 F.2d 521, 523-24 (11th Cir. 1983) (mutuality of parties not a prerequisite to fair use of collateral estoppel); *accord* Bruszewski v. United States, 181 F.2d 419, 422 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

7. *See* United States v. Mendoza, 464 U.S. 154, 159 n.4 (1984). "[The] defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party." *Id.* (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979)); *see* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.441 [3.-2] (2d ed. 1984). For a general discussion of offensive and defensive collateral estoppel, see Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 43-76 (1964); Note, *The Impact of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

8. 439 U.S. 322 (1979).

9. *Id.* at 331.

10. *Id.* at 328. "[T]he 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." *Id.* (quoting *Blonder-Tongue Labs. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971)).

11. *Id.* at 329-30. The Court further noted that the offensive use of collateral estoppel does not promote judicial economy in the same manner as the defensive use. *Id.* at 329. For a further discussion of judicial economy, see *infra* text accompanying notes 30-32.

ticular facts of a case, actually increases the burden on the judiciary by exhausting the same judicial resources that would have been spent on litigating the issue to be estopped. For these reasons, as the Supreme Court of Ohio[12] and others [13] have recognized, offensive collateral estoppel should not be used in product liability cases.

APPLICATION OF COLLATERAL ESTOPPEL IS UNFAIR IN PRODUCT LIABILITY CASES

The Supreme Court's mandate in *Parklane* concerning the offensive use of collateral estoppel is not absolute. The Court held only that in securities cases involving a fraudulent prospectus, the use of offensive collateral estoppel should not be precluded in federal courts.[14] Trial courts are granted broad discretion in determining when the doctrine can be applied with fairness. For example, the Supreme Court has indicated that in cases where the plaintiff easily could have joined in the earlier action, or where application of offensive collateral estoppel would be "unfair" to the defendant, the trial judge should not allow its use.[15]

In *Parklane,* the first action brought against the defendant had

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12. *See* Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 204, 443 N.E.2d 978, 988 (1983) ("[N]onmutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents.").

13. *See* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982) (offensive use of collateral estoppel inappropriate in asbestos products liability case when the judgment in a prior action was ambiguous, when prior judgments in similar cases were inconsistent, and when defendants in the prior action were sued for a relatively small amount of damages); Williams v. Laurence-David, Inc., 271 Or. 712, 723, 534 P.2d 173, 178 (1975) (where plaintiff user of rubber gloves contracted dermatitis allegedly as a result of an allergic reaction to gloves, and tests showed that plaintiff's allergic reactions differed appreciably from the prior plaintiff's, the "facts and circumstances in the case were such that unfairness would result from the application of collateral estoppel"); *see also* Sandoval v. Superior Court of Kings County, 140 Cal. App. 3d 932, 941, 190 Cal. Rptr. 29, 37-38 (1983) (collateral estoppel not applicable in successive products liability actions involving the same defendant when there have been inconsistent verdicts).

Other courts, while cautious about the use of collateral estoppel in product liability cases, have refused to establish a general bar against such use. For instance, the court in Vincent v. Thompson, 50 A.D. 2d 211, 377 N.Y.S. 2d 118 (App. Div. 1975), while denying the use of collateral estoppel to a plaintiff seeking to foreclose the issue of whether the drug Quadrigen caused birth defects, made it clear that it was not "lay[ing] down any general rule as to the nonapplication of collateral estoppel in products liability cases." *Id.* at 222, 377 N.Y.S. 2d at 128. As an example of a product liability situation where collateral estoppel might be appropriate, the court cited "a situation in which a group of people, after eating the same food, are shortly thereafter stricken with food poisoning." *Id.*

14. 439 U.S. at 331.

15. *Id.*

been instituted by the Securities and Exchange Commission ("SEC") to enjoin a false and misleading proxy statement.[16] The plaintiff in the subsequent proceeding, a private individual, could not have joined the earlier action.[17] Under these circumstances, the Court held that estopping Parklane from relitigating the falsity of its proxy statement in the lawsuit brought against it by a private individual would not be unfair for several reasons.[18] First, Parklane had every incentive to litigate the SEC lawsuit fully and vigorously; the SEC had made serious allegations and it was foreseeable that there would be subsequent private lawsuits following a judgment in favor of the government.[19] Second, there were no prior inconsistent decisions concerning the fraudulent character of Parklane's proxy statement.[20] In this regard, the Court recognized the potential unfairness of applying offensive collateral estoppel when a plaintiff attempts to rely on a judgment which is "inconsistent with one or more previous judgments in favor of the defendant."[21] Third, the lawsuit by the individual plaintiff would afford Parklane no procedural opportunities of a kind likely to cause a different result that were unavailable in the first action.[22] The Court noted the possible unfairness of applying offensive collateral estoppel if the procedural opportunities available in the subsequent action were not available in the prior action.[23]

Application of offensive collateral estoppel in a product liability lawsuit creates precisely the type of potential unfairness identified in *Parklane*. Moreover, a number of additional considerations provide greater reason not to permit its use in product liability lawsuits. First, there is always the possibility that the prior verdict relied upon by the subsequent plaintiff may have been erroneously decided. The court

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

17. *See* 15 U.S.C. § 78u(g) (1982). Section 78u(g) states in part that "no action for equitable relief instituted by the Commissioner pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commissioner, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commissioner." *Id.*

18. 439 U.S. at 331-33.

19. *Id.* at 332 & n.18 (petitioner knew of respondent's action because it had been commenced prior to the SEC's action for injunctive relief).

20. *Id.* at 332.

21. *Id.* at 330. The Court cited Professor Currie's example of a railroad collision in which fifty passengers were injured. If the railroad won the first twenty-five suits and a plaintiff won the twenty-sixth, fairness should preclude the use of offensive collateral estoppel by the successive plaintiffs. *Id.* at 330 n.14 (citing Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957)).

22. *Id.* at 332 & n.19.

23. *Id.* at 330-31. The Court did specify that the procedural opportunities available in the second action be of the type that could readily cause a different result. *Id.* at 330 & n.15.

may have erred in admitting or excluding evidence or in instructing the jury. Second, the prior plaintiff may have aroused extreme sympathy from the court or jury. Third, juries are composed of laymen, and the prior jury may not have understood the complex technical issues regarding the design or manufacture of a particular product or the mechanical workings of an unfamiliar piece of equipment. Thus, extending a verdict or verdicts to other cases runs the risk of perpetuating an error[24] or, at the very least, giving the jury's verdict a more far-reaching effect than the jury may have contemplated.

Prejudice can also arise where the defendant neglects to defend the prior case with full vigor. Perhaps the potential damages in such a case were negligible or the defendant may not have foreseen the possibility of additional suits involving the same issues. The defendant may have decided not to appeal an adverse judgment because the costs of appealing the judgment exceeded the costs of paying the judgment. Finally, the defendant may not have had the benefit of good counsel. All of these possibilities, and combinations thereof, make it unfair to estop the defendant from relitigating the issue in a subsequent lawsuit.

The potential for prejudice is particularly acute in the context of product liability litigation. Collateral estoppel gives binding effect to a finding on a particular issue, and an issue is framed in relation to the facts. To apply collateral estoppel, both the issue, and the facts relative to the issue must be identical to those in the prior action. It would be unfair to preclude litigation of an issue if the facts had changed or new evidence had been discovered—not uncommon in product liability actions—since the first decision.[25]

In contrast with situations where there has been a fraudulent prospectus filed with the SEC, factual variations are of great significance in product liability cases. The facts surrounding a particular product injury—the manner in which the product was used, the role of the plaintiff or others in contributing to the injury, the condition of the individual product unit—are highly relevant in a product liability lawsuit.[26] In addition, issues are individualized. While it might be fair to assume that a company's statement to its stockholders involves identical conduct toward each individual stockholder, an analogous assumption cannot be made in the context of product injuries. The only situation that would be sufficiently analogous in product liability would be where there was a mass disaster producing instantaneous physical inju-

24. *See, e.g.*, Lundeen v. Hackbarth, 285 Minn. 7, 171 N.W.2d 87 (1969) (jury sympathy in the first action precluded fair application of offensive collateral estoppel).

25. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4417 (2d ed. 1981).

26. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS §§ 99, 102 (5th ed. 1984).

ries to a number of people.[27] Most other product liability suits present more specialized facts. For instance, in situations involving alleged side effects from a pharmaceutical or an illness alleged to have arisen from exposure to a chemical, the facts and issues of a product liability case are too individualized to permit a finding in one case to control in another case.

Uncertainty in the law of product liability also makes offensive collateral estoppel troublesome in cases where the issue to be estopped is an issue of law. Application of offensive collateral estoppel on an issue of law would be unfair if the rule of law applied by the prior court has not yet been adopted by the state's highest court.[28] This is so because the rules as to what constitutes a defective product vary not only from state to state, but within individual states as well.[29] Furthermore, because the standards of liability are made by judges in individual cases,[30] there are no uniform standards for defectiveness, causation, or defenses, and those standards which do exist are constantly changing. Thus, a finding that a defendant's product was defective by a jury in one state several years ago does not mean that the product would be found defective in that same state today, let alone in a different state.

APPLICATION OF OFFENSIVE COLLATERAL ESTOPPEL IN PRODUCTS LIABILITY CASES DOES NOT PROMOTE JUDICIAL ECONOMY

The primary justification for the offensive use of collateral estoppel is that it reduces unnecessary litigation of issues previously litigated. The Supreme Court, in *Parklane,* acknowledged that offensive collateral estoppel does not necessarily serve the goal of judicial economy because potential plaintiffs might postpone filing suit, awaiting a favorable outcome in a case brought by another party.[31] Individuals may be discouraged from joining existing suits, increasing the total number of lawsuits that the system must bear. Furthermore, a defend-

27. *See, e.g.,* Hart v. American Airlines, 61 Misc. 2d 41, 41, 304 N.Y.S.2d 810, 811 (Sup. Ct. 1969) (airplane crash resulting in the death of 58 of 62 persons aboard).

28. *See* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 453, 482 N.E.2d 63, 66, 492 N.Y.S.2d 584, 587 (1985) (liability in the prior case was based on an unresolved question of law).

29. S. Rep. No. 670, 97th Cong., 2d Sess. 4 (1982). "Decisions on virtually every aspect of product liability law illustrate great variations among the States and constant changes in legal rules within a State." *Id.; see also* Ehrlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable,* 14 ST. MARY'S L.J. 19, 28 (1982) ("using collateral estoppel in products liability suits poses the problem of reconciling varying standards of defectiveness used in different jurisdictions").

30. *See, e.g.,* PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE 2 (P. Rheingold & S. Birnbaum ed. 1975) ("The term 'defect' has been defined on a case-to-case basis and there appears to be no single definition of the term that can be used in every product case.").

31. 439 U.S. at 330.

ant faced with the prospect of having an adverse judgment used against it in other cases may feel the need to litigate even small claims more aggressively than it would otherwise. The possibility of a court applying collateral estoppel thus forces defendants to litigate all cases on the assumption that the disposition of any issue might prove critical in subsequent cases.

In the product liability context, an additional factor further negates claims of judicial economy in the application of offensive collateral estoppel. As previously discussed, the nature and circumstances of individual injuries can vary greatly. Thus, there is rarely anything approaching an identity of issues in two distinct cases. The question of whether to apply collateral estoppel must itself be litigated. Resolving this dispute necessarily requires an investigation into the issue to be estopped, as well as other issues. Both parties must devote time and resources to proving or disproving the similarity of the plaintiffs' injuries, the circumstances of the injuries, the identity of issues, the opportunity to litigate the issues fully, and whether the issues were critical and necessary to the prior adjudication. The resources devoted to litigating these issues may offset any savings derived from the use of collateral estoppel and actually increase the total burden on the judicial system.[32] Finally, if offensive collateral estoppel is asserted in a case in which there are multiple defendants, due process would preclude estoppel against those defendants who were not parties to the prior action.[33] This would most likely require the trial to be bifurcated in order to permit litigation of the issue between the plaintiff and those defendants to whom the issue is not given estoppel effect. Thus, common issues will be relitigated, possibly resulting in inconsistent findings for the defendants who were not parties to the first action. Moreover, the bifurcation procedure places additional demands on the judicial system.

CONCLUSION

If the aim of collateral estoppel is to promote judicial efficiency, then the ultimate efficiency would be to allow a prior defendant to use collateral estoppel against a subsequent plaintiff. For example, if plaintiff A, alleging that the drug Bendectin caused a birth defect in her child, lost her case on the issue of causation and a jury found clearly that "Bendectin cannot cause birth defects," the manufacturer would be able to assert that finding in a subsequent case brought by plaintiff B. To make the case even more realistic, let us assume that plaintiff B

32. *See* Goodson v. McDonough Power Equip. Inc., 2 Ohio St. 3d 193, 204, 443 N.E.2d 978, 983-84 (1983).

33. 439 U.S. at 327 & n.7.

used the same attorney as plaintiff A. Should collateral estoppel be allowed? The organized plaintiffs' bar and some consumer groups who now hail offensive collateral estoppel, would answer with a resounding *NO!* They would claim that such use is unfair; violates due process; and deprives plaintiff B of her day in court. Beyond these conclusory allegations, the potential for prejudice is the same whether offensive collateral estoppel is applied against plaintiffs or defendants in product liability cases.

Cases involving personal injuries relating to use of a product seldom have a true identity of issues. A finding by a single jury looking at a single set of facts cannot fairly be extended to another case involving a different set of facts. Aside from the possibility that the prior verdict relied upon might be incorrect or based on prejudice, poor lawyering, or pure sympathy, choosing any single verdict to establish the issue in a subsequent case is inherently arbitrary. The unfairness that would result to a defendant who was estopped from litigating an issue merely because that issue was decided adversely to him in a different case is simply not outweighed by any overriding interest.

The Supreme Court has warned trial courts not to apply offensive collateral estoppel if it would be unfair to a defendant.[34] While the rule may be justified in such cases where there is a true identity of issues, it is not justified in product liability lawsuits. Furthermore, precluding a product liability plaintiff from asserting offensive collateral estoppel is fair to both parties. It allows the defendant a chance to distinguish facts and issues in different cases and it does not put the plaintiff at a disadvantage. The plaintiff does not bear a higher burden of proof—but is simply subject to the same requirements of proof as every other plaintiff. Barring offensive collateral estoppel ensures that all issues will be fully litigated and fairly decided. If offensive collateral estoppel is to be used at all in product liability cases, it should be confined to situations involving instantaneous mass injury, such as an airplane crash, in which there may be identity of issues (i.e., whether the pilot or manufacturer is responsible). Even in this situation, however, collateral estoppel should not be applied subsequent to the rendition of one or two jury verdicts. When there is a conflict between doing justice and pressing cases through an artificial cookie cutter machinery—justice should prevail.

34. *Id.* at 329-31.