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## Mandatory Intervention: Expansion of Collateral Estoppel in Favor of Single Defendants against Multiple Plaintiffs in Federal Civil Litigation, 14 J. Marshall L. Rev. 441 (1981)

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## COMMENTS

### MANDATORY INTERVENTION: EXPANSION OF COLLATERAL ESTOPPEL IN FAVOR OF SINGLE DEFENDANTS AGAINST MULTIPLE PLAINTIFFS IN FEDERAL CIVIL LITIGATION

#### INTRODUCTION

The United States Supreme Court's reasoning concerning the issue of non-assertion of the right to intervene in federal lawsuits has gradually changed over the last forty-six years.<sup>1</sup> This change in reasoning is due to the increasing number of lawsuits filed in the federal district courts.<sup>2</sup> The 1966 amendments to the Federal Rules of Civil Procedure (FRCP)<sup>3</sup> addressed this

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1. The first case to establish a rule concerning this issue was *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934). In *Chase*, Justice Brandeis, writing for the majority, stated that:

[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

*Id.* at 441. In 1968, Justice Harlan, writing for the majority in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), suggested that a recalcitrant intervenor might "be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." *Id.* at 114. Most recently, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), Justice Stewart applied a procedural penalty for failure to intervene in certain situations. *Id.* at 331. See notes 16-22 and accompanying text *infra*.

2. See Annual Report of the Director of the Administrative Office of the United States Courts 308 (1979). 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) (each judicial counsel shall make all necessary orders for the effective and expeditious administration of the business of the courts); Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599 (1970) (analysis of an act enacted for the benefit of the administration of United States courts); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (analysis of the time available to United States Supreme Court Justices); Chief Justice Warren, *Administrative Problems of the Federal Judiciary*, 23 BUS. LAW. 7 (1967) (noting the extrajudicial functions of federal judges); Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874 (1963) (statistical analysis of the caseload of the federal courts).

3. FED. R. CIV. P. for the United States District Courts, as amended, Feb. 28, 1966.

issue by establishing liberalized joinder provisions for the federal courts.<sup>4</sup> A major purpose of the liberalized joinder provisions is the resolution of all potential claims by all potential parties in one lawsuit.<sup>5</sup> An absent plaintiff who possesses a right to intervene in federal civil litigation, however, can wastefully prolong rather than help to expeditiously resolve disputes involving multiple plaintiffs and a single defendant.

The prolongation of such suits has resulted because the current state of the law<sup>6</sup> has made the following statements true: if there are two potential plaintiffs and one potential defendant in a legal dispute, and only one of the plaintiffs initiates a lawsuit against the defendant, the remaining plaintiff has everything to gain and nothing to lose by not effectuating joinder in the initial lawsuit.<sup>7</sup> If the remaining plaintiff brings a second suit against the defendant, he will not be bound by a judgment favoring the defendant in the prior suit.<sup>8</sup> The plaintiff will, however, be unable to estop the defendant from relitigating any unfavorable judgments in the prior suit.<sup>9</sup>

The imbalance in this situation is compounded by the number of potential plaintiffs involved. For example, in a lawsuit that is structured with fifty plaintiffs sharing a common claim against a single defendant,<sup>10</sup> assume that after the initial

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4. FED. R. CIV. P. 13(h), 14(a)(b), 18(a)(b), 19(a)(b), 20(a), 22, 23, and 24.

5. See generally McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976). Additionally, the joinder provisions, as well as all of the Federal Rules of Civil Procedure, can only be utilized to the extent their application is fair to all parties involved. See FED. R. CIV. P. 1.

6. See notes 78-105 and accompanying text *infra*.

7. *Id.*

8. See notes 33-38 and accompanying text *infra*.

9. While the validity of this statement is lessened somewhat due to the recent decision of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), pragmatically speaking the statement is correct. See notes 78-105 and accompanying text *infra*.

10. Lawsuits producing great numbers of potential plaintiffs against a single defendant are much less common than lawsuits producing ten or fewer plaintiffs against a single defendant. Nevertheless, the former situation has occurred several times. Such situations usually occur as a result of a "mass accident." A mass accident is defined as a sudden, unintentional occurrence causing harm to many persons or their property for which other persons may be legally responsible. Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1616-17 (1972). The claims in mass accident litigation usually involve wrongful death or personal injuries. See *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970). Additionally, Professor Currie demonstrated how a railroad accident could give rise to such massive tort litigation. Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 304 (1957). See also RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975). Finally, the United States District Court for the Northern District of Illinois is currently handling a form of this type of massive tort litigation due to the air disaster precipi-

suit is filed, the remaining forty-nine plaintiffs bring their actions one by one. Each plaintiff will wait for a determination in the prior action before filing his own lawsuit. If the defendant prevails in the first twenty-five suits, the remaining twenty-five plaintiffs will be unaffected by the defendant's victories, even though their claims are the same as those of the losing plaintiffs.<sup>11</sup> If the defendant loses suit number twenty-six, however, plaintiffs twenty-seven through fifty are automatically winners.<sup>12</sup>

Under current federal law, the defendant cannot assert a winning judgment against a nonparty plaintiff, but a losing judgment automatically renders the defendant liable to plaintiffs initiating future suits based on the same cause of action in the prior suits.<sup>13</sup> This subjects the defendant to both the possibility of collusion among the plaintiffs<sup>14</sup> and the burden of defending against claims and relitigating issues upon which the defendant has previously litigated against and prevailed.<sup>15</sup> Therefore, in such situations plaintiffs have at least two, and possibly more chances to prevail against the defendant. The plaintiffs need win only once, while the defendant must win every time.

The United States Supreme Court first confronted the issue of recalcitrant-plaintiff intervenors in *Chase National Bank v. City of Norwalk*<sup>16</sup> where the Court rejected the argument that a litigant is required to exercise a right of federal intervention.<sup>17</sup> The next time the Court significantly addressed this issue was thirty-four years later in *Provident Tradesmens Bank & Trust Co. v. Patterson*.<sup>18</sup> In *Provident*, Justice Harlan suggested that a

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tated by the crash of American Airlines Flight 191. *In re Air Crash Disaster Near Chicago Illinois on May 25, 1979*, No. 80-1812 (N.D. Ill. 1979). This air crash led to 158 cases being filed in federal district courts throughout the United States. All cases were consolidated in the United States District Court for the Northern District of Illinois.

11. This result is in accordance with the principles of offensive collateral estoppel. See notes 62-71 and accompanying text *infra* and note 8 and accompanying text *supra*.

12. Although *Parklane* attempted to avoid this result, pragmatically it is not likely to do so. See notes 78-105 and accompanying text *infra*.

13. *Id.*

14. There is no legal basis to prevent the plaintiffs from agreeing to sue the defendant successively in an attempt to establish, somewhere throughout the course of the lawsuits, the defendant's liability by mere chance; *i.e.*, in all likelihood, the defendant will lose one lawsuit out of fifty.

15. Since each new lawsuit would necessarily try the same legal and factual issues as the prior lawsuits, the defendant would be subjected to this wasteful repetition as long as he kept winning and the supply of plaintiffs held out.

16. 291 U.S. 431 (1934).

17. *Id.* at 441.

18. 390 U.S. 102 (1968).

disputant who had not intervened in an initial lawsuit might "be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene."<sup>19</sup> Although few courts followed this idea,<sup>20</sup> the current members of the Supreme Court have recently shown sensitivity to these issues in *Parklane Hosiery Co. v. Shore*.<sup>21</sup> The *Parklane* case, however, strongly indicates that judicial developments in this area are merely in the preliminary stages.<sup>22</sup> Therefore, further attention to the problem of nonintervening federal plaintiffs is necessary.

This comment will demonstrate how plaintiffs who possess a federal right of intervention, but who knowingly forego a reasonable opportunity to exercise that right, can do so without fear of preclusion in subsequent relitigation of issues determined in the initial action.<sup>23</sup> Examination of the various approaches that have either been judicially applied or proposed by other commentators will then be made.<sup>24</sup> Finally, the development of a new approach which logically flows from existing law will be structured.<sup>25</sup> Full understanding of the issues necessitates a preliminary discussion of the relationships between the procedural concepts involved.

#### DEVICES DESIGNED TO PROMOTE THE PRINCIPLES OF JUDICIAL ECONOMY AND FINALITY

##### *Intervention*

Intervention is a procedural device which allows the scope of the litigation to be expanded.<sup>26</sup> A nonparty can join as a party to an existing lawsuit on his own initiative if certain tests are

19. *Id.* at 114.

20. Few lower court decisions since *Provident* have followed Justice Harlan's suggestion. See *Consumers Union, Inc. v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1217 (D.C. Cir. 1978), *cert. granted sub nom.* *GTE Sylvania, Inc. v. Consumers Union of the United States*, 441 U.S. 942 (1979); *Pan Am. World Airways, Inc. v. United States District Court*, 523 F.2d 1073, 1077 (9th Cir. 1975); *Show-World Center, Inc. v. Walsh*, 438 F. Supp. 642, 648 (S.D.N.Y. 1977); *Pollard v. Roberts*, 283 F. Supp. 248, 254 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968). There are a few cases, however, which have followed the principle, at least partially, by refusing to allow assertion of collateral estoppel. See *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 452 (D.D.C. 1978); *cf.* *EEOC v. Huttig Sash & Door Co.*, 371 F. Supp. 848, 851 (S.D. Ala. 1974) (assertion of collateral estoppel barred due to lack of notice), *rev'd on other grounds*, 511 F.2d 453 (5th Cir. 1975).

21. 439 U.S. 322 (1979).

22. See notes 78-105 and accompanying text *infra*.

23. *Id.*

24. See notes 106-11 and accompanying text *infra*.

25. See notes 113-35 and accompanying text *infra*.

26. See F. JAMES, CIVIL PROCEDURE § II.IV, at 617-21 (1965).

met. Nonstatutory intervention<sup>27</sup> in federal civil litigation is established by meeting the tests set forth in FRCP 24(a)(2).<sup>28</sup> Upon timely application, FRCP 24(a)(2) gives a nonparty a right to intervene if each of the following three tests is satisfied: (1) he has an interest relating to the property or transaction involved in the action; (2) disposition of the action may impair or impede his ability to protect his interest as a practical matter; and (3) his interest is not adequately represented by present parties.<sup>29</sup>

FRCP 24 was established for the following purposes: to allow one, not a party to an existing lawsuit, to protect himself from exclusion in an action; to protect the nonparty from exclusion in an action where he might inexpensively litigate his claim and to resolve the claims of all potential parties in one lawsuit,

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27. Federal rule of civil procedure 24 reads, in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action . . . may impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . [i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24, as amended, July 1, 1975. In all federal actions, rule 24 and not the state law governs intervention. *McDonald v. Lavino Co.*, 430 F.2d 1065, 1070 (5th Cir. 1970).

Both rule 24(a)(1) and 24(b)(1) statutory intervention usually involve intervention by the United States or a state in a case involving the constitutionality of an Act of Congress or a state statute. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1966 (1972). Hence, statutory intervention is irrelevant for purposes of the present discussion on nonparties who purposely bypass an opportunity to intervene.

There are many procedural distinctions between intervention of right and permissive intervention. For present purposes, however, it is important to note only that the former involves nonparties to existing litigation who have a direct stake in the outcome of the litigation, while the latter usually involves nonparties who need not, and usually do not, have a direct personal or pecuniary interest in the subject of the litigation. *See, e.g.*, 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1906-23 (1972). Hence, permissive intervenors will not have a reason to choose not to try and intervene in existing litigation, since they will usually have no direct stake in the outcome of the action. Intervenors of right, however, may have several reasons for not exercising that right. *See* notes 62-71 and accompanying text *infra*.

28. FED. R. CIV. P. 24, as amended, July 1, 1975.

29. *Id.*

rather than in separate lawsuits.<sup>30</sup> It is this last purpose, aimed toward judicial economy, that becomes relevant for purposes of the present discussion.

While FRCP 24(a) establishes the prerequisites for nonparties to intervene as of right, the rule does not address those cases where a person who qualifies as a FRCP 24(a) plaintiff-intervenor declines to exercise that right.<sup>31</sup> Thus, by bringing a later action, the nonintervening plaintiff can wastefully prolong the litigation in opposition to the purpose of the rule which gives him a right to intervene.<sup>32</sup> The doctrine of *res judicata* complicates this situation by affording protection to the absent plaintiff.

### *Res Judicata and the Rules of Merger and Bar*

The doctrine of *res judicata* provides that where a final judgment has been rendered between two parties as to the merits of a particular claim, relitigation of that same claim in the future will not be allowed.<sup>33</sup> A plaintiff who wins in the first action, cannot later sue the same defendant for higher damages, because his prior action is *merged* into the judgment.<sup>34</sup> Similarly, if the plaintiff loses the first action, he is *barred* from later suing again on the same claim.<sup>35</sup> Hence, pleas of merger and bar under the *res judicata* doctrine are defendant's pleas.<sup>36</sup> Once having litigated a claim against a plaintiff, the defendant will not have to relitigate that identical claim with the same plaintiff.<sup>37</sup>

Under the *res judicata* doctrine, however, the defendant is not protected from an absent plaintiff having an identical cause of action as the plaintiff in the initial suit. If the absent plaintiff

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30. See 1B MOORE'S FEDERAL PRACTICE ¶ 0.412(1), at 1812 (2d ed. 1980).

31. The rules are phrased in terms of defining those general situations where a person may initiate joinder. The rules do not speak in terms of what penalties, if any, apply for failure to join. FED. R. CIV. P. 19 addresses those situations where a party who must be joined, cannot be joined. This is as close as the joinder provisions of the federal rules come to addressing issues of nonassertion of a right to join a pending action.

32. It is not likely a nonintervening plaintiff would forego his opportunity to intervene just to frustrate judicial economy. However, it is ironic that the intervention rule can be used in such a manner.

33. *Elder v. New York & Pa. Motor Express, Inc.*, 284 N.Y. 350, 353, 31 N.E.2d 188, 189 (1940); *Good Health Dairy Prods. Corp. v. Emery*, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937); *McCoid, A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 709-10 (1976).

34. *E.g.*, *Dearden v. Hey*, 304 Mass. 659, 24 N.E.2d 644 (1939). See RESTATEMENT OF JUDGMENTS § 45(a) (1942).

35. *E.g.*, *Thompson v. Washington Nat'l Bank*, 68 Wash. 42, 122 P. 606 (1912). See RESTATEMENT OF JUDGMENTS § 45(b) (1942).

36. See Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1013 (1967).

37. *Id.*

does not intervene in the initial action between the plaintiff and defendant, the rules of merger and bar have no effect on him.<sup>38</sup> Therefore, while *res judicata* helps to promote judicial economy and protects a defendant against wasteful relitigation with the same plaintiff, the doctrine does not protect the defendant against subsequent relitigation due to recalcitrant nonparties properly aligned as plaintiffs. Like *res judicata*, the doctrine of collateral estoppel is aimed toward judicial economy, but can also leave a defendant unprotected from relitigation of previously decided claims and issues.

### *Collateral Estoppel*

The Restatement of Judgments describes the legal effect of collateral estoppel as follows: “[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .”<sup>39</sup> The purpose of this doctrine is judicial economy and finality.<sup>40</sup> “Once a party has fought a matter in litigation with the other party, he cannot later renew that duel.”<sup>41</sup>

*Res judicata* only applies to the same cause of action, while collateral estoppel applies to different causes of action.<sup>42</sup> Under *res judicata*, a plaintiff is precluded from relitigating the same cause of action against the same defendant, whether or not the plaintiff won or lost in the prior action.<sup>43</sup> By contrast, collateral estoppel is generally limited in application to those *issues* which were essential to the judgment, and which were actually litigated and determined in the prior litigation.<sup>44</sup>

While *res judicata* is a defendant’s plea,<sup>45</sup> collateral estoppel may be successfully asserted by either a subsequent plaintiff or defendant.<sup>46</sup> Collateral estoppel may be asserted in a subsequent suit between the *same parties* on a different cause of action arising from the same transaction or occurrence that gave

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38. *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 184 N.E. 744 (1933).

39. RESTATEMENT OF JUDGMENTS § 68(1) (1942).

40. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

41. *Id.* at 597-98.

42. *Little v. Blue Goose Motor Coach Co.*, 346 Ill. 266, 178 N.E. 496 (1931).

43. *E.g.*, *Deardon v. Hey*, 304 Mass. 659, 24 N.E.2d 644 (1939). See RESTATEMENT OF JUDGMENTS § 45(a) (1942).

44. *E.g.*, *Cromwell v. County of Sac*, 94 U.S. 351 (1876). See RESTATEMENT OF JUDGMENTS § 68(2) (1942).

45. *E.g.*, *United States v. Moser*, 266 U.S. 236 (1924).

46. *E.g.*, *Little v. Blue Goose Motor Coach Co.*, 346 Ill. 266, 178 N.E. 496 (1931).



rise to the initial suit.<sup>47</sup> If the cause of action in the second suit is not barred by *res judicata*,<sup>48</sup> the assertion of collateral estoppel by either the plaintiff or defendant as to previously decided issues will usually prove fatal to the nonmovant's case. The latter situation occurs when the issues decided in the first case are determinative of the outcome in the second case.<sup>49</sup> Hence, collateral estoppel protects both parties from having to relitigate an identical issue with the same adversary,<sup>50</sup> after each litigant has had a full and fair opportunity to previously litigate the issue.

Where a *nonparty* to the prior litigation either asserts collateral estoppel or has the plea asserted against him, however, a judicial distinction between "defensive collateral estoppel" and "offensive collateral estoppel" has been made.<sup>51</sup> This distinction gives rise to the present problem of nonintervening federal plaintiffs. A nonparty can assert the plea of collateral estoppel, but cannot have the plea asserted against him.<sup>52</sup> The consequences of this procedure are unfairness to the defendant in multiple plaintiff cases and unnecessary litigation which burdens the federal courts. A closer examination of how this result has been made possible follows.

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47. Generally, where collateral estoppel is asserted in a subsequent suit between the same parties, "[a]pplication of collateral estoppel conserves judicial time and resources, protects a litigant from the unnecessary expense and potential harrassment of repetitive litigation, and avoids conflicting rights and duties that could result from inconsistent judgments." Note, *Katz v. Eli Lilly & Co.: Limitation of Collateral Estoppel in Products Liability Litigation*, 14 J. MAR. L. REV. 201, 201 n.1 (1980).

48. Collateral estoppel applies to those issues which were actually litigated and necessary to the outcome of the prior litigation. *Res judicata* applies to all issues which were previously litigated and those issues which might have been litigated. Additionally, under *res judicata*, a litigant cannot split his cause of action into separate lawsuits. Hence, *res judicata* prevents litigation of claims as well as issues that might have been litigated. For example, a litigant who wins or loses a negligence action against his opponent, cannot later bring a strict liability action against that same opponent, if both the negligence and strict liability claims arose from the same transaction or occurrence. The litigant cannot split his cause of action. *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 622-24 (2d ed. 1980).

49. *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 469-70 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951). If the issue determinative of liability was the same in two different cases, logically, upon assertion of collateral estoppel, a prior adjudication against the defendant would prove fatal in the subsequent case also.

50. *Reardon v. Allen*, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965).

51. See generally Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967). See notes 53-71 and accompanying text *infra*.

52. RESTATEMENT (SECOND) OF JUDGMENTS, § 88 (Tent. Draft. No. 3, 1976).

*Assertion of Defensive Collateral Estoppel by a Nonparty Defendant: Defendant is Protected from Relitigation*

A plea of defensive collateral estoppel occurs when there are two or more defendants potentially liable to one plaintiff on an underlying claim involving the same issues.<sup>53</sup> The plaintiff will sue one of the defendants. If he loses that action, he will then attempt to bring a second suit against the remaining defendant. Until its recent demise, the "mutuality doctrine" would have left the remaining defendant unprotected from the plaintiff's attempt to renew his claim by merely switching adversaries.<sup>54</sup>

The mutuality doctrine states that a nonparty cannot assert a favorable prior adjudication against a party because the prior judgment, had it gone the other way, could not have been asserted against him.<sup>55</sup> Therefore, the remaining defendant could not point to the plaintiff's loss in the case set forth above and attempt to bar the plaintiff's second suit on that basis. Since the nonparty defendant to the plaintiff's first action could not be bound by a judgment favoring the plaintiff in that action<sup>56</sup> under the mutuality doctrine, the nonparty defendant cannot likewise later assert a judgment favoring the defendant in the plaintiff's first action.<sup>57</sup>

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53. Note, *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1019 (1967).

54. The most persuasive attack on the mutuality doctrine came in *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942). Justice Traynor, speaking for a unanimous California Supreme Court, stated, "[n]o 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.* at 812, 122 P.2d at 895. In *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), the Court further criticized the mutuality doctrine:

In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or a lack of discipline and disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.

*Id.* at 329.

55. 1 FREEMAN, JUDGMENTS § 428 (5th ed. 1925).

56. *Id.*

57. *Id.*

The mutuality doctrine came under attack from courts in most state and federal jurisdictions.<sup>58</sup> The United States Supreme Court recently approved of the major decisions that abandoned the mutuality requirement.<sup>59</sup> As a result, defendants in federal courts are no longer subjected to wasteful relitigation in the defensive collateral estoppel cases. In such cases, a defendant can effectively preclude a single plaintiff from relitigating identical issues, previously litigated and lost against another defendant, by asserting a plea of defensive collateral estoppel.<sup>60</sup>

The assertion of defensive collateral estoppel by a defendant has only recently met with United States Supreme Court approval. Nonparty defendants were finally allowed to assert a defensive collateral estoppel plea against a single-party plaintiff, because the judiciary realized "it was no longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."<sup>61</sup> In those cases involving multiple plaintiffs and a single defendant, however, a different branch of collateral estoppel applies. The issue in those cases is whether nonparty plaintiffs are allowed to estop a party defendant. Under the doctrine of offensive collateral estoppel, the sometimes unfortunate answer to that question has been in the affirmative.

*Assertion of Offensive Collateral Estoppel by Nonparty  
Plaintiffs: Defendant is Subjected to Relitigation of  
Previously Decided Claims and Issues*

The defensive use of collateral estoppel by a nonparty involves a transaction which produces a single plaintiff and multiple defendants.<sup>62</sup> By contrast, the offensive assertion of col-

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58. See, e.g., *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950); *Riordon v. Ferguson*, 147 F. 2d 983 (2d Cir. 1945); *Portland Gold Mining Co. v. Stratton's Independence*, 158 F. 63 (8th Cir. 1907). See note 54 and accompanying text *supra*.

59. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) (implicitly approving of the *Bernhard* and *Blonder-Tongue* decisions).

60. *Id.*

61. *Id.*

62. There are several types of cases that fit in this category, but the majority of these cases involve derivative liability. Examples of such cases include an employer whose driver has been involved in an automobile accident while within the scope of the driver-employee's duties. In a suit against the driver, whereupon the driver wins such suit, the plea of defensive collateral estoppel is available to the employer and has been effective in a subsequent action against him. See *Taylor v. Denton Hatchery, Inc.*, 251 N.C. 689, 111 S.E.2d 864 (1960); accord, *Carroll v. Hubay*, 272 F.2d 767 (2d Cir. 1959) (complaint against employer dismissed due to prior action against employee resulting in verdict for employee). The reverse situation,

lateral estoppel involves a transaction which produces multiple plaintiffs and a single defendant.<sup>63</sup> Assuming only one of the plaintiffs in the latter situation initiates a suit against the defendant, a losing verdict against the defendant will give rise to the question of offensive assertion of collateral estoppel in a subsequent action by another plaintiff. Under the offensive collateral estoppel doctrine, a nonparty plaintiff can estop the defendant from relitigating the defendant's loss in the first suit.<sup>64</sup> The nonparty plaintiff seeks to avoid relitigating the issue of the defendant's liability and wants to proceed directly to the issue of damages.<sup>65</sup>

While the defensive use of collateral estoppel promotes judicial economy by forcing the single plaintiff to join all potential defendants in the initial lawsuit,<sup>66</sup> the offensive use of collateral estoppel promotes exactly the opposite incentive. In the New Jersey case of *Reardon v. Allen*,<sup>67</sup> the problem was succinctly defined:

To allow plaintiffs the benefit of the first judgment may actually increase litigation and delay in some cases. Claimants might be inspired to delay their personal injury actions in the hope that the first action by another claimant produces a favorable result. Two chances are better than one. The delay in bringing an action would deprive courts of the opportunity to consolidate the actions on motion, or on the court's own initiative. . . .<sup>68</sup>

The results in such situations are unfairness to the single defendant and wasteful litigation. The reasons for this are twofold. First, if the defendant is successful in the first suit, the nonparty plaintiffs are not bound under the rules of *res judicata*.<sup>69</sup> They can bring their own actions successively against the defendant. The defendant is, therefore, subjected to reliti-

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where the first action is against the employer and the subsequent action against the driver-employee, has yielded the same results. See *Davis v. Perryman*, 225 Ark. 963, 286 S.W.2d 844 (1956); *Giedrewicz v. Donovan*, 277 Mass. 563, 179 N.E. 246 (1932).

63. The multiple plaintiff and single defendant lawsuit can arise in many different situations and with a small or great number of plaintiffs. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968); *Elder v. New York & Pa. Motor Express, Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940) (lawsuit consisting of two plaintiffs, the owner and driver of a truck, and the defendant, the owner of the other vehicle). Lawsuits involving large numbers of plaintiffs and a single defendant usually involve an airplane crash, bus or train collisions, or devastating explosions. See Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615 (1972).

64. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979).

65. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1460 (1968).

66. See notes 53-61 and accompanying text *supra*.

67. 88 N.J. Super. 560, 213 A.2d 26 (1965).

68. *Id.* at 571-72, 213 A.2d at 32.

69. See notes 33-38 and accompanying text *supra*.

gating claims and issues he had previously defended. Second, a defendant may have been found liable in the first action, but the monetary compensation at stake may have been only minimal. The subsequent action, however, may involve large sums of money. Logically, the defendant would not defend against a small claim as vigorously as he would against a large claim. Having lost the prior suit, however, the defendant remains liable to future plaintiffs. The issue of his liability cannot be relitigated in future suits. The only remaining issue is how much the defendant is liable for.<sup>70</sup> Thus, offensive collateral estoppel, combined with the rules of res judicata, can subject the common defendant to sequential trials, each of which threatens to impose liability but offers no immunity from future suits. This loophole subjects the defendant to unfairness and burdens the federal courts with unnecessary litigation.<sup>71</sup>

*Intervention, Res Judicata, and Collateral Estoppel:  
A Summary*

The underlying purposes of intervention, res judicata, and collateral estoppel are judicial economy, judicial finality, and fairness to all parties.<sup>72</sup> To the extent these devices are used to effectuate joinder, or to estop a single plaintiff from successively suing multiple defendants, as in the defensive collateral estoppel case, these purposes are accomplished. But the development of intervention, res judicata, and collateral estoppel in cases involving a single defendant being sued successively by multiple plaintiffs, has left the defendant subject to unfairness and the federal courts subject to the possibility of wasteful relitigation.

Several methods, such as expansion of the res judicata doctrine,<sup>73</sup> virtual representation,<sup>74</sup> and stare decisis<sup>75</sup> have been employed by the federal courts for correcting the problem of

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70. Although this result seems obvious, it may not be anticipated by an attorney engaging in a case which has collateral estoppel implications. See note 65 and accompanying text *supra*. But see *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (where the second passenger's plea of collateral estoppel was denied because "it would be unfair in this case").

71. See notes 33-38 and 62-70 and accompanying text *supra*.

72. See notes 26-71 and accompanying text *supra*.

73. This approach involves a privity theory. When the interest of a nonparty and a party to a pending action are substantially identical, and the party representative vigorously protects that interest, the nonparty may be bound by collateral estoppel on the theory that he was the privy of the party representative. See Cortrell, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527 (1976). The problem with a general application of this approach has been the issue of adequacy of representation. See, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 155-56

nonintervening plaintiffs. These methods, however, have been applied on an ad hoc basis and none of them are useful as a uniform approach for resolution of this problem in the federal courts.<sup>76</sup> The United States Supreme Court's decision in *Parklane Hosiery Co. v. Shore*,<sup>77</sup> offered one avenue of reform. Unfortunately, the *Parklane* decision is not likely to persuade nonintervening plaintiffs to effectuate joinder in an existing ac-

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(1967) (dissenting opinion discussing intervention of right and adequacy of representation).

74. In *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975), *appeal dismissed and cert. denied*, 423 U.S. 908 (1975), two Florida state agencies leased a parcel of land to Aerojet-General. The contract contained a provision allowing Aerojet to exercise an option to purchase the land. 511 F.2d at 713. When Aerojet exercised their option, the agencies refused to convey the land. Aerojet brought an action for specific performance in federal district court. *Aerojet-General Corp. v. Kirk*, 318 F. Supp. 55 (N.D. Fla. 1970), *aff'd sub nom. Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972). The federal district court ruled in favor of Aerojet and ordered specific performance. Dade County, claiming a statutory right to purchase the land, did not intervene in the first action, but later petitioned the Florida Supreme Court to compel conveyance of the land from the agencies to it. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 714 (5th Cir. 1975), *appeal dismissed and cert. denied*, 423 U.S. 908 (1975). In response, Aerojet brought a second federal action to enjoin the enforcement of the Florida Supreme Court order. The federal district court estopped Dade County from challenging their previous rulings in favor of Aerojet. *Aerojet-General Corp. v. Askew*, 366 F. Supp. 901 (N.D. Fla. 1973). The court of appeals affirmed the district court. *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975), *appeal dismissed and cert. denied*, 423 U.S. 908 (1975). The *Aerojet* litigation is significant since it relied on the doctrine of virtual representation to come to a decision. Virtual representation requires that the interest of the absent party and the party representative be so close that the party representative will be expected to adequately represent the absent party's interest. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). The actual quality of the representation is irrelevant. RESTATEMENT OF PROPERTY §§ 181(b)(iii), 183-85 (1936). Additionally, the doctrine can only be applied when, "as a practical matter, a final adjudication of rights is necessary for the orderly conduct of everyday affairs, even though it entails foreclosure of an unknown person's claims." Hence, the virtual representation doctrine could not be generally applicable to multiple plaintiff cases in federal civil litigation on due process grounds. See notes 116-25 and accompanying text *infra*.

75. Stare decisis is a doctrine which states, "when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same." BLACK'S LAW DICTIONARY 1557 (4th ed. 1951). While the doctrine has been effective to preclude relitigation of principles of law, the results, when applied to preclude relitigation of facts, can be illogical. See *Western Elec. Co. v. Intersil, Inc.*, No. 76-0212-R (E.D. Va. Sept. 28, 1978), *argued sub nom. Western Elec. Co. v. Teledyne, Inc.*, No. 78-1892 (4th Cir. Dec. 5, 1979).

76. The remaining approaches are res judicata privity, compulsory intervention, and mandatory joinder. For an excellent discussion of these approaches and the negative aspects of each, see McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 714-28 (1976).

77. 439 U.S. 322 (1979).

tion and, thereby, avoid subjecting single defendants to the perils of the offensive collateral estoppel situation.

THE UNITED STATES SUPREME COURT'S SOLUTION TO  
RECALCITRANT FEDERAL PLAINTIFF INTERVENORS—  
*PARKLANE HOSIERY CO. V. SHORE*: BARRING  
THE USE OF OFFENSIVE  
COLLATERAL ESTOPPEL

*The Facts and Procedural History of Parklane*

In *Parklane*, plaintiffs brought a stockholder's class action in the United States District Court for the Southern District of New York against Parklane Hosiery Co.<sup>78</sup> The complaint alleged that Parklane had issued a materially false and misleading proxy statement, which led to a merger, and which caused Parklane's shareholders to sell their stock.<sup>79</sup> Damages, rescission of the merger, and recovery of costs were demanded.<sup>80</sup>

Before the class action came to trial, however, the Securities and Exchange Commission (SEC) brought an action in the Southern District of New York against Parklane.<sup>81</sup> The complaint alleged that Parklane's proxy statement violated the Securities Exchange Act of 1934.<sup>82</sup> The SEC requested an injunction.<sup>83</sup> The district court found the proxy statement in violation of the Act as alleged. The Second Circuit Court of Appeals affirmed,<sup>84</sup> and Parklane did not appeal.

Plaintiffs in the class action then moved for partial summary judgment against the defendants, asserting that the defendants were collaterally estopped from relitigating the issues resolved in the SEC action. The district court denied the motion, but cer-

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78. Certified as a class action Sept. 14, 1974 by Order dated May 2, 1975.

79. 439 U.S. at 324.

80. *Id.*

81. The Securities and Exchange Commission requested the trial court to:

(i) enjoin defendants Parklane and Somekh from further violations of the antifraud, proxy, and reporting provisions of the federal securities laws, (ii) order the appointment of a Special Counsel armed with all necessary powers and authority to make a determination as to the proper value of Parklane's stock, and as to the proper mode and extent of relief to be afforded public Parklane shareholders, (iii) order Parklane to amend its prior public filings with the Commission so as to correct and adequately disclose all material matters relating to Parklane's financial and other affairs (iv) order the defendant Parklane to file a Form 10K for the year ending September 30, 1975, and (v) order any relief as the Court deems necessary and appropriate.

SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 480 (S.D.N.Y. 1976).

82. *Id.* at 479.

83. *Id.*

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

tified the question for appeal. The Second Circuit Court of Appeals, relying on *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,<sup>85</sup> reversed. The Second Circuit ruled that offensive use of collateral estoppel by the shareholders was permissible in this case. Since *Parklane* conflicted with a ruling by the Fifth Circuit in *Rachal v. Hill*,<sup>86</sup> the United States Supreme Court granted certiorari.<sup>87</sup>

The Supreme Court affirmed the Second Circuit in the *Parklane* shareholders' action.<sup>88</sup> The Court abandoned the mutuality requirement for assertions of collateral estoppel.<sup>89</sup> Although the *Blonder-Tongue* case had partially addressed the mutuality issue, no Supreme Court case had completely abandoned the mutuality requirement until the *Parklane* decision. The Supreme Court used a "fairness analysis" in deciding whether to allow assertion of collateral estoppel in *Parklane*. Since the Court felt it would be fair for the shareholders to estop *Parklane* from relitigating the proxy statement issue, offensive assertion of collateral estoppel was allowed.<sup>90</sup>

#### *The Implications of Parklane*

*Parklane* involved a nonparty plaintiff (the shareholders) simultaneously involved in another lawsuit, who asserted offensive collateral estoppel against a party defendant (*Parklane*). This situation differs from those previously discussed in that the shareholders did not sit back and wait for a determination in a previously filed suit.<sup>91</sup> Rather, the filing of the suit crucial to the shareholders' plea of estoppel (the SEC action) was contemporaneous with their own lawsuit.<sup>92</sup> Nevertheless, the Supreme Court recognized the potential for abuse of offensive collateral estoppel in cases involving multiple plaintiffs and a single defendant, where no contemporaneous suits by the plaintiffs were pending.<sup>93</sup> The Court felt *Parklane* presented a ripe controversy concerning the general area of collateral estoppel. Therefore, two principles of law were set forth.

The first principle established in *Parklane* was the abandonment of the mutuality requirement.<sup>94</sup> As noted earlier, lack

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85. 402 U.S. 313 (1971).

86. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

87. 439 U.S. 322, 325 n.3 (1979).

88. 439 U.S. 322 (1979).

89. *Id.* at 326-28.

90. *Id.* at 337.

91. See notes 62-71 and accompanying text *supra*.

92. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

93. *Id.*

94. *Id.* at 330.



of mutuality promotes judicial economy and finality in cases involving assertion of defensive collateral estoppel.<sup>95</sup> Also noted earlier, however, is the unfair situation a single defendant faces when successively sued by multiple plaintiffs, after the abandonment of the mutuality doctrine.<sup>96</sup> Justice Stewart, writing for the majority in *Parklane*, recognized this problem when he noted:

Since a plaintiff will be able to rely on a previous judgment against the defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude in the hope that the first action by another plaintiff will result in a favorable judgment.<sup>97</sup>

Justice Stewart further noted that "[o]ffensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."<sup>98</sup> In answering this problem, the Court established the second principle of law which consisted of its statement that:

The general rule should be that in cases where a plaintiff could easily have joined in the earlier action, or where . . . the application of offensive collateral estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.<sup>99</sup>

The Court indicated its preference for offensive collateral estoppel by noting, for the first time, the precise distinction between defensive and offensive use of collateral estoppel.<sup>100</sup> The Court would prefer that, in some situations, offensive use of collateral estoppel be permitted.<sup>101</sup> In *Parklane*, application of offensive collateral estoppel by the shareholders seemed fair.<sup>102</sup>

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95. See notes 53-61 and accompanying text *supra*.

96. *Id.*

97. 439 U.S. at 330.

98. *Id.*

99. *Id.* at 331.

100. Until the *Parklane* decision no court had clearly distinguished between offensive and defensive use of collateral estoppel. The *Parklane* decision established that the Supreme Court wanted the distinctions between the two different doctrines understood by the federal courts. Additionally, the Court wanted the doctrines to be applied correctly in light of its recognition of the abandonment of the mutuality requirement. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). One state court has held there was no distinction between application of offensive and defensive collateral estoppel. *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967) (overruling *Elder v. New York & Pa. Motor Express, Inc.*, 284 N.Y. 350, 31 N.E.2d 188 (1940) on the theory that there is no practical distinction between offensive and defensive assertion of collateral estoppel by a non-party).

101. This was the result that was brought about in *Parklane*. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979).

102. In *Parklane*, the Supreme Court considered whether application of

But *Parklane* involved parties in contemporaneous litigation. Where there are multiple plaintiffs successively suing a single defendant, the *Parklane* analysis breaks down.

*Barring the Use of Offensive Collateral Estoppel:  
An Unlikely Solution*

The problem with barring the use of offensive collateral estoppel is that judicial economy and finality are not achieved if the plaintiff could have easily intervened in the first action. If the plaintiff in the second suit is denied the use of offensive collateral estoppel, the same issues which were already litigated and lost by the defendant in the first suit must now be relitigated.<sup>103</sup> Moreover, if the *Parklane* approach was intended as an incentive for a rule 24(a) intervenor to exercise his right of intervention, it is unlikely this result will be reached.

First, suppose the potential plaintiff takes a "wait and see" attitude hoping the trial court in his action will rule that he could not have easily intervened. In this case, the plaintiff will be able to assert offensive collateral estoppel even though he might very well have intervened easily in the first action. Second, suppose the plaintiff is barred from using offensive collateral estoppel. There is nothing to prevent the plaintiff from obtaining a transcript of the first trial and arguing the successful strategy of the first plaintiff.<sup>104</sup> Furthermore, how does barring the use of offensive collateral estoppel make it more fair for the defendant? In the assertion of defensive collateral estoppel, the defendants are protected from relitigating claims and issues they had previously litigated.<sup>105</sup> Contrast this with the Supreme Court's treatment of the offensive collateral estoppel issue in *Parklane*. If offensive use of collateral estoppel is barred, the defendant will still have to relitigate issues and claims he previously litigated, thereby subjecting the courts to wasteful relitigation.

The use of offensive collateral estoppel did justice between the parties in *Parklane*. Unfortunately, the rule barring the offensive use of collateral estoppel should have been limited to

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offensive collateral estoppel would be unfair to defendant *Parklane*. Due to the seriousness of the actions taken by defendant *Parklane* and the lack of reward to the plaintiffs should the application of offensive collateral estoppel be made, collateral estoppel was applied. 439 U.S. at 331-33.

103. This is precisely the situation sought to be avoided in cases involving multiple plaintiffs and a single defendant.

104. Although the case would be tried in front of a different judge or jury, there is little doubt that having a transcript from the previous trial would give the plaintiff a strong strategic advantage.

105. See notes 53-61 and accompanying text *supra*.

the facts in the case, since it affords multiple plaintiffs with a common claim against a single defendant no pragmatic reasons to intervene in the initial action. Additionally, the *Parklane* rule destroys the viability of approaches advanced by past commentators to correct the problem of nonintervening plaintiffs in federal civil litigation.

THE VIABILITY OF APPROACHES ADVANCED BY PAST  
COMMENTATORS IN LIGHT OF *PARKLANE*

Past commentators, having recognized the problem a single defendant encounters when being sued successively by multiple plaintiffs,<sup>106</sup> advocated binding the absent disputants to the results of the initial litigation.<sup>107</sup> Under these preclusion theories,<sup>108</sup> if the absent disputant refuses a known and adequate opportunity to intervene in the earlier action, he becomes bound by the results of the litigation.<sup>109</sup> Binding absent disputants to the results of the initial litigation would have the effect of resolving all claims by all parties in one lawsuit. If the defendant loses, then the absent plaintiffs win. If the defendant wins, then the absent plaintiffs lose. Before *Parklane*,<sup>110</sup> such approaches were viable and seemed to be an effective solution to the prob-

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106. These articles are addressed to *any* disputant who chooses not to intervene when intervention could be easily accomplished. See Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) (analyzing the distinctions between offensive and defensive collateral estoppel); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968) (advocating elimination of multiple lawsuits by the class action and other joinder devices); Touton, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551 (1979) (advocating binding absent disputants to the results of prior litigation); Vestal, *Rational of Preclusion*, 9 ST. LOUIS U. L.J. 29 (1964) (analysis of the various devices effective for use in preclusion of nonparties to an action who fail to act on an opportunity to effectuate joinder); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098 (1968) (advocating mandatory intervention in certain situations); Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527 (1976) (examining the increasing application of res judicata to prevent wasteful relitigation); Note, *The Impacts of Assertion of Defensive and Offensive Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967) (intensive analysis of the law of collateral estoppel with mention of the necessity of legislative enactment of rules to eliminate wasteful relitigation).

107. See note 106 *supra*.

108. On the use of preclusion devices, see McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976).

109. In other words, the theory being advocated was mandatory intervention (although not so labeled) in the literal sense. The absent party must join the litigation or be bound by the results. See, e.g., Touton, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551 (1979).

110. 439 U.S. 322 (1979).

lem. Since *Parklane*, however, preclusion theories of that kind become illogical.

The reason preclusion theories and the *Parklane* decision are not compatible is that the latter would cancel out the former. Assume that an absent nonparty plaintiff had an adequate opportunity to intervene in an earlier lawsuit, but chose not to do so. Further, assume that the defendant loses in that lawsuit. Under the preclusion theory, the absent nonparty plaintiff would be bound by the result and thus would win. Under the *Parklane* rule, however, the nonparty plaintiff cannot make use of the prior judgment against the defendant because the nonparty plaintiff could have easily intervened in the earlier action.<sup>111</sup> Hence, the Supreme Court, having recognized offensive and defensive collateral estoppel in *Parklane*, is not likely to later rule in a manner that would totally destroy both of those doctrines. Ruling in favor of preclusion would represent too radical a departure from the *Parklane* decision. Therefore, precluding absent plaintiffs in the manner discussed previously is no longer viable in light of *Parklane*.

What is more likely is a future ruling extending the *Parklane* rationale. Since the Supreme Court recognized both forms of collateral estoppel in *Parklane*,<sup>112</sup> the next logical step would be an extension of the collateral estoppel doctrine in favor of a single defendant subject to the possibility of successive lawsuits by multiple plaintiffs.

EXPANSION OF THE COLLATERAL ESTOPPEL DOCTRINE IN FAVOR  
OF A DEFENDANT AS A BASIS FOR RESOLVING ALL  
POTENTIAL CLAIMS IN ONE LAWSUIT

Multiple plaintiffs who can easily intervene in federal civil litigation, but who opt not to do so, should be subjected to a second form of defensive collateral estoppel.<sup>113</sup> Under this approach, if the circumstances are such<sup>114</sup> that (1) the absent plaintiffs should intervene in the initial action, (2) they are

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111. *Id.* at 331.

112. 439 U.S. at 330-31.

113. As noted earlier, the existing form of defensive collateral estoppel occurs where two defendants are potentially liable to a single plaintiff. *See* notes 53-61 and accompanying text *supra*. In those situations, however, the plaintiff, against whom defensive collateral estoppel is being asserted has already had his day in court. Under the present approach, the multiple plaintiffs against whom defensive collateral estoppel may be potentially asserted will not have had a day in court.

114. There are several existing tests which may be used to determine if the circumstances warrant intervention in the initial action. One example is the test provided in FED. R. CIV. P. 24(b)(2) for permissive intervention. Under that test, the circumstances justifying intervention will exist when

aware of the action, (3) they refuse to join, and (4) the defendant prevails in the initial action, the absent plaintiffs should be collaterally estopped by the defendant from relitigating any identical issues in a later action by the plaintiffs.<sup>115</sup> In order for the plaintiffs to be estopped from relitigating the previously litigated issues, however, the plaintiffs must have been afforded due process of law.<sup>116</sup>

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there are common questions of law or fact between the initial action and the potential actions of the absent plaintiffs.

FED. R. CIV. P. 19(a) addresses those situations where an absent party is needed for a just adjudication. Under rule 19(a):

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff.

It therefore follows that in any situation wherein an absent party properly aligned as a plaintiff is not joined under rule 19(a), the procedure being advocated herein (assertion of a second form of defensive collateral estoppel) should be implemented. This would have the effect of eliminating the court's determination of whether or not the action should proceed in the party's absence as per FED. R. CIV. P. 19(b).

A final example of a test for mandating intervention was advocated by one commentator. Under this approach,

(a) (1) Where the claim of a nonparty is based on the same transaction as the claim of a party to an action; and (2) the interests of the claimants are not adverse; and (3) the nonparty has notice of the action; and (4) joinder of both claims in the same action would result in a substantial saving of time and expense; then the nonparty will be bound by the judgment in the action.

Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098, 1122 (1968). The proposed criterion goes on to state those situations where the above rules will not apply. Notably, this is the major defect in such a rule. The idea behind any approach which seeks to achieve judicial finality and economy should leave no fair and constitutional alternative other than joinder of all claims in one action. See notes 117-33 and accompanying text *infra*.

115. Logically, the question of whether assertion of this second form of defensive collateral estoppel will be allowed will occur when the absent plaintiffs do not join, the defendant wins in the initial action, and the absent plaintiffs try to sue the defendant in a later action claiming immunity from the defendant's prior victory under the *res judicata* doctrine. The issues fully litigated in the prior action will usually be determinative of the outcome in any future actions since the absent plaintiff's claims are based on the same series of events which gave rise to the initial action. See notes 48-49 and accompanying text *supra*.

116. See *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

In all civil actions, due process requires that before a person can be deprived of property by judicial decree, he must have had notice of the action<sup>117</sup> and an opportunity to be heard.<sup>118</sup> To satisfy this requirement, the court should instruct the defendant to notify all potential plaintiffs in the action.<sup>119</sup> Such notice should contain the name of the action, the court where the action was brought, the docket number, the names of the attorneys involved and where they may be reached, and a separate copy of the pleadings.<sup>120</sup> The notice will advise the potential plaintiffs that a hearing will be held allowing these plaintiffs to demonstrate why intervention in the action would not be easy.<sup>121</sup>

After the potential plaintiffs present arguments or evidence to the court as to why it would not be easy to intervene,<sup>122</sup> formal notice of the results of the hearing should be sent to the potential plaintiffs.<sup>123</sup> If the court decides that intervention would be easy,<sup>124</sup> the potential plaintiffs should be advised that if the defendant prevails in the action and the potential plaintiffs do not intervene in any future suits, the potential plaintiffs will be effectively subjected to defensive collateral estoppel by the

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117. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (due process encompasses at least timely notice and an opportunity to be heard); 1 B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 1252 (1974).

118. *Id.*

119. Since the defendant will receive the benefit of the second form of defensive collateral estoppel, it may be equitable to require him, rather than the plaintiff, to notify all potential plaintiffs of the existing action. Ascertaining the names of the potential plaintiffs may not be very difficult nor more burdensome than that which is required by current federal law. FED. R. Civ. P. 19(c) requires "a pleading asserting a claim for relief [to] state the names, if known to the pleader, of any persons . . . who are not joined, and the reasons why they are not joined."

120. The defendant should make sure that all relevant information is transmitted to the absent plaintiffs so that a later objection to the assertion of the second form of defensive collateral estoppel does not fail on grounds of insufficient notice.

121. The standard for whether offensive use of collateral estoppel is to be allowed in a later action is whether the "absent plaintiffs could have *easily* intervened in the initial action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (emphasis added). In accordance with *Parklane*, the standard at the hearing for determining whether a plaintiff or group of plaintiffs should later be subjected to estoppel should be the same; *i.e.*, whether they can easily intervene in the initial action.

122. It is to be noted, however, that due process does not require the plaintiff's actual presence at such a hearing. The plaintiff may waive the right to be heard by failure to appear at the hearing. As long as the plaintiff or group of plaintiffs had the *opportunity* to be heard, due process is satisfied. See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876).

123. The procedure for the giving of notice is well established in the federal courts by class action litigation. See Annot., 32 A.L.R. Fed. 102 (1977). Hence, no new burdens are imposed on the federal courts in the form of the notice requirement.

124. See note 131 *infra*.

defendant as to any previously litigated issues present and identical in the later actions.

Under this approach, the absent but potential plaintiffs have notice of the existing action and an opportunity to be heard as to why they cannot easily intervene. Since this procedure satisfies due process, no federal district court should be allowed to prevent the defendant, in later actions, from asserting defensive collateral estoppel on constitutional grounds.<sup>125</sup> With the due process obstacle removed, several desirable effects become possible.

First, *Parklane* requires the trial court to determine whether the plaintiff attempting to use offensive collateral estoppel in a later action could have easily intervened in the initial action.<sup>126</sup> Under this new approach, that determination is also required. Hence, no greater burden is placed on the trial court than is required by current law. Second, if the trial court determines that the potential plaintiffs could have easily intervened, but the potential plaintiffs opt not to do so, the initial action will most likely end the litigation whether the defendant wins or loses. If the defendant wins, he can assert the second form of defensive collateral estoppel in any later actions and the plaintiffs will be foreclosed from relitigating any previously decided issues.<sup>127</sup> If the defendant loses, the absent plaintiffs will not be able to later assert offensive collateral estoppel against the defendant, because under *Parklane*, the ability to easily intervene bars such assertion.<sup>128</sup> This leads to the question of whether allowing the assertion of the second form of defensive collateral estoppel will accomplish judicial economy and finality. Since a loss by the defendant in the initial suit will result in subsequent relitigation by the absent plaintiffs, how will judicial economy and finality be achieved? The answer to that question lies in the third benefit from the defendant's power to assert a second form of defensive collateral estoppel in later actions. As a practical matter, if all potential plaintiffs with a common claim against the defendant did not join in the initial action,<sup>129</sup> they would risk

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125. The procedure described also includes notice of the possible threats to the absent plaintiffs' interest should they fail to intervene. Such notice is required. See *Brenner v. Ebbert*, 398 F.2d 762, 765 (D.C. Cir.), cert. denied, 393 U.S. 926 (1968).

126. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

127. Instead of being immune to the defendant's victory under the res judicata doctrine, the absent plaintiffs, having bypassed an adequate opportunity to intervene, are prevented from relitigating any identical issue in their own claims.

128. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

129. Although the absent plaintiffs are left with the choice (after a hearing in which a determination is made that such intervention can easily be

being estopped from asserting their claims against the defendant in the future, without ever having had a chance to formally present them.<sup>130</sup> Hence, if the potential plaintiffs wish to litigate their claims, they will have a strong incentive to join in the initial action. Without effectuating joinder, the chance to litigate their claims may never occur.

Under the extension of the defensive collateral estoppel approach, multiple plaintiffs with a common claim against a single defendant would pragmatically be facing mandatory intervention. Unless the plaintiffs are able to demonstrate to the court that intervention would be burdensome, or the court decides that intervention would violate sound judicial principles,<sup>131</sup> the threat of later assertion of defensive collateral estoppel by the defendant provides a forceful method whereby all potential claims of all potential parties are tried in one lawsuit. Since the

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accomplished) as to whether or not to intervene, the choice is limited by the fact that no practical advantage is gained from nonintervention. See note 130 and accompanying text *infra*.

130. That is, the possibility that the defendant may win in the initial action coupled with the lack of any advantage by failing to intervene will likely force the absent plaintiffs to effectuate intervention. Should the absent plaintiffs choose not to intervene, the defendant's victory in the initial action would prevent the absent plaintiffs from having a day in court. Seemingly, with no advantages to outweigh this possibility, that risk would be too great to take.

131. Several considerations are relevant in this determination by the court. First, plaintiffs have traditionally had the right to control the time and place of their own lawsuit. Second, the court must consider whether intervention by the absent plaintiffs would decrease, rather than increase, judicial efficiency and management of the lawsuit. Third, consideration must be given to subject matter jurisdiction, personal jurisdiction, service of process, and venue. An excellent discussion of these issues in a context different from, but applicable to the present discussion, appears in Touton, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1568-76 (1979) (limitations on the court's power to hear actions are not significant barriers to binding absent disputants to the results of the initial litigation, although in some instances may limit the preclusion of absent disputants).

Further, although other methods of consolidating the claims of absent plaintiffs are not superior to allowing assertion of a second form of defensive collateral estoppel by the single defendant, the court may wish to consider such other methods. These would include the imposition of a plaintiff's class action on the absent plaintiffs by the defendant, where the number of plaintiffs involved number twenty-five or greater. Typically, mass accidents give rise to such considerations. See Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978) (advocating use of the class action device in mass actions on the theory that judicial economy is promoted); Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383 (1977) (class actions are desirable for mass accident litigation). Other such alternatives where plaintiffs number less than twenty-five may include joinder, *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), transfer and consolidation under FED. R. CIV. P. 42(a), transfer for coordinated pretrial under 28 U.S.C. § 1407(a) (1970), or pretrial settlement.



defendant would be assured of only one lawsuit and the plaintiffs would be unable to wastefully prolong the litigation, this procedure would give a more realistic meaning to the purposes of the joinder provisions of the Federal Rules of Civil Procedure<sup>132</sup> and to the doctrines of res judicata and collateral estoppel; *i.e.*, judicial economy and finality and fairness to all parties involved or potentially involved in the litigation.<sup>133</sup>

#### CONCLUSION

In *Chase National Bank v. City of Norwalk*,<sup>134</sup> Justice Brandeis stated that "unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."<sup>135</sup> The increasing caseloads in the federal courts, the manner in which res judicata and collateral estoppel have developed, and the enactment of the Federal Rules of Civil Procedure have made it necessary to summon multiple plaintiffs with a common claim against a single defendant into one lawsuit or risk having their legal rights affected. Allowing the later assertion of a second form of defensive collateral estoppel in such situations, wherein the plaintiffs' due process rights are safeguarded, compliments the decision in *Parklane Hosiery Co. v. Shore* and supports the principles of judicial economy and finality. Since *Parklane* attempted to force multiple plaintiffs to intervene in one action, it is likely a future ruling will fully accomplish that purpose. Expansion of the defensive collateral estoppel doctrine provides a viable method for eliminating splintered litigation.

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132. FED. R. CIV. P. 13(h), 14(a)(b), 18(a)(b), 19(a)(b), 20(a), 22, 23, and 24. *Ford Motor Credit Co. v. Beard*, 45 F.R.D. 523 (D.S.C. 1968) (spirit of the Federal Rules of Civil Procedure contemplates avoidance of circuitry or multiplicity of litigation).

133. See notes 33-52 and accompanying text *supra*.

134. 291 U.S. 431 (1934).

135. 291 U.S. at 441.