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Katz v. Eli Lilly & (and) Co.: Limitation of Collateral Estoppel in Products Liability Litigation, 14 J. Marshall L. Rev. 201 (1980)

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CASENOTES

*KATZ v. ELI LILLY & CO.:** LIMITATION OF COLLATERAL ESTOPPEL IN PRODUCTS LIABILITY LITIGATION

A discernible trend in the law of collateral estoppel¹ in re-

* 84 F.R.D 378 (E.D.N.Y. 1979).

1. The terms collateral estoppel or issue preclusion describe the doctrine which prevents a party or his privy from relitigating an issue that was previously determined in a prior judgment, based on a different cause of action, to which he was bound. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

As defined by Professor Moore:

The essence of collateral estoppel by judgment is that some question of fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. Thus the principle of such an estoppel may be stated as follows: Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, case or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.

1B MOORE'S FEDERAL PRACTICE ¶ 0.441[2], at 3777 (2d ed. 1980).

The main purpose of collateral estoppel is to prevent a party from having more than one full and fair opportunity to litigate an issue previously adjudicated. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328 (1971). It thus encourages the termination of litigation and in turn promotes numerous other interests. Application of collateral estoppel conserves judicial time and resources, protects a litigant from the unnecessary expense and potential harassment of repetitive litigation, and avoids conflicting rights and duties that could result from inconsistent judgments. *E.g.*, *Oldham v. Pritchett*, 599 F.2d 274, 278 (8th Cir. 1979); *Johnson v. United States*, 576 F.2d 606, 609-10 (5th Cir. 1978); see Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1013 (1967). Collateral estoppel should therefore be viewed as an attempt to harmonize considerations of due process and judicial economy. It seeks to produce substantial justice while avoiding needlessly repetitious litigation. *Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp.*, 515 F.2d 964, 976-77 (3d Cir. 1975).

Where collateral estoppel is invoked, the proponent must show that the very fact or point now in issue was (1) actually litigated in the former action, (2) actually decided in the former action, and (3) necessary to the determination of that action. JAMES & HAZARD, CIVIL PROCEDURE § 11.16, at 563-64 (2d ed. 1977). In addition, the party against whom the estoppel is asserted must have had a full and fair opportunity to litigate in the prior action said to be controlling. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979).

cent decades has been expansion.² What began as a narrow rule of issue preclusion between the original parties to an action³ that predated the related doctrine of *res judicata*,⁴ has grown into an aggressive doctrine in both scope and effect. The benefits of its use no longer confined to an original party, collateral estoppel may now be invoked by any litigant to prevent relitigation of previously determined issues.

The single greatest factor responsible for the frequency of the modern application of collateral estoppel is Justice Traynor's opinion in *Bernhard v. Bank of America National Trust & Savings Association*,⁵ which laid to rest the exception riddled⁶ requirement of mutuality of estoppel.⁷ Freed from the strictures

2. There has been a growing acceptance of issue preclusion or collateral estoppel as a desirable principle because of the great workload of the courts. Courts have therefore revealed an increasing willingness to expand collateral estoppel since a greater amount of potential litigation can be handled by preventing the relitigation of issues previously decided. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 359 (1974).

3. "Until relatively recently, . . . the scope of collateral estoppel was limited by the doctrine of mutuality of parties. 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." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979). See generally note 7 *infra*.

4. "[T]he idea of estoppel by record is one which preceded a reception in the English law of the Roman idea of *res judicata*." Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41 (1940).

The distinction between collateral estoppel and *res judicata* can often be confusing. With *res judicata*, a judgment on the merits in a prior action bars a second suit between the same parties or their privies based on the same cause of action. It extends both to the issues that were litigated and those that could have been litigated. The doctrine of collateral estoppel however, can apply where the second cause of action is different from the first, and only precludes relitigation of issues that were actually litigated, and necessary, to the first cause of action. 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 622-24 (2d ed. 1980); e.g., *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876).

5. 19 Cal. 2d 807, 122 P.2d 892 (1942). See generally Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

6. There were several exceptions to the rule of mutuality of estoppel. Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery*, 64 CORNELL L. REV. 1002, 1004 (1979); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1015-17 (1967). Most of the exceptions to mutuality of estoppel concerned suits by a plaintiff against closely related defendants. See, e.g., *Portland Gold Mining Co. v. Stratton's Independence Ltd.*, 158 F. 63, 65-69 (8th Cir. 1907) (lessor-lessee); *Brobston v. Darby Borough*, 290 Pa. 331, 138 A. 849, 851-52 (1927) (joint tortfeasors).

7. The judicially developed doctrine of mutuality of estoppel provides that unless both parties, or their privies, in a second action are bound by a judgment in a previous case, neither party, nor his privy, in the second action may use the prior judgment as determinative of an issue in the second action. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 320-21 (1971).

of mutuality, and encouraged in part by crowded court dockets,⁸ collateral estoppel acquired a broad scope. Supreme Court approval of the demise of mutuality followed in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,⁹ in which the Court permitted the defensive assertion of collateral estoppel by a defendant. The next step followed in *Parklane Hosiery Co. v. Shore*,¹⁰ in which offensive use of collateral estoppel was sanctioned by the Supreme Court¹¹ as long as there was shown to have been a full and fair opportunity to litigate the issue in the prior action.¹²

Thus the general rule was that one had to be bound by the prior judgment in order to take advantage of its collateral estoppel effect. *See, e.g., Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912).

Though almost universally recognized, the mutuality rule received frequent criticism from both courts and commentators. As stated by Justice Traynor:

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.

Bernhard v. Bank of America Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942).

Nevertheless, several commentators have defended mutuality as it often may assure a just result. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1], at 1809-12 (2d ed. 1980); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308-11 (1961); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies—Two California Cases*, 57 HARV. L. REV. 98, 105 (1943).

8. "The courts have often discarded the mutuality rule while commenting on crowded dockets and long delays preceding trial." *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328 (1971); Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 60, 219 (1979).

9. 402 U.S. 313 (1971).

10. 439 U.S. 322 (1979).

11. "[O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." *Id.* at 326 n.4; *accord*, RESTATEMENT (SECOND) OF JUDGMENTS, § 88, Comment d (Tent. Draft No. 3, 1976); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010 (1967).

12. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979).

Even prior to the holding in *Parklane*, offensive collateral estoppel had been applied by several courts. *E.g., Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); *United States v. United Airlines, Inc.*, 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.*, *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *Gorski v. Comm. Ins. Co.*, 206 F. Supp. 11 (E.D. Wis. 1962); *B.R. DeWitt, Inc. v. Hall*, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).

Other courts, however, have allowed defensive use of collateral estoppel without mutuality of estoppel, but not offensive use. *E.g., In re Evans*, 267 N.W.2d 48, 51 (Iowa 1978).

The possibility that such a potentially aggressive doctrine¹³ could have a major impact on litigation was foreseen early.¹⁴ Speculation soon gave way to substance upon the extension of offensive collateral estoppel to products liability,¹⁵ where it was welcomed as a valuable tool by plaintiffs in multiple-plaintiff ac-

13. Professor Moore has previously characterized collateral estoppel as a more dangerous doctrine than *res judicata*. 1B MOORE'S FEDERAL PRACTICE ¶ 0.444[1], at 4002 (2d ed. 1980); *accord*, Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289 (1957).

Furthermore, application of offensive collateral estoppel creates several problems not presented by application of defensive collateral estoppel. Instead of decreasing litigation, offensive use of collateral estoppel may often increase it by discouraging joinder. Rather than risk being bound by joining an ongoing action, a prospective plaintiff is more likely to sit back and await the outcome. Should the original plaintiff win, the prospective plaintiff can jump in and enjoy the benefit of offensive collateral estoppel. Should the original plaintiff lose, the prospective plaintiff can then bring his own action. 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1], at 1810 (2d ed. 1980); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1033 (1967); *see, e.g.*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115 (1958); Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965).

Offensive collateral estoppel may also serve to increase litigation by encouraging a party to litigate minute claims more strongly than necessary. Where the small claim could be followed by later claims on the same issues, a party is almost forced into expending his best efforts in the initial action to avoid its later collateral estoppel effect. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 309 (1961).

It may be unfair to apply offensive collateral estoppel where the defendant in the prior action was forced to defend in an inconvenient forum and as a result was prevented from putting on a full defense. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979).

Where the prior action was for nominal damages and therefore not vigorously defended, application of offensive collateral estoppel might seem harsh. It might also work an injustice where the prior action is found to have been based on a compromise verdict. Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010, 1036 (1967).

Or circumstances may have been such that the defendant could not have foreseen later litigation and thus did not defend to the fullest. *See, e.g.*, *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 538-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (court denied collateral estoppel to a plaintiff seeking \$7,003,000 against airline that failed to appeal earlier \$35,000 judgment).

It could also be unfair to apply offensive collateral estoppel where the preclusive judgment is one that is inconsistent with prior judgments in the defendant's favor. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 285-89 (1957).

14. *See generally* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-Party*, 35 GEO. WASH. L. REV. 1010 (1967).

15. *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727 (2d Cir. 1979) (defendant manufacturer held estopped from denying liability that was determined in a previous case).

tions involving the same product and similar injuries.¹⁶ The welcome may prove to have been premature in light of the recent federal district court decision in *Katz v. Eli Lilly & Co.*¹⁷

In *Katz*, the court was faced with the question whether jurors might be deposed to determine the presence of a compromise verdict necessary to limit the collateral estoppel effect of a judgment. The resolution of this issue in *Katz* has effected a possible reversal of the expansive trend of collateral estoppel — at least insofar as it relates to products liability.¹⁸ In doing so, the court may also have provided those defending product liability claims with a defense to collateral estoppel capable of far-reaching abuse at the expense of the jury system.

The purpose of this paper is to examine in detail the holding of the district court in *Katz* and the authorities cited in support of that holding. Attention will also be given to the probable consequences of the court's decision, both as it extends to the facts of the immediate case as well as future litigation in general. A final consideration will involve scrutiny of the other alternatives available to the court in rendering its judgment, and the relative merits of each.

FACTS AND HOLDING OF THE DISTRICT COURT

Prior to her daughter Benna's birth in 1953, Esta Katz took the drug diethylstilbestrol¹⁹ (DES) which was prescribed by her

16. Nat'l L. J., Dec. 17, 1979, at 5, col. 1.

17. 84 F.R.D. 378 (E.D.N.Y. 1979).

18. Nat'l L. J., Dec. 17, 1979, at 5, col. 1.

19. DES is a man-made estrogen first approved in 1947 by the FDA for use in the prevention of miscarriages. It was manufactured by hundreds of companies and prescribed for such use until 1971 when it was banned for use by pregnant women because of its correlation to the increase in previously rare forms of vaginal cancer among the daughters of women who had taken the drug. DES was also found to be not particularly effective in preventing miscarriages.

DES is still marketed for a variety of other purposes, such as treatment of menopause disturbances in women, and treatment of cancer of the prostate in men. DES is also used in animal feed and drugs as a growth promoter, and its presence can be detected in the tissue of animals that have ingested it. As a result twenty-three countries, excluding the United States, have banned use of DES in cattle feed pending further tests. Comment, *DES & A Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 963-66 (1978).

An estimated two million pregnant women took DES to prevent miscarriage before the FDA revealed its dangers in 1971. The drug recently has been found to be related to genital abnormalities and infertility in the sons of women who used it. Further, it now appears that the daughters of women who took DES, upon reaching their childbearing years are more prone to miscarriage, stillbirth, premature birth, and ectopic pregnancy in which the fetus grows outside the uterus. *Time Magazine*, March 24, 1980, at 48, col. 3.

physician to decrease the likelihood of miscarriage. Approximately eighteen years later it was discovered that Benna Katz suffered from adenocarcinoma²⁰ of the vagina. Benna thereafter brought an action for damages in 1975 against Eli Lilly & Company (Lilly) as manufacturer of DES, alleging breach of warranty and negligence in the testing and distribution of the drug to her mother.²¹ Following the death of her daughter in 1977, Esta Katz brought a diversity action for wrongful death against Lilly.²²

During pretrial discovery, counsel for Lilly learned that a prior state court judgment against Lilly in a DES action, *Bichler v. Eli Lilly & Co.*,²³ was possibly the result of a compromise verdict.²⁴ A juror allegedly stated that her vote for liability was conditioned upon the reduction of damages.²⁵ To forestall the potentially disastrous collateral estoppel effect of the prior judgment,²⁶ Lilly sought to depose two of the former jurors. Plaintiff

20. Adenocarcinoma is defined as a malignant abnormal growth of epithelial (skin) cells in a glandular or glandlike pattern. *STEDMAN'S MEDICAL DICTIONARY* 22 (4th lawyers ed. 1976). The term is generally used to refer to a rare and sometimes fatal form of cancer of the vagina or uterus. Comment, *DES & A Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 965 (1978).

21. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 379 (E.D.N.Y. 1979).

22. *Id.*

23. No. 15600 (N.Y. Sup. Ct., July 16, 1979).

24. A compromise verdict is one reached only by surrender of conscientious convictions on one material issue by some jurors in return for a similar relinquishment of matters in their opinion on another issue. The result is a verdict which does not have the full approval of the entire jury. *BLACK'S LAW DICTIONARY* 260 (5th ed. 1979).

The compromise may be as to issues of liability or damages, between various counts of an indictment, or in rendering verdicts in multi-defendant prosecutions. Palmer, *Post-Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 *HOUS. L. REV.* 290, 305 (1968).

25. Several days after the verdict in *Bichler*, counsel for Lilly phoned one of the jurors, a Mrs. Donnelly, and requested she meet with them to discuss the case. Mrs. Donnelly freely consented and arranged a meeting for the following day. At that meeting, Mrs. Donnelly on her own initiative informed counsel that "she had not believed that Lilly should be held liable in *Bichler*, but had agreed to compromise her verdict and vote for liability only on the condition that the jury would agree that the damages awarded against Lilly would be reduced by averaging the awards thought proper by each juror." Affidavit in support of defendant's memorandum in opposition to plaintiff's motion to quash, at 2, *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y. 1979).

26. It has been estimated that Lilly is a defendant in about three-quarters of the more than 500 DES actions filed nationwide. *Nat'l L. J.*, Dec. 17, 1979 at 5, col. 1.

Additionally, under a theory of enterprise liability a finding of liability can have an effect on all industry members who manufactured an identically defective product. The theory would be available to a plaintiff who could not identify the manufacturer responsible for his injury, and serves to shift the burden of proof as to causation to the defendants. The elements of enterprise liability are:

Katz then moved to quash the discovery subpoenas and vacate the notices of deposition.

In considering the motion, the district court noted that both federal and New York law generally bar the use of a juror's statement to impeach or collaterally attack a verdict, but distinguished the present case as having a more narrow purpose.²⁷ The court specified that the depositions were not sought to undercut the finality of the prior verdict, but rather to limit the preclusive effect of that judgment.²⁸ It was thus held that where permissible investigation demonstrates a factual basis for a belief that a judgment used for collateral estoppel purposes was based on a compromise verdict, deposition of jurors known to have relevant information is warranted under the Federal Rules of Civil Procedure.²⁹

COLLATERAL ESTOPPEL OR JURY IMPEACHMENT:

A LIMITED CHOICE

The Mansfield Rule

In deciding whether collateral estoppel should apply, the initial dilemma of the court, in *Katz*, was to establish a means of ascertaining whether the earlier verdict was in fact a compromise verdict, while at the same time placating the long-established Mansfield rule which prohibits a juror from impeaching his verdict.³⁰ In support of her motion to quash, Mrs. Katz ar-

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- A. Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendants conduct.
 - B. A generically similar defective product was manufactured by all the defendants.
 - C. Plaintiff's injury was caused by this product defect.
 - D. The defendants owed a duty to the class of which plaintiff is a member.
 - E. There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants.
 - F. There existed an insufficient, industrywide standard of safety as to the manufacture of this product.
 - G. All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.

Once the elements are established, the individual defendant can exonerate itself only by showing that its product could not have been the one to injure the particular plaintiff. Comment, *DES & A Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 995-1000 (1978).

27. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 380 (E.D.N.Y. 1979).

28. *Id.* at 381.

29. *Id.* at 382.

30. At early common law, a new trial could be had on the basis of juror misconduct proven by the testimony or affidavit of one of the jurors. 8 *WIGMORE, EVIDENCE* § 2352, at 696 (McNaughton ed. 1961). In 1785 however, Lord Mansfield in *Vaise v. Delaval*, 1 Term. Rep. 11, 99 Eng. Rep. 944 (K.B.

gued that jurors were incompetent to impeach their verdict and thus the depositions sought would violate the sanctity of the

1785), reversed the trend based on the maxim that "a witness shall not be heard to allege his own turpitude." While the maxim eventually fell into disuse, the Mansfield rule itself became the majority rule in America. 3 WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 606[03], at 24-25 (1978); Comment, *To Impeach Or Not to Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 PEPPERDINE L. REV. 343 (1977); see e.g., *McDonald v. Pless*, 238 U.S. 264 (1915).

The rule essentially provides that evidence of juror misconduct must come from some source other than a juror. Thus an outsider who observed the irregularity in the jury room can testify concerning it, while one of the jurors cannot. Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 249.

The major criticism of the Mansfield rule is that it renders jury verdicts invulnerable to attack on the basis of jury misconduct, since the jurors themselves will usually be the only source of proof available. JAMES & HAZARD, CIVIL PROCEDURE § 7.19, at 309 (2d ed. 1977); Palmer, *Post-Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 HOUS. L. REV. 290, 291, 299 (1968); see *Jorgenson v. York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir. 1947).

The rule is also strongly criticized for being logically inconsistent. For while it forbids testimony of misconduct by a member of the jury, the rule would admit the same testimony if given by an eavesdropper to the jury deliberations. *State v. Kocioleck*, 20 N.J. 92, 99-100, 118 A.2d 812, 815-16 (1955) (Brennan, J.); 3 WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 606[03], at 23 n.5 (1978); 8 WIGMORE, EVIDENCE § 2353, at 699 (McNaughton ed. 1961).

The rule nevertheless continues to survive based on public policy considerations. It is thought to promote the finality and stability of verdicts, and thereby avoid protracted litigation and encourage public respect for trial by jury. In addition the Mansfield rule ensures the secrecy of jury deliberations which in turn prohibits post-trial tampering and harassment of jurors, and thereby induces free discussion in the jury room. Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 250-51. In considering these factors, the United States Supreme Court stated:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915); accord, JAMES & HAZARD, CIVIL PROCEDURE § 7.19, at 311 (2d ed. 1977).

In summing up the basic rationale behind the Mansfield rule, the Supreme Court further stated:

The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room.

McDonald v. Pless, 238 U.S. 264, 267 (1915).

jury system.³¹ In addition, she asserted that the information sought would not be competent evidence, and therefore was not discoverable under the Federal Rules of Civil Procedure.³²

The court's rationale in holding that the depositions were not sought for purposes of impeachment or collateral attack can be summarized in four basic steps. First, it relied on the representation of Lilly's counsel that Lilly would not use the depositions in the New York state court to attack the *Bichler* verdict.³³ Second, the court noted that both federal and state law barred the use of federal deposition in the New York state court should Lilly attempt to do so.³⁴ Third, it was emphasized that the depositions sought would normally be within the scope of the federal discovery rules were it not for the Mansfield rule.³⁵ Fourth, the court accentuated that there was no express prohibition against

Repeated attempts have been made however, to strike a more perfect balance that would protect both the sanctity of the jury system and the individual's right to a fair and impartial jury trial. Federal Rule of Evidence 606(b) seeks an accommodation between these competing interests by delineating between the thought process of the jury, and extraneous influence. The former is absolutely protected because its speculative nature renders it virtually incapable of proof, whereas the latter is admissible since it consists of objective acts which can be identified and proven. 3 WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 606[03], at 24-25 (1978); *accord*, State v. Kocioleck, 20 N.J. 92, 118 A.2d 812 (1955) (Brennan, J.); *see also* UNIFORM RULE OF EVIDENCE 41 (1953); MODEL CODE OF EVIDENCE rule 301 (1942); CAL. EVID. CODE § 1150 (1965); NEW JERSEY RULES OF EVIDENCE § 41 (1969).

Under 606(b), both compromise and quotient verdicts are protected as part of the mental process of the jury. While it might be preferable to expose such misconduct, both courts and commentators have recognized that there may often be a fine line between the give and take necessary to reach a valid verdict and an impermissible compromise. JAMES & HAZARD, CIVIL PROCEDURE § 7.19, at 316 (2d ed. 1977).

A minority of jurisdictions have taken a more liberal view however:

Justice also requires disclosure whenever a verdict is arrived at by chance, including a quotient verdict, in which the jurors agree in advance to be bound. . . . [I]t is felt that reaching a verdict by chance is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed.

NORTH DAKOTA RULES OF EVIDENCE, rule 606 (1977) (Procedure Comm. Notes); *accord*, Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210-12 (1866) (jurors should not be questioned concerning matters that "essentially inhere in the verdict itself" but this would not preclude questioning whether "the verdict was determined by aggregation and average or by lot"); Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 255-58; *cf.* Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 372 (1958) (jurors should be allowed to impeach a verdict arrived at by chance methods).

31. Katz v. Eli Lilly & Co., 84 F.R.D. 378, 381 (E.D.N.Y. 1979).

32. *Id.* at 381.

33. *Id.* at 380.

34. *Id.* at 380 n.2.

35. *Id.* at 380.

taking depositions aimed solely at cutting off the collateral estoppel effect of a judgment.³⁶

While it was probably correct in assuming that Lilly would be estopped from using the depositions in state court after asserting it would not do so,³⁷ the *Katz* court nevertheless failed to address the question raised by the plaintiff's argument. The contention of Mrs. Katz, as clearly exemplified by her cited authority, was that "public policy opposes such probing of motivations which inhere in a jury's verdict. In the absence of good cause, jurors should be protected against post-trial efforts to 'browse among their thoughts' in an effort to invalidate their verdict."³⁸

The import of her argument was further clarified by her reliance on the express language of Rule 606(b) of the Federal Rules of Evidence which provides that a juror is not a competent witness in an inquiry into the validity of a verdict.³⁹ The issue therefore was not whether Lilly would be able to use the *Katz* depositions in the New York system, but rather whether the taking of the depositions for use in the *Katz* litigation would, in itself, violate the impeachment rule.⁴⁰

The same criticism follows for the court's citation of *Ba-charach v. General Investment Corp.*,⁴¹ *Empire Liquor Corp. v. Gibson Distilling Co.*,⁴² and *Moore's Federal Practice*⁴³ as support for the proposition that federal discovery depositions can-

36. *Id.* at 381 n.5.

37. After having assured the district court that the depositions were sought solely for use in the *Katz* litigation, the general principles of estoppel should serve to bar Lilly from using them in the state court appeal. See generally 1 WILLISTON, CONTRACTS § 139 (3d ed. Jaeger 1963).

38. *Gamell v. Mt. Sinai Hosp.*, 40 A.D.2d 1010, 339 N.Y.S.2d 31, 33 (1972). See *McDonald v. Pless*, 238 U.S. 264 (1915); *Schrader v. Joseph H. Gertner, Jr., Inc.*, 282 A.D. 1064, 126 N.Y.S. 2d 521 (1953). Accord, FED. R. EVID. 606(b).

39. Federal Rules of Evidence 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

40. The plaintiff's argument emphasized that the disclosure of the information sought would be a violation of the impeachment rule. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 381 (E.D.N.Y. 1979).

41. 31 F. Supp. 84 (S.D.N.Y. 1940).

42. 2 F.R.D. 247 (S.D.N.Y. 1941).

43. 4 MOORE'S FEDERAL PRACTICE ¶ 26.54, at 104-05 (2d ed. 1979).

not be used in state litigation. The focus of both the cited cases and Professor Moore's discussion is a procedural aspect of the federal rules of discovery.⁴⁴ The cited authorities therefore provide scant protection against jury impeachment, which is hardly unexpected since it is a function they were never intended to perform. Although still good law, these authorities are nonetheless irrelevant to a determination as to whether permitting the deposition of the *Bichler* jurors was an attack on that verdict. The reliance of the *Katz* court upon them as authority for such a proposition is unjustified.

The court's determination that the information sought would normally be discoverable but for the Mansfield rule is a further example of specious reasoning. The scope of federal discovery extends to any matter, not privileged, which is relevant to the subject matter of the pending action,⁴⁵ and would certainly seem to include the alleged evidence of the compromise verdict. Yet this still fails to establish that the depositions in question are not an attack on the prior *Bichler* verdict within the meaning of the Mansfield rule. Plaintiff Katz was clearly arguing that the specific prohibitions of the Mansfield rule superseded the general discovery provisions.⁴⁶ The court's reasoning that discovery of the desired information might be permissible in this instance because it would be permissible generally is unpersuasive. The policy behind the broad scope of the federal discovery rules does not automatically obviate the policy behind the rule that a juror may not impeach his own verdict.

The final justification given by the court, that no absolute rule prohibited such deposition of jurors in order to curtail the collateral estoppel effect of a prior judgment, emerges as especially suspect when standing alone. The absence of an absolute prohibition that is violated by deposing jurors is slight authority for allowing such depositions. However, the *Katz* court held that such a result was dictated from a reading of New York case law, as exemplified by *People v. DeLucia*,⁴⁷ *Schrader v. Joseph*

44. The fear is that if federal discovery depositions were admissible in New York state courts, litigants would forego the parochial state rules of discovery for the more liberal federal provisions. See *Empire Liquor Corp. v. Gibson Distilling Co.*, 2 F.R.D. 247, 248 (S.D.N.Y. 1941).

45. Fed. R. Civ. P. 26(b)(1). "Relevant to the subject matter" contemplates either evidence to be introduced at trial or information that may lead to such evidence. Johnston, *Discovery in Illinois and Federal Courts*, 2 J. MAR. J. PRAC. & PROC. 22, 32 (1967).

46. Mrs. Katz emphasized that the scope of federal discovery was limited to competent evidence and would not include depositions regarding matters rendered incompetent by the Mansfield impeachment rule. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 380 (1979).

47. 20 N.Y.2d 275, 282 N.Y.S.2d 526 (1967).

H. Gertner, Inc.,⁴⁸ and *People ex rel Nunns v. County Court*.⁴⁹ The inherent weakness in such a broad reading is that none of these cases dealt with an investigation into the means by which a jury reaches its verdict, and are thus distinguishable from the *Katz* situation. Both the *DeLucia* and *Schrader* cases involved the testimony of jurors as to extraneous influence exerted on their deliberations, while *Nunns* concerned jurors testifying in a contempt proceeding against a juror who lied during voir dire.⁵⁰

The federal cases relied on by the *Katz* court,⁵¹ as illustrated by *Clark v. United States*,⁵² are distinguishable for the same reasons. Although the Supreme Court in *Clark* found jurors to be competent witnesses, the holding was limited to separate contempt proceedings against another juror.⁵³ There was thus little or no effect on the jury deliberations or verdict by admitting such testimony.

While the cited cases may arguably advance the *Katz* court's ultimate position in that they admitted testimony of jurors, each did so only upon a showing of some overt act independent of the jury deliberations. However, in *Katz* the alleged compromise occurred in the jury's deliberation itself.⁵⁴ These cases therefore yield little support for the broad holding that deposing jurors would not constitute an impeachment of their verdict.

48. 282 A.D. 1064, 126 N.Y.S.2d 521 (1953).

49. 188 A.D. 424, 176 N.Y.S. 858 (1919).

50. The *Nunns* court clarified why the contempt proceeding was not an impeachment of the jury verdict:

Such verdict in this state was a finality, for it was one of acquittal in a criminal case, and hence these proceedings were not, and could not be, directed against the verdict. The verdict was not involved—not even a feature in the proceedings. . . . The relator (juror) was not brought to book because of his verdict, or because of his part in the rendition of it.

People ex rel. Nunns v. County Court, 188 A.D. 424, 176 N.Y.S. 858, 860 (1919). *Accord*, JAMES & HAZARD, CIVIL PROCEDURE § 7.19, at 314 (2d ed. 1977) (there is a tendency to depart from the Mansfield rule to permit evidence of false answers by a juror on voir dire); *see generally* Annot., 30 A.L.R.2d 914 (1953).

51. The federal cases were cited as analogous support since Fed. R. Evid. 601 provides that the competency of a witness shall be determined according to state law, where state law supplies the rule of decision in the action. *But cf.* Palmer, *Post-Trial Interviews of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 HOUS. L. REV. 290, 308 (1968) (state law does not apply in determining the admissibility of evidence obtained from jurors).

52. 289 U.S. 1 (1933).

53. The Mansfield rule is generally inapplicable to a contempt action against a juror for misconduct, because it is a separate proceeding where the actual outcome of the verdict is of secondary importance. *People v. DeLucia*, 20 N.Y.2d 275, 279, 282 N.Y.S.2d 526, 529 (1967); *see McDonald v. Pless*, 238 U.S. 264, 269 (1915).

54. *See* note 25 *supra*.

Thus, while the *Katz* court was technically correct in holding that the jury depositions could not be used for impeachment purposes in state court,⁵⁵ it was not entirely accurate. The rule against a juror impeaching his verdict serves to protect more than the finality of the verdict itself.⁵⁶ It extends also to the protection of jurors from harassment and embarrassment for their verdict,⁵⁷ and thereby promotes free discussion in jury deliberations.⁵⁸ Such protection is further designed to maintain stability,⁵⁹ and foster public respect and confidence in the jury system.⁶⁰ Little imagination is needed to realize that the potentially abusive tool of discovery could wreak havoc with jury deliberations in general.⁶¹ Since this would clearly violate the

55. See text accompanying notes 37-43 *supra*.

56. See note 30 *supra*.

57. *E.g.*, *McDonald v. Pless*, 238 U.S. 264, 267 (1915) ("jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct"); *People v. DeLucia*, 20 N.Y.2d 275, 278, 282 N.Y.S.2d 526, 528 (1967) ("we do not wish to encourage the post-trial harassing of jurors for statements which might render their verdict questionable"); *JAMES & HAZARD, CIVIL PROCEDURE* § 7.19, at 310 (2d ed. 1977).

58. *E.g.*, *Clark v. United States*, 289 U.S. 1, 13 (1933) (Cardozo, J.) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments were to be freely published to the world."); *Redman v. United States*, 77 F.2d 126, 130 (9th Cir. 1935) ("Whatever the defects of the jury system, it is evident that if it is to be preserved the rights of jurors to discuss matters fully and fairly in the jury room, and to act upon their independent judgment, must be preserved."); 8 *WIGMORE, EVIDENCE* § 2345 (McNaughton ed. 1961).

59. See, *e.g.*, *McDonald v. Pless*, 238 U.S. 264, 267 (1915); *Carlson & Sumberg, Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 251.

60. *Carlson & Sumberg, Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 251.

61. The broad flexibility of the federal discovery rules leaves them susceptible to abuse. See 4 *MOORE'S FEDERAL PRACTICE* ¶ 26.02[3], at 68-71 (2d ed. 1979); *Pollack, Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1979).

Such vast potential for abuse could be particularly injurious to the jury system. Regarding post-trial interviewing of jurors, the Second Circuit has stated:

A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts. Thus, supervision is desirable not only to protect jurors from harassment but also to insure that the inquiry does not range beyond subjects on which a juror would be permitted to testify under Rule 606(b).

United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978).

In addition to inhibiting free discussion and other harmful effects, unrestrained discovery of jury deliberations could lead to other less obvious intrusions. Through extensive questioning of jurors in one action, counsel may be able to increase the probability of favorable verdicts in later related actions. See *Zeisel & Diamond, The Jury Selection in the Mitchell-Stans*

policies the Mansfield rule was intended to enforce, the *Katz* court improperly ignored contrary precedent.

Under New York law a juror may not be questioned about his verdict in a later proceeding.⁶² The only real exception is statements made by a juror as to outside influences upon the jury, since such acts are more susceptible to adequate proof and therefore less a danger to the privacy of the jury system.⁶³ Otherwise, affidavits from jurors as to their deliberations are strictly disapproved.⁶⁴

The federal rule is much the same in effect. A juror only may testify as to some overt act known to all jurors,⁶⁵ or as to some extraneous influence exerted upon the jury deliberations.⁶⁶ Neither exception has been construed to include a compromise verdict. On the contrary, a juror's affidavit regarding the existence of a compromise verdict has been explicitly excluded as incompetent evidence, because the alleged compromise is too akin to the absolutely protected mental processes of the jury.⁶⁷

Conspiracy Trial, AMERICAN BAR FOUNDATION RESEARCH J. 151 (1976) (defense was guided by a public opinion survey, and by determining the profile of persons who emerged as most prejudiced against the defendants, counsel was able to pick jurors who could increase chances of acquittal); see generally VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 183-90 (1977).

62. *In re Cochran*, 237 N.Y. 336, 143 N.E. 212, 213 (1924).

63. *People v. DeLucia*, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 530 (1967) ("Statements concerning outside influences on a jury, however, occurring less frequently and more susceptible to adequate proof, should be admissible to show that the defendant was prejudiced, for here the danger to our jury system is minimal compared with the more easily proven prejudice to the defendant.").

64. *People v. Streiff*, 41 A.D.2d 259, 342 N.Y.S.2d 513, *aff'd in part, rev'd in part on other grounds*, 35 N.Y.2d 22, 358 N.Y.S.2d 701 (1973).

65. See *McDonald v. Pless*, 238 U.S. 264, 268 (1915) (juror's affidavit as to an overt act which is capable of being disproved by other jurors may be admissible); Comment, *To Impeach Or Not To Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 PEPPERDINE L. REV. 343, 351 (1977).

66. *Mattox v. United States*, 146 U.S. 140, 148-49 (1892) ("a juror may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind"); accord, FED. R. EVID. 606(b). Several examples of extraneous influence were listed in *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975). The court there stated:

Extraneous influence has been construed to cover publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in the court, and communications or other contacts between jurors and third persons including contacts with the trial judge outside the presence of the defendant and his counsel.

See also 3 WEINSTEIN, WEINSTEIN'S EVIDENCE § 606[04], at 31-34 (1978).

67. *Hyde v. United States*, 225 U.S. 347 (1911) (jurors agreed to vote for conviction on one count only after receiving concessions from other jurors on other counts).

Upon a consideration of the foregoing, the *Katz* court's treatment of the plaintiff's argument is troubling. Allowing the deposition of jurors from the prior *Bichler* judgment is arguably an impeachment of that verdict irrespective of the fact that the depositions are inadmissible in state court. Should any argument exist for distinguishing *Katz* from the contrary precedent, it at the very least merited full development and consideration by the district court in the text of its opinion.⁶⁸ The fact that the court summarily dismissed Mrs. Katz's argument with a minimum of discussion — much of it in a footnote⁶⁹ — manifests a distinct intent to avoid the issue.

Offensive Collateral Estoppel

The district court's ultimate decision to grant or deny defendant Lilly's motion to depose the *Bichler* jurors necessitated a preliminary determination whether plaintiff Katz would be procedurally able to assert offensive collateral estoppel and whether it would be appropriate to do so where the prior judgment might have been based on a compromise verdict. In response to plaintiff's motion to quash the discovery subpoenas, defendant Lilly conceded that state court judgments can have preclusive effect in federal court,⁷⁰ and that in the instant case collateral estoppel would be procedurally permitted.⁷¹ Lilly asserted however, that under controlling New York law,⁷² the fact that the prior judgment resulted from a compromise verdict was grounds for denying it collateral estoppel effect in a later action.⁷³

The reasoning behind the district court's holding can be summed up in five steps. First, it held that plaintiff Katz would be procedurally able to utilize offensive collateral estoppel under New York law.⁷⁴ Second, the court noted that the equitable nature of collateral estoppel required exploration as to whether defendant Lilly had a full and fair opportunity to liti-

68. See text accompanying notes 105-07 *infra*.

69. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 380 n.2, 381 n.5 (E.D.N.Y. 1979).

70. Defendant Lilly's memorandum in opposition to plaintiff's motion to quash, at 8, *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y. 1979).

71. *Id.*

72. In a diversity action, state law controls application of collateral estoppel. *E.g.*, *Lowell v. Twin Disc, Inc.*, 527 F.2d 767 (2d Cir. 1975); *Ritchie v. Landau*, 475 F.2d 151 (2d Cir. 1973); see *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 732-33 (2d Cir. 1979); *but cf.* *Johnson v. United States*, 576 F.2d 606, 613 (5th Cir. 1978) (federal law of collateral estoppel held to apply to claim under Federal Tort Claims Act).

73. Defendant Lilly's memorandum in opposition to plaintiff's motion to quash, at 6, *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y. 1979).

74. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 381 (E.D.N.Y. 1979).

gate in the prior *Bichler* action.⁷⁵ Third, the district court emphasized that allowing an erroneous judgment to have preclusive effect would violate fundamental fairness.⁷⁶ Fourth, it was held that permitting offensive collateral estoppel in the instant case would not advance the policies the doctrine was designed to promote.⁷⁷ Finally, the court asserted that the fact Lilly did not physically have its day in court against Mrs. Katz was at least grounds for allowing Lilly to investigate a possible defense to collateral estoppel where the prior judgment was allegedly based on an erroneous verdict.⁷⁸

The *Katz* court initially recognized that there is no longer any requirement of mutuality of estoppel under the law of New York.⁷⁹ All that need be shown for a plaintiff to utilize the judgment of a prior litigant against a defendant, is that the defendant had a full and fair opportunity to contest the same issue in the prior action.⁸⁰ According to the New York Court of Appeals in *Schwartz v. Public Administrator of the County of Bronx*,⁸¹ the establishment of a full and fair opportunity "requires an exploration of the various elements which make up the realities of litigation."⁸² Furthermore, in listing those elements, *Schwartz* specifically included "indications of a compromise verdict."⁸³ Thus, should Lilly be able to establish the presence of a compromise verdict in *Bichler*, plaintiff Katz would be precluded from the benefit of its collateral estoppel effect. Accordingly, the judge in *Katz* held that fundamental fairness required that Lilly be given "every reasonable opportunity to explore the factual basis for a claim that the judgment asserted as binding . . . should not be accorded such an effect because [that judgment was] based on a compromise verdict."⁸⁴

It is undoubtedly true that the equitable nature of collateral estoppel requires an inquiry into whether there was a full and fair opportunity to litigate.⁸⁵ As noted by Professor Currie,

75. *Id.* at 382.

76. *Id.*

77. *Id.*

78. *Id.*

79. *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967) (mutuality of estoppel is a dead letter).

80. *E.g.*, *Schwartz v. Public Admin. of Co. of Bronx*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 959 (1969) ("it is now evident that New York has adopted the full and fair opportunity test in applying the doctrine of collateral estoppel"); *accord*, *Winters v. Lavine*, 574 F.2d 46, 56 (2d Cir. 1978); *Zdanok v. Glidden Co.*, 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

81. 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969).

82. *Id.* at 72, 298 N.Y.S.2d at 961.

83. *Id.*

84. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 381-82 (E.D.N.Y. 1979).

85. The ideal limitation would be for courts to make a "detailed inquiry

"[n]o legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice."⁸⁶ However, in attempting to avoid injustice to Lilly, the *Katz* court should not have neglected competing interests. The harm to the plaintiff might be outweighed by the harm that would result from the alternative. There is a very real possibility that an order granting "every opportunity to explore" could be used as a broad mandate to harass the *Bichler* jurors for indications of a compromise verdict that may not even exist. A better rule would specifically limit the extent of the investigation to avoid prejudice to the individual jurors themselves, and the jury system in general.⁸⁷

According to Professor Moore, once a final judgment is entered it is entitled to collateral estoppel effect whether based on a compromise verdict or not.⁸⁸ Yet the *Katz* court held that the blind application of this proposition to a situation where a stranger asserts the judgment offensively violates basic notions of fairness.⁸⁹ In support of its contention, the court noted that the purpose of collateral estoppel was to protect a party from the burden of relitigating an issue previously decided,⁹⁰ and to advance the public interest in minimizing litigation.⁹¹

Since Mrs. Katz was a stranger to the original *Bichler* action the court emphasized that she could not claim the need to be free of the burden of repeated litigation.⁹² The court further held that:

[w]hether or not the public interest . . . would be served by broad application of non-mutuality of estoppel, it is clear that while Lilly

into the circumstances of the former judgment to determine the fairness of allowing the plea of collateral estoppel." Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 29 (1965).

86. *Id.* at 37.

87. See *United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978) ("Supervision is desirable not only to protect jurors from harassment but also to insure that the inquiry does not range beyond subjects on which a juror would be permitted to testify under Rule 606(b)."); see generally note 61 *supra*.

88. Professor Moore asserts:

A judgment on a compromise verdict, like any other erroneous judgment, can be corrected in the trial court, or upon appeal. Collateral estoppel is by judgment, not by verdict; and a final judgment, thought erroneous, is an adjudication entitled to collateral estoppel effect

1B MOORE'S FEDERAL PRACTICE ¶ 0.443[4], at 3917 (2d ed. 1980); *contra*, *Taylor v. Hawkinson*, 47 Cal. 2d 893, 306 P.2d 797 (1957) (Justice Traynor refused to give collateral estoppel effect to a judgment rendered on an apparent compromise verdict).

89. *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 382 (E.D.N.Y. 1979).

90. *Id.*

91. *Id.*

92. "She in fact seeks to be relieved of the burden of litigation altogether." *Id.*

has had its day in court against Joyce Bichler in New York Supreme court, strictly speaking it has not had an opportunity to meet plaintiff here who was a stranger to the State court action.⁹³

The court went on to assert that while non-mutuality was not determinative as to whether collateral estoppel should apply, "it does suggest at a minimum that where the original judgment is questioned on the ground . . . [of] a compromise verdict, a court must in fairness provide a litigant every opportunity to explore the basis for a defense to offensive use of the judgment as collateral estoppel against it."⁹⁴ The court then granted the defendant's motion to depose the *Bichler* jurors.

A careful scrutiny of the court's reasoning reveals some logical inconsistencies. While it is true that Mrs. Katz cannot claim the need to be free of relitigation, such need is no longer necessary since the demise of mutuality.⁹⁵ At most it is a possible mitigating factor in the consideration whether collateral estoppel applies. Also, though the court admits that the prior physical meeting is not determinative as to whether collateral estoppel should apply, it nevertheless seems to use this factor for such a determination. In short, the *Katz* court appears to be effecting a limited return to mutuality where other factors militate against the application of offensive collateral estoppel.

Despite the partial return to mutuality, the *Katz* court's decision to allow the depositions seems to conform to the letter and spirit of the New York law.⁹⁶ New York precedent provides that collateral estoppel should be based on principles of fairness,⁹⁷ and that "each case must be examined to determine whether, under all the circumstances, the party said to be estopped was not unfairly or prejudicially treated in the litigation in which the judgment sought to be enforced was rendered."⁹⁸

93. *Id.*

94. *Id.*

95. See note 79 *supra*.

96. Some courts have interpreted mutuality of estoppel as having a lingering vitality. *Divine v. Commissioner*, 500 F.2d 1041 (2d Cir. 1974) (limit non-mutuality of estoppel to specific cases dictated by policy, excluding generally cases where the legal issue is "subject to varying appraisals"); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965) (abandonment of mutuality not sound where estoppel in successive actions would create anomalous results, or where party has not had a full and fair opportunity to litigate).

97. *E.g.*, *Divine v. Commissioner*, 500 F.2d 1041, 1050 (2d Cir. 1974) (collateral estoppel is based on principles of fairness and was developed to protect a party from legal harassment and redundant legal fees).

98. *Duverney v. State*, 96 Misc. 2d 898, 410 N.Y.S.2d 237, 242 (Ct. Cl. 1978); accord, *Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp.*, 515 F.2d 964, 978 (3d Cir. 1975) ("each case merits individual consideration before a district court rules on an estoppel plea . . . other extraordinary grounds, not expressly mentioned, may provide the necessary foundation for denying . . . collateral estoppel.").

Moreover, the determination whether judgment was rendered pursuant to a full and fair opportunity to litigate includes an examination into whether there were indications of a compromise verdict.⁹⁹ The question remains, however, whether the court's holding that discovery depositions were in order was too broad a solution to a narrow problem.

Policy Considerations

While the partial return to mutuality of estoppel implied by the *Katz* court may not seem initially desirable, it fits comfortably within the broad discretion granted by the Supreme Court in *Parklane* where offensive collateral estoppel is concerned. Recognizing that strict application of collateral estoppel offensively could often serve to work an injustice, and yet not wanting to abandon the doctrine for its obvious benefits, the Supreme Court held that the test should be whether the trial judge considered it fair to apply offensive collateral estoppel.¹⁰⁰ Under this nebulous standard, mutuality might often be the factor to tip the scales in preventing issue preclusion.

Given the fact that Lilly is defending in excess of 500 DES actions,¹⁰¹ with more still likely to be filed, the possible reper-

99. *E.g.*, *Schwartz v. Public Admin. of Co. of Bronx*, 24 N.Y.2d 65, 72, 298 N.Y.S.2d 955, 961 (1969); *accord*, RESTATEMENT (SECOND) OF JUDGMENTS § 88(5) (Tent. Draft No. 3, 1976):

§ 88 Issue Preclusion in Subsequent Litigation with Others.

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 68 and 68.1, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in 68.1 and also whether:

* * *

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

* * *

[W]here the issues have been tried to a jury, the circumstances may suggest that the issue was resolved by compromise. . . . In (this) and similar situations, taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality. RESTATEMENT (SECOND) OF JUDGMENTS, *supra*, Comment *g*.

100. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *accord*, *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950) ("the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*").

101. Nat'l L. J., Dec. 17, 1979, at 5, col. 1.

cussions of collateral estoppel could be disastrous.¹⁰² A judgment finding Lilly liable in one action could be conclusive of the liability issue in all later actions by precluding Lilly from relitigating the issue.¹⁰³ In such circumstances a court would be hesitant to give preclusive effect to a genuinely valid verdict, let alone a suspect one. Therefore the *Katz* court's attempt to give Lilly an opportunity to escape the preclusive effect of the *Bichler* verdict seems entirely justified. Yet the problem arises in the fact that the court fails to come to grips with the realization that deposition of the jurors will violate public policies favoring finality and protection from harassment.¹⁰⁴ The brief treatment accorded this argument in the text of the opinion re-

102. The district court noted that Lilly's aggregate liability in DES cases could reach "several billion dollars nationwide." *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 380 (E.D.N.Y. 1979).

103. This situation resembles the "multiple-plaintiff anomaly" foreseen by Professor Currie and other commentators soon after the rejection of mutuality of estoppel. In Currie's example the first twenty-five plaintiffs lose to the defendant. Assuming none of the plaintiffs are in privity with each other, the defendant cannot assert these judgments to collaterally estop the remaining plaintiffs, since they have not had an opportunity to litigate the issue. Then the next plaintiff wins his action. Now all the remaining plaintiffs can use this judgment to estop the defendant from contesting liability in later actions, because the defendant has previously litigated the issue. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 286 (1957). The result is that each victory by the defendant is a victory only against the particular plaintiff, while a single victory for any plaintiff may be used by all remaining plaintiffs to estop the defendant. Note, *Collateral Estoppel of Non-Parties*, 87 HARV. L. REV. 1485, 1500 n.89 (1974).

Moreover, the possibility of a compromise verdict having such preclusive effect on a defendant in multiple plaintiff situations was also predicted. In personal injury cases jurors tend to compromise the liability issue. Currie, *supra* at 298-99 n.37, 321.

The chances of the multiple plaintiff anomaly occurring in Lilly's defense of DES actions is obvious. Less than a week after *Bichler* was publicized, it was named in a complaint filed against Lilly and asserted to be conclusive as to the liability issue. *Kinley v. Eli Lilly & Co.* (Minn. Dist. Ct., 4th Jud. Dist., filed July 27, 1979).

104. See note 30 *supra*. Additionally, after being granted the opportunity to depose the *Bichler* jurors, defendant Lilly conceded the possibility that the information disclosed might be used in its appeal of *Bichler* in state court:

The law of New York is clear that a verdict may be directly attacked on grounds of compromise only by proof of objective facts. Lilly intends to make this objective showing in its appellate brief in *Bichler*.

* * *

The issue of compromise will be decided by the Appellate Division, First Department, of the State of New York. Whether or not the Appellate Division calls for transcripts of jurors' testimony in the *Katz* case (and the likelihood of that happening is about zero) is an issue for that Court, not for this one.

Affidavit for defendant in opposition to Joyce Bichler's motion to intervene, at 3, *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y.) 1979).

flects both the likelihood of a violation of the Mansfield rule and the court's hesitancy to deal with it.

The *Katz* holding can perhaps best be seen as a policy decision. The court's first major alternative was to deny the deposition to avoid conflict with the impeachment rule, but this would result in Lilly being bound in a successive number of actions by a possibly invalid prior judgment. The second major alternative was to permit the depositions and thereby give Lilly a chance to avoid the preclusive effect of a defective judgment, but this would impinge on the Mansfield rule. Given such an unattractive choice between two conflicting considerations, the court understandably attempted to create a third alternative. The result was a holding which risks the intrusive effect of the depositions on the jurors to forestall the possible prejudicial effect of collateral estoppel, while at the same time it attempts to distinguish the contrary impeachment precedent.

The court could have obtained the same result, however, through a more thorough analysis. Rather than summarily explaining the Mansfield rule away, the court instead should have attempted to strike a balance that would protect the function of the jury and yet prevent the preclusive effect of the compromise verdict. Such a result could have been achieved by distinguishing a compromise verdict from the absolutely protected mental processes of the jury. Whereas the mental processes need protection because they are known only to each individual juror and therefore generally unprovable,¹⁰⁵ a compromise verdict needs no such protection because it is an objective occurrence known to all jurors. It thus could be identified, exposed, and proven without disturbing the remainder of the jury's deliberation.¹⁰⁶ Moreover, the exposure of an impermissible compro-

105. "Since inquiry into the thought process of any individual is at best speculative and the cases suggest that it is relatively easy to convince a juror that he acted mistakenly, a judge's ability to reconstruct the juror's thoughts at the time of his deliberation is doubtful and unverifiable." 3 WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 606[03], at 25 (1978).

The theory is that mental and emotional reactions are highly suggestive and peculiarly within the knowledge of the individual juror and no one else. These reactions are therefore nearly impossible to contradict or cross examine. Thus, were a single juror able to impeach the collective judgment of twelve by testimony of his undisclosed mental processes, he could irresponsibly do so with relative impunity. *Mattox v. United States*, 146 U.S. 140, 148 (1892); JAMES & HAZARD, CIVIL PROCEDURE § 7.19, at 313 (2d ed. 1977).

106. Since an overt act will be known to all jurors, its validity can be proved or disproved. Therefore there is no danger of such juror's testimony being offered for a corrupt purpose. Also, allowing juror testimony of an overt act will not encourage post trial harassment or tampering with a juror, since remaining jurors could disprove any false allegation. *Mattox v. United States*, 146 U.S. 140, 148 (1892); *People v. Hutchinson*, 71 Cal. 2d 342, 350, 455 P.2d 132, 137 (1968) (Traynor, J.), *cert. denied*, 396 U.S. 994 (1969).

mise would not impede honest deliberations of a jury, but rather would have the beneficial effect of deterring jurors from compromising their verdict.¹⁰⁷

Alternatively, the *Katz* court could have prevented the collateral estoppel effect of the *Bichler* judgment and not reached the impeachment issue at all. To do so it would have been necessary to deny the preclusive effect of the *Bichler* judgment when the plaintiff asserted it. This result would be in accord with the holding in *Schwartz v. Public Administrator of the County of Bronx*,¹⁰⁸ which suggested that indications of a compromise verdict denoted a lack of a full and fair opportunity to litigate.¹⁰⁹ Further support could be derived from *Zdanok v. Glidden Co.*,¹¹⁰ in which the court held that offensive collateral estoppel might not be appropriate to the situation where a defendant faces a series of similar actions forcing him to risk losing all in each successive trial although unable to win more than one at a time.¹¹¹ Authority could also be found in other jurisdictions where offensive collateral estoppel has been denied due to other overriding considerations, or on grounds of basic fairness.¹¹² If nothing else, the *Katz* court could have at least tem-

107. As stated by Justice Cardozo:

Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. . . . The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

Clark v. United States, 289 U.S. 1, 13 (1933); *accord*, *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 212 (1866) ("public policy protects a juror in the discharge of his duty, . . . but if he steps aside from his duty, . . . he is a competent witness to prove such fact"); *People ex rel. Nunns v. County Court*, 188 A.D. 424, 176 N.Y.S. 858, 862 (1919) ("honest juror need have no fear of exposure").

108. 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969).

109. *Id.* at 961.

110. 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

111. *Id.* at 955; *accord*, *Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 285-89 (1957).

112. *E.g.*, *Moch v. E. Baton Rouge Parish School Bd.*, 597 F.2d 770 (5th Cir. 1979) (unpublished opinion) (court refused to apply collateral estoppel because it would be unjust due to an intervening change in the law); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977) (where defendant was precluded from testifying in prior action due to operation of Illinois Dead Man Act, court held it would be unfair to apply offensive collateral estoppel); *Grantham v. McGraw-Edison Co.*, 444 F.2d 210 (7th Cir. 1971) (collateral estoppel effect of prior patent litigation held not applicable because there had been an intervening change of ownership and the earlier trial had been truncated); *Taylor v. Hawkinson*, 47 Cal. 2d 893, 306 P.2d 797 (1957) (Traynor, J.) (collateral estoppel denied where earlier action the re-

porarily denied the preclusive effect of the *Bichler* judgment pending its appeal in state court.¹¹³ This would be a reasonable alternative. Giving collateral estoppel effect to a judgment later found to be erroneous on appeal would only lead to inconsistent judgments and repeated injustice.¹¹⁴

Whichever means was used to ascertain whether collateral estoppel should apply, the court should nevertheless have avoided the potentially intrusive discovery depositions. While the liberal discovery provisions are possibly the most notable advance of the federal rules,¹¹⁵ they are also the most capable of being abused.¹¹⁶ Further, the impact of such abuse would be particularly acute on jury deliberations which depend heavily on an element of secrecy for their survival.

Therefore, even though discovery may be especially crucial in a products liability action,¹¹⁷ it still should not be extended to jury deliberations without some form of limitation. A possibility would be for the trial judge in *Katz* to hold an evidentiary hearing and conduct a court-controlled investigation into the alleged compromise verdict.¹¹⁸ Should this not be feasible owing to a

sult of a compromise verdict); *Clovis Ready Mix Co. v. Aetna Freight Lines*, 25 Cal. App. 3d 276, 101 Cal. Rptr. 820 (1972) (where prior judgment was the result of a settlement, it would not be given collateral estoppel effect); *Fred Olson Motor Serv. v. Container Corp. of America*, 81 Ill. App. 3d 825, 401 N.E.2d 1098 (1980) (where defendant prevented from testifying in prior action due to Illinois Dead Man Act, judgment would not be given estoppel effect); *LaSalle Nat'l Bank v. City of Chicago*, 54 Ill. App. 3d 944, 369 N.E.2d 1363 (1977) (prior zoning litigation held to have no preclusive effect because of intervening change of conditions).

113. *Duverney v. State*, 96 Misc. 2d 898, 410 N.Y.S.2d 237, 246 (Ct. Cl. 1978) (the full and fair opportunity to litigate doctrine could mandate denial of collateral estoppel while an appeal is pending); *contra*, *Sullivan v. George Ringler & Co.*, 69 A.D. 388, 74 N.Y.S. 978 (1902).

114. The theory is that a judgment being appealed might be found erroneous and be reversed on appeal. For this reason, many courts will deny such judgment collateral estoppel effect until its resolution in the appellate court. Annot., 9 A.L.R.2d 984, 987 (1950).

115. "Perhaps the most notable advance and in a sense the very guts of the Federal Rules, are the liberal discovery provisions. . . . They were designed to convert the lawsuit from a sporting event into a search for truth." Kaufman, *The Federal Rules: The Human Equation Through Pre-Trial*, 44 A.B. A.J. 470 (1958).

116. Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978); *see also* note 61 *supra*.

117. "The very nature of products liability litigation necessitates liberal application of discovery rules in order to allow each side to obtain the foundation for the presentation of necessary proof." Comment, *You've Gotta Know the Territory: Issue Recognition & Resolution in the Preparation of a Products Liability Suit*, 5 OHIO N. L. REV. 1, 27 (1978).

118. "[S]upervision is desirable not only to protect jurors from harassment but also to insure that the inquiry does not range beyond subjects on which a juror would be permitted to testify under Rule 606(b)." *United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978); *see e.g.*, *Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1979).

crowded docket, the court should at least provide a protective order which strictly limits the time, place, and scope of the depositions sought by Lilly.¹¹⁹ In this way the need for exploration could be satisfied without any undue intrusion into the privacy of the individual jurors.

CONCLUSION

A careful reading of the *Katz* holding suggests alternatives. Although a court cannot be expected to appease all conflicting interests in rendering a judgment, the *Katz* court nevertheless could have achieved a more just result through a better analysis. Part of every court's analysis should include a look beyond the immediate case to the future impact of its holding.

Much of the impact of *Katz* remains questionable because it was a district court opinion rendered under unique circumstances. Further, any opportunity for appellate interpretation of the holding has been precluded by an intervening settlement between the parties.¹²⁰ Nevertheless, the *Katz* holding remains significant for what it portends.

Katz illustrates the dangers of strict application of offensive collateral estoppel. No longer restrained by mutuality, offensive collateral estoppel remains virtually unchecked in its potential for injustice. While a return to the absolute rule of mutuality of estoppel is not desirable, *Katz* reveals the need for standards to guide a trial court in its consideration of whether offensive collateral estoppel should apply.

The *Katz* decision also indicates the need for a re-examination of the Mansfield rule. Although protection of the thought

As stated by Judge Pollack:

[I]t has now become clear that to an important degree the courts and the paying public cannot depend on counsel to effectively regulate and police discovery activity; it has assumed a troublesome runaway aspect.

* * *

The more promising possibility to stop runaway discovery . . . is . . . judicial control by the judge who will have to try the controversy and deal with the product of discovery if and when presented at trial. The trial judge is the natural monitor to be looked to.

Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 221-23 (1979).

119. FED. R. Civ. P. 26(c). The language of the rule itself states that if justice requires, a party is entitled to protection from annoyance, embarrassment, oppression, or undue burden and expense by a court direction that discovery be had by a method other than that selected by the inquiring party.

In addition, district courts are given power to regulate their own discovery procedures in any manner not inconsistent with the federal rules. FED. R. Civ. P. 83.

120. A stipulation of dismissal was filed by the parties on Feb. 12, 1980, pursuant to a settlement of approximately \$235,000.

processes of jurors is indispensable to the jury system, it is questionable whether such protection need extend to an impermissible compromise. An individual's right to a fair trial should mandate disclosure of overt acts of compromise.

Finally, *Katz* could be a dangerous holding if used as authority for further discovery of jury deliberations. Though discovery was arguably necessary to prevent injustice in *Katz*, the need for limitations on such discovery was even more essential. By providing specific guidelines for the discovery procedure, the *Katz* court could have insured protection of the jury system and resolved this sensitive issue for later courts should it ever recur. By failing to do so, the court's holding exacerbated the issue so as to assure its recurrence in future litigation.

Steven Polick

