

Summer 1983

## Collaterally Estopping the Clever Donor: Privity One Step Further, 16 J. Marshall L. Rev. 573 (1983)

Vincenzo J. Chimera

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#)

---

### Recommended Citation

Vincenzo J. Chimera, Collaterally Estopping the Clever Donor: Privity One Step Further, 16 J. Marshall L. Rev. 573 (1983)

<https://repository.law.uic.edu/lawreview/vol16/iss3/5>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# COLLATERALLY ESTOPPING THE CLEVER DONOR: PRIVITY ONE STEP FURTHER

## INTRODUCTION

Charitable contributions to nonprofit organizations are widely recognized in the United States as a benefit to society.<sup>1</sup> Donations are usually made to an organization that seeks to protect or preserve some interest that the donor is interested in protecting or preserving. An example of such an organization is a public-interest law firm, a nonprofit legal organization which litigates issues in which the public has some pecuniary interest.<sup>2</sup> Such firms litigate issues of broad public concern as opposed to private interests.<sup>3</sup> There may be, however, situations where a "clever donor"<sup>4</sup> manipulates a public-interest law firm in such a way as to have it represent his narrow interests.

This attempted manipulation appears when the clever donor discreetly informs the donee public-interest law firm that it may lose the donor's substantial contribution unless the donee brings, or intervenes in, a certain suit. These suits, naturally, will involve issues ultimately affecting the donor. For example, the clever donor could be a steel manufacturer questioning the validity of newly promulgated Environmental Protection Agency (EPA) regulations. Perhaps these regulations lower the amount of pollutants that steel manufacturers may discharge. If, under the guise of representing the public interest, the donee elects to contest these regulations and is successful, the clever donor will benefit by not having to lower his plant's pollutant discharge. On the other hand, should the donee public-interest law firm be unsuccessful, the clever donor could bring a second action in his own name since he was not a named party to the prior action.<sup>5</sup>

---

1. This is evident by the very nature of our federal income tax laws which allow deductions from adjusted gross income for any charitable contribution. I.R.C. § 170 (1982).

2. WEISBROD, HANDLER, & KOMESAR, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 4-9 (1978). An example of a public-interest law firm is the American Civil Liberties Union (ACLU).

3. *Id.*

4. The term "clever donor" characterizes a donor who intentionally manipulates the donee public-interest law firm's case selection. The clever donor is to be contrasted with a good faith donor, who intends only to donate money to a worthy cause.

5. In such a hypothetical situation, a public-interest law firm may also file an *amicus curiae* brief; an *amicus curiae* does not have the status of a

Unless the donor is precluded from relitigating issues the donee public-interest law firm has litigated, he may enjoy the luxury of two "days" in court. Such a result would encourage vexatious litigation and overburden our already crowded court dockets.<sup>6</sup> To prevent these problems, the doctrine of collateral estoppel should be invoked to preclude relitigation.<sup>7</sup> The traditional concept of privity sufficient to collaterally estop nonparties<sup>8</sup> has been immensely expanded.<sup>9</sup> This article proposes that privity be expanded even further to encompass the clever donor. Specifically, it will show how the nonparty clever donor and donee public-interest law firm relationship is similar to other relationships which have been held sufficient to warrant use of estoppel. This article will also examine the practical considerations of collaterally estopping the clever donor.

---

party and cannot exert control over the litigation, but also is not bound by the resulting judgments. *Brown-Crummer Investment Co. v. Paulter*, 70 F.2d 184 (10th Cir. 1934). Should the donee public-interest law firm file an *amicus curiae* brief at the direction of the clever donor, neither the donee nor the donor would be bound by the decision.

6. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 3 (1981). For a general discussion of additional effects the increasing caseload has had on the federal district courts, see Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970).

7. In this sense, the EPA, in the example, would use the final determination of the issues necessarily decided in the prior action defensively in a second action brought by the clever donor. This would prevent the donor from relitigating the validity of EPA regulations. For a discussion of defensive collateral estoppel see *infra* note 24 and accompanying text. For an alternate solution to this problem, see Comment, *Mandatory Intervention: Expansion Of Collateral Estoppel In Favor Of Single Defendants Against Multiple Plaintiffs In Federal Civil Litigation*, 14 J. MAR. L. REV. 441 (1981). The author suggests that persons, who could have easily intervened in a federal civil suit but who do not should be subject to a second form of defensive collateral estoppel. *Id.* at 459. After notice of the pending action has been sent to these persons, they should present arguments on why it would not be easy to intervene. If the court finds that they could easily intervene, they will be warned that, if they do not intervene, they will be subject to defensive collateral estoppel by the party defendant in any subsequent suit, regardless of the relationship between the nonparty and the party plaintiff. *Id.* at 459-62. The author concludes that this would prevent burdensome litigation for the defendant and lessen the strain on the federal court dockets. If the court finds that the nonparty could easily intervene, the nonparty will join the action for fear that, if the defendant wins, he may be collaterally estopped from relitigating those issues in a subsequent suit against the same defendant. *Id.* at 463-64. The author did not consider expanding privity to encompass such a situation.

8. A nonparty is a person who, although he may have an interest in a legal suit, is not a named party. See generally 1B J MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.411 (6), at 155-76 (2d ed. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1980).

9. See *infra* notes 37-42 and accompanying text.

## A HISTORICAL LOOK AT COLLATERAL ESTOPPEL

The doctrine of collateral estoppel prevents the relitigation of issues actually and necessarily determined by a court in a prior action between the same parties or their privies.<sup>10</sup> A similar principle is the doctrine of *res judicata*, under which a party, or one in privity with that party, is precluded from suing again on the same cause of action when the first suit concluded with a final judgment.<sup>11</sup> Preclusion of nonparties who control a prior action, such as the clever donor, falls under the rubric of collateral estoppel, rather than *res judicata*. Collateral estoppel applies because the person controlling the litigation as a nonparty will subsequently bring a different cause of action.<sup>12</sup>

10. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (permitting the limited use of offensive collateral estoppel); *Blonder-Tongue Lab's, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971) (implicitly abandoning the requirement of mutuality in collateral estoppel in patent litigation). For a discussion of *Parklane*, see *infra* note 23. See also F. JAMES & G. HAZARD, *CIVIL PROCEDURE*, §§ 11.3—11.4 (2d ed. 1977); *RESTATEMENT (SECOND) OF JUDGMENTS* § 27 (1980). See generally Note, *Collateral Estoppel*, 16 U. RICH. L. REV. 341 (1982).

11. *Lawlor v. National Screen Serv.*, 349 U.S. 322, 326 (1955). In *Lawlor*, the Court recited the crucial distinction between *res judicata* and collateral estoppel:

[U]nder the doctrine of *res judicata*, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

*Id.*

The rules that prevent a cause of action from being relitigated are called the rules of merger and bar. If the plaintiff wins in the first action, his cause of action is said to have merged into his judgment. The plaintiff cannot later sue the same defendant on the same cause of action for higher damages. If the plaintiff in the first action loses, his cause of action is extinguished, and he is barred from suing again on the same cause of action. *RESTATEMENT (SECOND) OF JUDGMENTS* § 17 (1982). For recent cases dealing with collateral estoppel and *res judicata*, see *General Teamsters, Auto Truck Drivers & Helpers Local 162 v. Mitchel Bros. Truck Lines*, 682 F.2d 763 (9th Cir. 1982) (collateral estoppel inapplicable where prior and subsequent cases lacked identity of issues); *Bullard v. Webster*, 679 F.2d 92, 93 (5th Cir. 1982) (whereas *res judicata* normally precludes litigation of claims which were and might have been litigated, where prior case was dismissed for lack of jurisdiction, *res judicata* bars only those issues actually litigated); *Russell v. Commissioner*, 678 F.2d 782, 786 (9th Cir. 1982) (judgment not final for *res judicata* purposes if further judicial action by court which rendered judgment is required to determine the matter litigated); *In re Ellis*, 674 F.2d 1238 (9th Cir. 1982) (collateral estoppel did not apply to finding unnecessary to decision of earlier case); *Nilsen v. City of Moss Point*, 674 F.2d 379, 382 (5th Cir. 1982) ("a dismissal based upon the statute of limitations will bar claims that, although themselves timely, are part of the same cause of action as the previously asserted time-barred claim . . .").

12. See, e.g., *G. & C. Merriam Co. v. Saalfeld*, 241 U.S. 22, 29 (1916); 1B J. MOORE & T. CURRIER MOORE'S *FEDERAL PRACTICE* ¶ 0.411 (6), at pp. 1553-54

Traditionally, the mutuality rule governed the application of collateral estoppel.<sup>13</sup> The mutuality rule prevented the determination of an issue or claim from being conclusive in a subsequent proceeding if the second proceeding involved different parties.<sup>14</sup> This rule was premised on the idea that it would be unfair to allow a party to use a prior judgment when he himself is not bound by it.<sup>15</sup> In its endeavor to create symmetry in the law, the mutuality rule would give a party who had fully and fairly litigated an issue a second opportunity to litigate that issue. But as Justice Hastie aptly pointed out: "the achievement of substantial justice rather than symmetry is the measure of fairness of the rules of *res judicata*."<sup>16</sup>

In the leading case of *Bernhard v. Bank of America National Trust and Savings Association*,<sup>17</sup> the California Supreme Court abandoned the doctrine of mutuality.<sup>18</sup> In dispatching the mutuality rule, *Bernhard* proposed the following three-part test for determining the validity of a plea of *res judicata* (collateral estoppel): "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior

---

(2d ed. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 39, comment b (1982); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

13. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Id.* See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.24 (2d ed. 1977); 1B J. MOORE & T. CURRIER MOORE'S FEDERAL PRACTICE ¶ 0.412(1), at 1801 (2d ed. 1982); Note, *Collateral Estoppel*, 16 U. RICH. L. REV. 341, 344-47 (1982). The rigid requirement of mutuality had given way under exceptions based on vicarious liability. See, e.g., *Frisby v. Hurley*, 236 Ark. 127, 364 S.W.2d 801 (1963). Among the relationships which create vicarious liability are those of master and servant, principal and agent, and general contractor and subcontractor. RESTATEMENT (SECOND) OF JUDGMENTS § 51, comment a (1982).

14. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979).

15. *Id.*

16. *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). Although the court used the term *res judicata*, it was referring to what we know today as collateral estoppel.

17. 19 Cal. 2d 807, 122 P.2d 892 (1942).

18. *Id.* at 812, 122 P.2d at 895. As Justice Traynor stated for a unanimous California Supreme Court: "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." *Id.* See also Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) (analyzes the distinctions between offensive and defensive collateral estoppel).

adjudication?"<sup>19</sup>

In a subsequent opinion, Justice Traynor recognized the necessity of a fourth test; was the issue in the first case competently, fully, and fairly litigated.<sup>20</sup> Since *Bernhard*, many state and federal courts have rejected the mutuality requirement.<sup>21</sup> The United States Supreme Court finally approved this trend away from the mutuality requirement in *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*.<sup>22</sup>

As a result of the abandonment of mutuality, a nonparty can, under certain circumstances, use collateral estoppel offensively<sup>23</sup> or defensively.<sup>24</sup> In both situations, the party against

---

19. *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

20. *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 603, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962).

21. See *Bruszewski v. United States*, 181 F.2d 419, 422 (3d Cir.) (mutuality is a "formalism which impedes the achievement of fair and desirable results"), *cert. denied*, 340 U.S. 865 (1950); *C.I.S., Inc. v. Kann*, 76 Ill. App. 3d 109, 111, 394 N.E.2d 916, 918 (1979) ("the modern approach is that the identity of parties criterion is satisfied so long as the party against whom collateral estoppel is sought to be invoked is identical in both actions"). See *generally* Annot., 31 A.L.R.3d 1044 (1970 & Supp. 1981).

22. 402 U.S. 313 (1971). In *Blonder-Tongue*, the Court concluded that if a patent holder sues one alleged infringer and loses because of invalidity of the patent, other alleged infringers whom it later sues may invoke estoppel against it. *Id.* at 350. Later, the United States Supreme Court implicitly approved the *Bernhard* and *Blonder-Tongue* decisions. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979).

23. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). Offensive use occurs when a plaintiff seeks to foreclose the defendant from relitigating an issue the defendant has litigated with another plaintiff. In *Parklane*, the plaintiff brought a stockholders' action against the defendant, based on an alleged false proxy statement issued by the defendant. After the suit was started, but before it was tried, the SEC brought a suit containing the same allegations and the trial court found in the SEC's favor. The plaintiff then sought to use the verdict in the SEC case to collaterally estop the defendant from relitigating the issue of the falsity of the proxy statement. *Id.* at 325. The Supreme Court permitted this use of collateral estoppel, even though the estoppel was not only nonmutual, but also offensive, i.e., the estoppel was sought by a plaintiff, rather than defendant, in the second action. *Id.* at 332-33. The Court conceded that offensive collateral estoppel may create an incentive on the part of each plaintiff to adopt a "wait and see" attitude in the hope that the first action by another plaintiff will result in a favorable judgment and that it may sometimes be unfair to the defendant. Unfairness might arise if the first suit was for such a small amount that the defendant had no reason to contest it vigorously, or if the second action "affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Id.* at 330-31. Nonetheless, the Court concluded, these difficulties should not be resolved by a ban on all nonmutual offensive use of collateral estoppel, but rather by a case-by-case analysis of the wisdom of allowing such use. *Id.* at 331. In this case, offensive use was reasonable. There was no evidence that plaintiff had an incentive to sit out the first litigation; he probably couldn't have joined the SEC suit even if he had wanted to. Also, defendant had every incentive to litigate the SEC case vigorously, particularly since plaintiff's case had al-

whom estoppel is asserted has litigated and lost in a prior action. A well-established principle in collateral estoppel is that in order to prevent a party from relitigating an issue, that party must have been a party or in privity with a party in the prior action.<sup>25</sup> Privity is a legal fiction which signifies a sufficiently close relationship between two or more persons such that a judgment involving one of them is conclusive upon the others even though they were not party to the lawsuit.<sup>26</sup> As one scholar noted, privity is merely "a legal conclusion" justifying the application of collateral estoppel.<sup>27</sup>

Traditional notions of privity exist in three situations. First, courts will bind a nonparty whose interests were adequately represented by a party to a prior action.<sup>28</sup> Second, a nonparty

---

ready been filed. *Id.* at 331-32. See also Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); 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).

24. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). Defensive collateral estoppel occurs where two or more defendants are potentially liable to one plaintiff. If the plaintiff sues one of the defendants and loses, the other potential defendants could collaterally estop the plaintiff from relitigating any issues decided adversely to the plaintiff in his action against the first defendant. See Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1019 (1967).

25. See, e.g., *Blonder-Tongue Lab's, Inc., v. University of Ill. Found.*, 402 U.S. 313, 320 (1971); *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942). See generally Strom, *Issue Preclusion and the Concept of Privity*, 15 CREIGHTON L. REV. 117 (1982) (rationalizing privity expansion as necessary to obviate the relitigation of issues fully and fairly litigated); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974) (rationalization of privity expansion as a balancing of interests test); Note, *Preclusion of Nonparties: A Due Process Violation?*, 13 Sw. L.J. 169 (1982) (illustrating situations where issue preclusion of nonparties would meet the procedural requirements of due process). Cf. *NLRB v. Gass*, 377 F.2d 438 (1st Cir. 1967) (although refusing to bind a nonparty to a prior Board order, the court indicated that it could take judicial notice of admissions made by the defendants who had been parties to the first proceeding and foreclose the issue as to them).

26. *Gill & Duffus Services, Inc. v. Islam*, 675 F.2d 404, 405 (D.C. Cir. 1982).

27. *Vestal, Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 45 (1964). *Accord Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963) ("It is sufficient that the word designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.").

28. See, e.g., *Kersch Lake Drainage Dist. v. Johnson*, 309 U.S. 485 (1940) (because Arkansas law gave commissioners authority to represent bondholders, bondholders were bound by decree in which commissioners were parties); *Kerrison v. Stewart*, 93 U.S. 155 (1876) (trustee represents interest of trust beneficiaries); *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975) (state represents interest of a home-rule county); *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952) (local government represents interests of the public).

who controlled the prior action will be bound by the resulting judgment.<sup>29</sup> Third, a nonparty succeeding to a party's interest in property is bound by any prior judgments against the party concerning the property.<sup>30</sup> These traditional notions of privity have recently been immensely expanded.<sup>31</sup> The due process clauses of the fifth and fourteenth amendments define the extent to which privity may be expanded and require that a person be permitted his day in court.<sup>32</sup> Thus, nonparties should arguably not be collaterally estopped where the relationship between the nonparty and party becomes too attenuated.<sup>33</sup>

#### RATIONALIZING THE PRIVITY EXPANSION

The expansion of privity is rationalized as a balancing of interests. It is clear that the clever donor situation should be included in this expansion. Applying this balancing-of-interests test will result in the clever donor being collaterally estopped.<sup>34</sup> Recently, there has been a significant number of cases barring trade association members from relitigating a cause of action

29. See, e.g., *Kreager v. General Elec. Co.*, 497 F.2d 468 (2d Cir.) (president and sole stockholder controls corporation), *cert. denied*, 419 U.S. 861 (1974); *Astron Indus. Assoc's, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968) (parent corporation controls actions of subsidiaries). See generally 1B J. MOORE & T. CURRIER MOORE'S FEDERAL PRACTICE ¶ 411(6), at 1551 (2d ed. 1982).

30. See, e.g., *SBA v. Taubman*, 459 F.2d 991 (9th Cir. 1972) (assignee bound by factual determination adverse to assignor); *Hummel v. Equitable Life Assur. Soc.*, 151 F.2d 994 (7th Cir. 1945) (successor trustee in bankruptcy bound by judgment adverse to original trustee in bankruptcy). See generally 1B J. MOORE & T. CURRIER MOORE'S FEDERAL PRACTICE ¶ 0.411(12), at 1664 (2d ed. 1982).

31. See *infra* notes 37-42 and accompanying text.

32. "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. See also *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) ("[a] sentence of a court pronounced against a party without . . . giving him an opportunity to be heard, is not . . . entitled to respect in any other tribunal").

33. See, e.g., *Blonder-Tongue Lab's, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971). Where the relationship between the nonparty and party becomes too attenuated, the nonparty cannot be said to have appeared in the prior action. Implicitly recognizing the need to protect such a nonparty, the Court in *Blonder-Tongue* stated:

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Id.* at 329.

34. See *infra* text accompanying notes 58-61.



the trade association previously litigated.<sup>35</sup> The clever donor is similar to a trade association member<sup>36</sup> and, by analogy, he should be collaterally estopped from relitigating issues the donee public-interest firm has litigated on his behalf.

### *Balancing-of-Interests Test*

A host of cases have stretched the privity requirement in collateral estoppel a great deal in binding nonparties.<sup>37</sup> For instance, community property states have precluded nonparty spouses from relitigating issues decided adversely to their spouses as parties in personal injury actions.<sup>38</sup> Similarly, a cemetery desecration action resulted in issue preclusion against a nonparty relative where the identical action had been brought by other similarly situated relatives.<sup>39</sup> The expansion has not stopped there. Counties have been barred by judgments against

---

35. See *infra* note 62.

36. See *infra* notes 74-75 and accompanying text.

37. See, e.g., *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir.) (private airlines bound by prior judgment against public authorities), *cert. denied*, 434 U.S. 832 (1977); *Aeroflot-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.) (Florida county bound by prior judgment entered against Florida state agencies), *cert. denied*, 423 U.S. 908 (1975); *Cauefield v. Fidelity & Casualty Co.*, 378 F.2d 876 (5th Cir.) (collateral estoppel applied in a cemetery desecration action), *cert. denied*, 389 U.S. 1009 (1967); *Friedenthal v. Williams*, 271 F. Supp. 524 (E.D. La. 1967) (recognizing the injustice of allowing forum shopping), *aff'd per curiam*, 395 F.2d 202 (5th Cir. 1968); *Nemeth v. Aluminum Cooking Utensil Co.*, 146 Cal. App. 2d 405, 304 P.2d 129 (1956) (wife held in privity with husband); *Waitkus v. Pomeroy*, 506 P.2d 392 (Colo. App. 1972) (copassenger collaterally estopped from litigating issue of defendant driver's negligence after other passenger had brought prior action where the driver was held not at fault), *rev'd on other grounds*, 517 P.2d 396 (Colo. 1973); *Ramos v. Horton*, 456 S.W.2d 565 (Tex. Civ. App. 1970) (husband held in privity with wife). For analysis of these cases see Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1486-96 (1974); Note, *Preclusion of Nonparties: A Due Process Violation?*, 13 Sw. L.J. 169, 179-87 (1982). For a discussion of whether state or federal law governs the applicability of *res judicata* or collateral estoppel, see Annot., 19 A.L.R. FED 709 (1974 & Supp. 1982).

38. *Friedenthal v. Williams*, 271 F. Supp. 524 (E.D. La. 1967), *aff'd per curiam*, 395 F.2d 202 (5th Cir. 1968). "It would be manifestly unjust to allow one, by re-arrangement and addition of parties, to have access to several forums in which to attempt to recover favorable judgments on the same cause of action." *Id.* at 526. See also *Nemeth v. Aluminum Cooking Utensil Co.*, 146 Cal. App. 2d 405, 304 P.2d 129 (1956); *Ramos v. Horton*, 456 S.W.2d 565 (Tex. Civ. App. 1970).

39. *Cauefield v. Fidelity & Casualty Co.*, 378 F.2d 876 (5th Cir.) (plaintiffs had been witnesses in the prior case, were represented by same attorney, and had no new evidence to offer in second desecration action), *cert. denied*, 389 U.S. 1009 (1967). *But cf.* *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973). In this airplane crash case, the court refused to preclude the relitigation of the airline's negligence where it had been found free of negligence in a prior action. The court noted that plaintiff's attorney could employ a different strategy than the other attorneys.

state agencies,<sup>40</sup> private airlines have also been barred where a prior action was brought by public authorities,<sup>41</sup> and in an automobile personal-injury action, a nonparty passenger was collaterally estopped from suing the other driver after another passenger had unsuccessfully sued him.<sup>42</sup>

Expanding privity to include nonparties is rationalized by balancing the competing interests at stake.<sup>43</sup> The nonparty has an interest in having his day in court to present his own case.<sup>44</sup> Competing against this interest is the judicial interest in protecting the nonparty's adversaries from the expense and vexation of multiple lawsuits.<sup>45</sup> The judicial interest also involves conserving resources and minimizing the possibility of inconsistent judgments.<sup>46</sup> The nonparty's right to a day in court may

---

40. *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). The Court applied the doctrine of "virtual representation" to bar an action by a Florida county based on a prior judgment entered against certain Florida state agencies. *Id.* at 719-20. "Under the federal law of *res judicata*, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." (italics added) *Id.* at 719. *Cf. Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978) (plaintiff massage parlor owners did not have such an alignment of interests with other massage parlor owners who brought a prior action to warrant invocation of the virtual representation doctrine).

41. *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). In *Southwest Airlines*, the court adopted a "case by case" balancing approach to test the requirements of due process. *But see Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977). The Supreme Court held that citizens of Niagara County, New York, who were challenging the constitutionality of state procedures for charter adoption, were not bound by a judgment that had previously been entered against the county in a similar action. "The District Court properly rejected [the *res judicata*] defense upon the ground that the plaintiffs had not been parties to the earlier suit and were not in privity with the county of Niagara, which had brought it." *Id.* at 263 n.7.

42. *Waitkus v. Pomeroy*, 506 P.2d 392, 397 (Colo. App. 1972), *rev'd on other grounds*, 517 P.2d 396 (Colo. 1973). In collaterally estopping the plaintiff from relitigating the other driver's negligence, the court stressed that both passengers had an identical interest against the other driver. *Id.*

43. *See Note, Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1496-1501 (1974).

44. *See Hansberry v. Lee*, 311 U.S. 32 (1940), where the Court stated: But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

*Id.* at 40. *See also supra* notes 32-33 and accompanying text.

45. *See Montana v. United States*, 440 U.S. 147, 153 (1979). For a discussion of *Montana* see *infra* text accompanying notes 49-57.

46. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979).

have been satisfied through his participation in a prior action. By controlling the prior action and having adequate representation in the prior action, the nonparty can be said to have had a vicarious day in court.<sup>47</sup> In this situation, the competing judicial interests would outweigh any right the nonparty may have had to a day in court.<sup>48</sup>

A landmark case on the issue of control by a nonparty is *Montana v. United States*.<sup>49</sup> In *Montana*, a government contractor attacked the constitutionality of Montana's imposition of a one-percent gross-receipts tax on contractors of public, but not private, construction projects. Because this tax was ultimately passed on to the United States through the increase in the public project's cost, one month later the government also brought an action challenging the constitutionality of the tax. By agreement, federal action was stayed pending resolution of the state court litigation.<sup>50</sup> That action, *Peter Kiewit Sons' Co. v. State Board of Equalization*<sup>51</sup> (*Kiewit I*) concluded in a Montana Supreme Court decision upholding the tax. In reviewing the federal case, the Supreme Court noted that although the government had not been a party to *Kiewit I*, it was undisputed that the government had:

- (1) required the filing of the lawsuit;
- (2) reviewed and approved the complaint;
- (3) paid attorneys' fees and costs;
- (4) directed the appeal to the Montana Supreme Court;
- (5) appeared and submitted an *amicus curiae* brief;
- (6) directed the filing of notice of appeal to the United States Supreme Court; and
- (7) directed Kiewit's abandonment of that appeal.<sup>52</sup>

The district court heard the government's case and held that the government was not bound by *Kiewit I* and that the tax violated the supremacy clause.<sup>53</sup>

The Supreme Court held that the government was collaterally estopped from relitigating the validity of the Montana gross-receipts tax.<sup>54</sup> It noted that preclusion of parties that have had a

---

47. See Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974). The author stated: "In determining whether a nonparty's interest in litigating an issue identical to one litigated in a previous action is more or less compelling, the crucial element is the extent to which the nonparty may be thought to have had a vicarious day in court." *Id.* at 1499-1500.

48. *Id.*

49. 440 U.S. 147 (1979).

50. *Id.* at 151.

51. 161 Mont. 140, 505 P.2d 102 (1973) (*Kiewit I*).

52. 440 U.S. at 155.

53. 437 F. Supp. 354, 361 (D.C. Mont. 1977).

54. *Montana v. United States*, 440 U.S. at 155.

full and fair opportunity to litigate a matter prevents vexatious litigation, conserves judicial resources, and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."<sup>55</sup> The Court also reasoned that the same policies are implicated where nonparties control litigation in which they have a direct financial or proprietary interest and then seek to relitigate issues previously resolved.<sup>56</sup> The Court finally concluded that the United States had a sufficient "laboring oar" in the state-court litigation to warrant issue preclusion.<sup>57</sup>

The amount of control sufficient to satisfy the *Montana* control test is unknown. Control is a question for the trier of fact.<sup>58</sup> Factors important to a finding of control include: 1) selection and payment of counsel; 2) payment of litigation expenses; 3) a written indemnification agreement; 4) participation in settlement negotiations; and 5) control over the decision to appeal.<sup>59</sup> The *Montana* control test would not be satisfied where a donor makes a good faith contribution to the donee public-interest law firm; more than mere funding for litigation is required to collaterally estop a nonparty.<sup>60</sup> The donor's interest in having his day in court would outweigh any judicial interests calling for an end

---

55. *Id.* at 153-54.

56. *Id.* at 154.

57. *Id.* at 155.

58. *Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc.*, 484 F.2d 1037, 1039-40 (3d Cir. 1973).

59. *See Troy Co. v. Products Research Co.*, 339 F.2d 364, 367 (9th Cir. 1964), *cert. denied*, 380 U.S. 930 (1965). In a patent infringement action, the Ninth Circuit affirmed the district court's conclusion that the named defendant Troy was merely a nominal defendant and that Danville Manufacturing Co. (maker of the device in question), although not a party to the suit, nonetheless was the party principally responsible for the litigation. The district court had found that Danville, as manufacturer, was in privity with Troy. In agreeing with the district court, the Ninth Circuit found the control over the litigation by Danville sufficient to place the parties in privity. The record disclosed that Danville: 1) selected and paid Troy's defense counsel; 2) indemnified Troy (without which Troy would not have defended the suit); 3) prepared certain exhibits; 4) designated all prior art references to be used at trial; and most significantly 5) entered into settlement negotiations with plaintiff patent holder without knowledge of Troy. *Id.* *See generally* 1B J. MOORE & T. CURRIER MOORE'S FEDERAL PRACTICE ¶ 0.411(6) (2d ed. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982). Section 39 provides: "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." *Id.* at 382.

60. *Phoenix Bd. of Realtors, Inc. v. United States Dep't of Justice*, 521 F. Supp. 828, 831 (D. Ariz. 1981). Here the court did not apply the *Montana* control test, since the government's involvement in or control of an Iowa action could not be determined from the record before the court. The court did note in dicta that "[i]t is clear, however, that more than the mere provision of funding for litigation is required for principles of collateral estoppel to operate against a non-party." *Id.*

to litigation. Conversely, if the clever donor should meet the *Montana* control test, he would be collaterally estopped from litigating. The clever donor's contribution is clearly distinguishable from the good-faith donor's. Unlike the good-faith donor, the clever donor is intending to control and is controlling the donee's case selection. While the clever donor will not conspicuously take over the case, as the United States did in *Montana*, he will simply control the donee public-interest law firm's case selection by implying that contributions will end unless the donee litigates a certain case. His interest in a day in court should not be given as much weight as that of the good-faith donor, who is making a contribution for a worthy public cause, not a private cause. Judicial interests should outweigh the clever donor's interest in relitigating an issue. Since the clever donor has had notice of the case and an opportunity to be heard, his due process rights have been satisfied.<sup>61</sup> In lieu of his opportunity to be heard, the clever donor has elected to take the risk of having the donee public-interest law firm represent him in the guise of representing the public interest. Such intentional manipulation should result in less weight being given to his subsequent claim that the application of collateral estoppel to him denies him his right to a day in court.

### *The Trade Association Cases*

Another aspect of the recent expansion of privity is seen in the trade association cases. These cases illustrate a continuing willingness on the part of the courts to apply *res judicata* to litigation by an association.<sup>62</sup> In *Expert Electric, Inc. v. Levine*,<sup>63</sup> electrical contractors were barred from bringing suit on a cause of action previously litigated by the trade association of which they were members. The original action had been brought by the United Construction Contractors Association, Inc., to which the electrical contractors belonged. The *Expert Electric* court stated: "Where the representative association has standing to

---

61. See *supra* notes 32-33 and accompanying text.

62. See *General Foods Corp. v. Massachusetts Dep't of Public Health*, 648 F.2d 784 (1st Cir. 1981) (food associations); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227 (2d Cir. 1977) (members of electrical contracting firms and the United Construction Contractors Association, Inc.), *cert. denied*, 434 U.S. 903 (1977); *Aluminum Co. of Am. v. Admiral Merchants Motor Freight, Inc.*, 486 F.2d 717 (7th Cir.) (member motor carriers), *cert. denied*, 414 U.S. 1113 (1973); *United States v. Burlington Truck Line, Inc.*, 356 F. Supp. 582 (W.D. Mo. 1973) (member motor carriers); *Proctor & Gamble Co. v. Byers Transp. Co.*, 355 F. Supp. 547 (W.D. Mo. 1973) (member motor carriers). See also *Grossman v. Axelrod*, 646 F.2d 768 (2d Cir. 1981) (functional equivalent of a trade association).

63. 554 F.2d 1227 (2d Cir. 1977).

assert the interests of its members, and is found to have adequately protected those interests, any determination rendered against the association is binding on its members."<sup>64</sup>

A more recent trade association case is *General Foods Corp. v. Massachusetts Department of Public Health*,<sup>65</sup> in which General Foods and Rich-SeaPak attacked the constitutionality of a Massachusetts open-date food-labeling regulation. In an identical action brought by Grocery Manufacturers of America (GMA), American Frozen Food Institute (AFFI), and ten individual food manufacturers against the same defendant, the Massachusetts Supreme Court had declared the regulation constitutional.<sup>66</sup> It was undisputed that: 1) General Foods was a member of GMA and AFFI; 2) General Foods declined an invitation to the prior action, but did contribute \$2,500 toward the litigation expenses; and 3) General Foods did not otherwise participate in or control the GMA case.<sup>67</sup> In as much as the challenged regulations affected the trade association members, General Foods knew that GMA's standing depended on its representing its members as the real parties in interest.<sup>68</sup> This was sufficient to indicate that General Foods had expressly or impliedly authorized GMA to represent it in the prior case,<sup>69</sup> and General Foods was bound as if it had been a party. *Expert Electric* and *General Foods* indicate that membership in a trade association which represented a nonparty's interest in a prior case forecloses the nonparty from relitigating the same cause of action in a later case. This analysis would not apply when a good-faith donor seeks to relitigate an issue the donee public-interest law firm has litigated. On the other hand, the analysis should apply to foreclose a clever donor from relitigating the same issues. An analysis of the difference between a trade association and a public-interest law firm will illustrate why a good-faith donor should not be estopped while the clever donor should.

Trade associations are different from public-interest organizations in that trade associations<sup>70</sup> represent the interests of a

64. *Id.* at 1235-36.

65. 648 F.2d 784 (1st Cir. 1981).

66. *Grocery Mfrs. of Am. Inc. v. Department of Public Health*, — Mass. —, 393 N.E.2d 881 (1979) (GMA).

67. 648 F.2d 784, 786 (1st Cir. 1981).

68. *Id.* at 788.

69. *Id.*

70. See G. LAMB & C. SHIELDS, *TRADE ASSOCIATION LAW AND PRACTICE* § 1.1, at 3 (1981). A trade association is:

[a] nonprofit organization whose members are business firms, usually competitors. The membership may be limited to companies in one service industry, or to companies at one functional level of a product industry—manufacturers, wholesalers or retailers. In the product in-

specified group of business concerns, and as such, they are expected to keep abreast of all issues affecting their members and to challenge any restrictive regulations or laws at administrative or judicial hearings.<sup>71</sup> Trade association members often instigate litigation themselves or instruct the association to bring suits. Occasionally, members are invited to join a suit or to contribute to specific litigation.<sup>72</sup> Unlike the typical trade association, public-interest law firms represent a broad public interest,<sup>73</sup> and are not vehicles for representation of narrow interests. Donors to public-interest firms are contributors, not members, and as such, they have no authority to control or direct its activities as do trade association members.

The differences between a public-interest law firm and a typical trade association negate any possibility of a good-faith donor explicitly or implicitly authorizing the public interest law firm to represent the donor. The good-faith donor is simply making a contribution to a worthy cause. He makes the donation when he has no knowledge of specific litigation the public-interest firm might pursue. It would be illogical to hold that such a donation was the equivalent of a donation when the donor has knowledge of the specific litigation and directs instigation of the litigation like a trade association member. The explicit or implied authority analysis of *Expert Electric* and *General Foods* would not foreclose a good-faith donor from relitigating issues.

It appears superficially that the clever donor would also not be foreclosed from relitigating issues which the donee public-interest law firm has previously litigated. Upon carefully examining the clever donor situation, it is obvious that it is analogous to the trade association situation.<sup>74</sup> Just as trade associations represent the narrow interests of their members, so too will the public-interest law firm which is controlled by a clever donor. Under the guise of representing the broad public interest, the donee public-interest law firm will, in substance, represent the clever donor's narrow interests. For these purposes, the donee public-interest law firm can then be categorized as the functional equivalent of a trade association with the implied authority to represent its member, the clever donor. Like the trade

---

dustries, a trade association's membership may also include companies operating at different functional levels.

*Id.*

71. *Id.* at §§ 1.1, 1.2, at 3.

72. See *supra* notes 65-69 and accompanying text.

73. See *supra* notes 2-3 and accompanying text.

74. For a description of trade associations, see *supra* notes 70-72 and accompanying text.

association member, the clever donor controls the donee's case selection, and has knowledge of the litigation because of his purposeful influence. This is sufficient under *Expert Electric* and *General Foods* to find that the clever donor has explicitly or implicitly authorized the donee public-interest law firm to represent his interest<sup>75</sup> and is sufficient to collaterally estop the clever donor. Such estoppel would prevent vexatious litigation, conserve judicial resources, and, most importantly, prevent the clever donor from having the benefit of two days in court.

#### PRACTICAL CONSIDERATIONS OF COLLATERALLY ESTOPPING THE CLEVER DONOR

Successfully estopping the clever donor either under a balancing of interests test or as being equivalent to a trade association is only half the battle. One must also consider practical aspects. It will be very difficult for the court to distinguish between a clever donor and a good-faith donor. Both make contributions to a public-interest law firm, but they have different intentions; while the clever donor intends to control the donee public-interest law firm's case selection, the good-faith donor does not. Thus, a court should not be quick to label a donor "clever" simply because the donee public-interest law firm selects a case in which the donor has an interest. It should only do so when it finds an intentional manipulation of the donee public-interest law firm's case selection.

Several factors determine whether a donor has intentionally manipulated a public-interest law firm. First, a substantial increase in the donor's regular donation, close in time to the case in which the public-interest law firm was alleged to have represented the donor, may be intended for litigation expenses. The increase could be construed as an indication from the donor that the donee can receive large contributions if it selects cases of interest to the donor. The donor thus has more leverage in persuading the donee to select a certain case. Second, if the donor's interest could be substantially impaired by adverse precedent, the court should question why the donor did not intervene. Finally, if the prior action involved a controversy in which the donee public-interest law firm normally did not get involved or that arguably was not in the public interest, the court should suspect intentional manipulation by the donor. If these three factors are present, a presumption that the donor is in fact a clever donor should arise. The donor should then be allowed to rebut this presumption showing that the donation was a purely good-faith

---

75. See *supra* notes 63-69 and accompanying text.



donation. If this presumption is not rebutted, however, the donor should be collaterally estopped from relitigating the issues the donee public-interest law firm litigated while representing the donor's narrow interests.

#### CONCLUSION

The collateral estoppel privity requirement has expanded greatly.<sup>76</sup> This expansion should include a clever donor intentionally manipulating a donee public-interest law firm's case selection. As early as 1910, the United States Supreme Court stated: "The persons for whose benefit, to the knowledge of the parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause."<sup>77</sup> The clever donor is also not a stranger to a cause in which he has intentionally manipulated the donee public-interest law firm's case selection. Allowing the clever donor to obtain two days in court as a result of such manipulation would do injustice to our court system. For these reasons he should be collaterally estopped.

Courts should not overlook what effect such an extension of collateral estoppel might have on charitable contributions. Good-faith donors may stop contributions to worthy public-interest law firms for fear that they, too, will be collaterally estopped, or they just may not want to even go through the expense and vexation of having to prove they are not clever donors. Such reductions in contributions would be disastrous to public-interest law firms, resulting in fewer cases of public interest being litigated and, possibly, the dissolution of such firms. This would not be in our country's best interests. Often individual rights cannot be vindicated except through a public-interest law firm; many individuals are not financially capable of bringing such suits. For these reasons, courts should be cautious in their extension of collateral estoppel to clever donor situations, but they should not refuse such an extension out of hand.

*Vincenzo J. Chimera*

---

76. See *supra* notes 37-42 and accompanying text.

77. *Souffront v. Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 486-87 (1910).