OFFENSIVE COLLATERAL ESTOPPEL IN ARIZONA: FAIR LITIGATION VS. JUDICIAL ECONOMY

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Collateral estoppel, commonly called issue preclusion, evolved from the doctrine of res judicata.[1] Collateral estoppel expanded that doctrine to preclude relitigating matters that were necessarily litigated and determined against a party or one in privity, on the same or even on a different cause of action.[2] In addition, collateral estoppel may be invoked by a party that was not involved or in privity in the prior litigation.

Prior to the landmark decision in *Bernhard v. Bank of America National Trust and Savings Association*,[3] the mutuality doctrine required that the party wishing to assert collateral estoppel had to either have been a party in the prior lawsuit, or have been in privity with a party in the prior lawsuit.[4] Almost all jurisdictions have since abandoned the mutuality doctrine,[5] thereby allowing a stranger to the first lawsuit to plead collateral estoppel in later litigation against a person bound to the first judgment.

Bernhard states three relevant inquiries to consider when allowing a stranger to a prior lawsuit this procedural advantage. They are (1) whether the issue is identical with the one presented in the previous action, (2) whether there was a final judgment on the merits in the first action, and (3) whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.[6] Although *Bernhard* has been widely followed, its application has generally been limited to defensive collateral estoppel, which allows a defendant to assert an estoppel as a shield against a plaintiff who was a party or privy in the first lawsuit—a stranger to a litigation may assert an estoppel to prevent a party, who lost in the prior proceeding, from attempting to relitigate the same issues that were decided

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1. 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405(1), ¶ 0.405(3) (2d ed. 1984) [hereinafter J. MOORE]. Res judicata applies to bar a subsequent action upon the same claim between the same parties or those in privity when a final judgment has been rendered on the merits, regardless of whether the parties have put forward all the claims or defenses available to them in the first action.

2. *Id.* at ¶ 0.405(1); A. VESTAL, RES JUDICATA/PRECLUSION (1969).

3. 19 Cal. 2d 807, 122 P.2d 892 (1942).

4. *See* J. MOORE, *supra* note 1, at ¶ 0.412. The argument for requiring mutuality was that it was unfair to allow a party to take advantage of a favorable judgment when they would not be bound to an adverse judgment to which the opponent would be bound.

5. *See* J. MOORE, *supra* note 1, at ¶ 0.441(3-2). *See generally* Note, *Mutuality of Estoppel: McCourt v. Algiers in Context*, 1967 WIS. L. REV. 267.

6. *Bernhard*, 19 Cal. at 813, 122 P.2d at 895.

against the party. Offensive collateral estoppel, on the other hand, enables a plaintiff to take advantage of a prior judgment against the defendant by having him declared the loser on the previously litigated issue. Thus, a plaintiff who was never involved in the first proceeding can use offensive collateral estoppel as a sword to win on an issue that was previously adjudicated against his opponent.

While most jurisdictions have adopted defensive collateral estoppel, courts have been divided on the application of offensive collateral estoppel. Arizona courts have sanctioned the use of defensive collateral estoppel,[7] and until recently have refused to allow offensive collateral estoppel.[8] In *Wetzel v. Arizona State Real Estate Department*,[9] the Arizona Court of Appeals allowed offensive collateral estoppel for the first time. The court in *Wetzel* adopted the *Restatement*'s view[10] and employed an analysis which has been used extensively in the federal courts and in some states.[11] *Wetzel* expanded the limited view of collateral estoppel that the Arizona courts have previously taken.

This Note analyzes the advantages and disadvantages of adopting offensive collateral estoppel by exploring both the procedural and the substantive factors that must be considered to ensure that all parties involved are afforded a full and fair opportunity[12] to litigate. This Note presents support for applying a case-by-case approach to collateral estoppel. Finally, it surveys the history and the future of collateral estoppel in Arizona.

THE BEGINNINGS OF COLLATERAL ESTOPPEL

The United States Supreme Court first sanctioned defensive collateral estoppel, abandoning the mutuality requirement, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[13] The Court in *Blonder-Tongue* followed the reasoning in the *Bernhard* decision, concluding that the issue was identical, that there was a final judgment on the merits of the first action and that the plaintiff against whom the plea was asserted was a party to the prior adjudication. Thus, the plaintiff in *Blonder-Tongue* was collaterally estopped from relitigating the validity of a patent after a federal court had previously declared it valid.

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7. *See* DiOrio v. City of Scottsdale, 2 Ariz. App. 329, 408 P.2d 849 (1965).

8. Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968); Standage Ventures, Inc. v. Arizona, 114 Ariz. 480, 562 P.2d 360 (1977) (the Arizona Supreme Court adopts defensive collateral estoppel and rejects offensive, affirming *Spettigue*).

9. 151 Ariz. 330, 727 P.2d 825 (1986), *cert. denied*, 107 S. Ct. 3186 (1987).

10. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). The comments to the section state the rationale.

> A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled.

Id. at comment b.

11. Zdanok v. Glidden Co. Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934. United States v. United Airlines, Inc., 216 F. Supp. 709 (D. Nev. 1962); DeWitt Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Bonniwell v. Beech Aircraft Corp., 633 S.W.2d 553 (1982), *aff'd* 663 S.W.2d 816 (1984).

12. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).

13. 402 U.S. 313 (1971).

Parklane Hosiery Co., Inc. v. Shore,[14] decided after *Blonder-Tongue*, sanctioned the use of offensive collateral estoppel. The Court in *Parklane Hosiery* adopted a two-pronged test to allow stockholders in a class action, who were strangers to the first lawsuit, to estop the defendants from relitigating whether a proxy statement was false and misleading. The Court stated that a determination of when to apply offensive collateral estoppel turns on (1) whether a plaintiff could easily have joined in the earlier action, and (2) whether any unfairness to the defendant might result.[15]

This two prong test requires an analysis of both procedural and substantive factors[16] to determine whether the defendant has had a full and fair opportunity to litigate. First, the *Parklane* Court considered whether there were any new procedural opportunities that had not been available at the time of the prior litigation that might have caused different results in that prior litigation had they been available.[17] The Court then considered the inconsistency of the first judgment with any previous decisions involving the same defendant. Next, the Court looked at the seriousness of the allegations in the first lawsuit. Finally, the Court examined the foreseeability of subsequent lawsuits which would affect the defendant's incentive to litigate. Due to the lack of new procedural opportunities, the seriousness of the allegations in the prior litigation, and the foreseeability of subsequent private lawsuits that typically follow a successful government judgment, the Court concluded that no unfairness would result to the defendant by holding the defendant to the prior judgment. Moreover, the Court found that the plaintiff could not easily have joined in the first suit. Therefore, the Court concluded that offensive collateral estoppel had been properly invoked.

Long before *Parklane*, the federal courts applied the full and fair opportunity test in a number of decisions. In *Zdanok v. Glidden Company, Durkee Famous Foods Division*,[18] a group of employees asserted offensive collateral estoppel to hold their employer to the decision in the first case in which a different group of employees had pursued a successful judgment against the employer. In *United States v. United Air Lines, Inc.*[19] the heirs of passengers killed in a plane crash used a prior judgment to establish the airline's liability. Some state courts have also sanctioned offensive issue pre-

14. 439 U.S. 322 (1979).

15. *Id.* at 331.

16. The *Parklane* factors have been incorporated into the RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

> A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless the fact that he lacked a full and fair opportunity to relitigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. . . .
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> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary.

Id.

17. *Parklane*, 439 U.S. at 333-37 (trial by jury held not to be a procedural opportunity likely to cause a different result). However, Justice Rehnquist, in dissent, presented a strong argument that the federal policy favoring jury trials makes it "unfair" to apply collateral estoppel where the party to be estopped has not had the opportunity to have the facts of his case determined by a jury. *Id.* at 337-56 (Rehnquist, J., dissenting).

18. 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964).

19. 216 F. Supp. 709 (D. Nev. 1962), *aff'd*, 335 F.2d 379 (9th Cir. 1964).

clusion to preclude relitigation of negligence.[20]

ADVANTAGES AND DISADVANTAGES OF COLLATERAL ESTOPPEL

Collateral estoppel is intended to promote judicial economy by preventing relitigation of the same issues. Additionally, the doctrine establishes rights of individuals so they can act with assurance in knowing how the stand vis-a-vis other persons.[21] The doctrine also prevents harassment of parties with frivolous lawsuits, provides for more efficient use of the courts, and maintains the prestige of courts by respecting decisions in earlier cases.[22]

One of the problems with allowing offensive collateral estoppel is that a defendant may feel compelled to overlitigate an issue and bring an automatic appeal since the defendant is aware he or she may be bound against other potential plaintiffs. This may result in an inefficient use of the court's resources. On the other hand, where a small amount is at stake there may be little incentive to litigate. Given that fact, it has been suggested that it would be unfair when a defendant is sued for nominal damages to hold that defendant to the judgment in a subsequent lawsuit for a large amount of damages.[23] A second problem is that multiple lawsuits may be encouraged by allowing potential claimants to wait and see the outcome of a case before bringing their claim.

It may seem harsh to bind a defendant where there is little incentive to litigate or where plaintiffs may be encouraged to wait for a favorable outcome. There is, however, no litmus test to determine fairness to the defendant. Although the above factors are evidence of potential unfairness, they are not conclusive in determining whether the defendant had a full and fair opportunity to litigate. To counter any potential unfairness to the defendant, courts adopting offensive collateral estoppel should apply discretion in determining whether a defendant has had a full and fair opportunity to litigate the issue the first time. In determining fairness to the defendant, the court must consider available safeguards that would ensure a fair application of offensive collateral estoppel.

SAFEGUARDS TO ENSURE A FAIR APPLICATION OF OFFENSIVE COLLATERAL ESTOPPEL

Procedural Factors

Modern procedural rules help to ensure that a party has had a full and

20. For example, New York courts have allowed a plaintiff in a second lawsuit against the same defendant, to use a prior determination of the defendant's negligence to recover damages to the plaintiff's property arising out of the same accident. *DeWitt*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596. In another case a plaintiff was allowed to use a prior determination of a utility company's gross negligence as a result of a blackout, to recover for physical injuries from falling down stairs. Shaid v. Consolidated Edison of New York, Inc., 95 A.D.2d 610, 467 N.Y.S.2d 843 (1983).

21. A. VESTAL, *supra* note 2, at V-7-12.

22. *Id.*

23. *See Parklane*, 439 U.S. at 330. This is one of the factors involved in the determination of whether a defendant had a full and fair opportunity to litigate. *See also* Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965) (offensive collateral estoppel denied where defendant failed to appeal an adverse judgment awarding $35,000 and defendant was later sued for over $7 million).

fair opportunity to litigate. Some of the provisions that help to protect against unfairness are reasonable venue provisions, the doctrine of forum non conveniens, power to transfer for convenience of parties and witnesses, greater provisions for securing testimony, and provisions for compelling the attendance of witnesses.[24] Moreover, the freedom to assert claims and issues under the Federal Rules of Civil Procedure provides both parties with a fair opportunity to litigate.[25]

Rules designed to prevent relitigation of an issue include the compulsory counterclaim rule[26] and the so-called Two-Dismissal Rule.[27] Additionally, rules of intervention can be used to prevent a plaintiff who could have intervened but failed to do so, from taking offensive advantage of a judgment.[28]

Other procedural safeguards the courts look for in determining whether there has been a fair opportunity to litigate include whether the judgment in the first action was inconsistent with any previous action,[29] and whether there are any new procedural opportunities that were unavailable in the first

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24. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 321 (1957). Professor Currie argued that a plea of collateral estoppel should not be allowed against a party lacking the initiative in the first lawsuit. However, he expressed mistrust with this position because of the procedural devices available with the Federal Rules of Civil Procedure, and later retracted from the position that initiative should be retained as a limitation on the *Bernhard* doctrine.

25. Note, *Revisiting The Second Restatement Of Judgments: Issue Preclusion And Related Problems*, 66 CORNELL L. REV. 564, 579 (1981). Modern procedural rules provide both the plaintiff and the defendant an opportunity to raise every issue that could possibly be offered in any claim, defense, avoidance or counterclaim. Additionally, a party is not required to put matters "distinctly in issue" before proof is formally ordered and weighed.

26. FED. R. CIV. P. 13(a); ARIZ. R. CIV. P. 13(a).

> (a) A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Id. See also A. VESTAL, *supra* note 2, at V-132-V-133.

27. FED. R. CIV. P. 41(a)(1).

> (a) Voluntary Dismissal: Effect Thereof.
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> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Id. See also A. VESTAL, *supra* note 2, at V-171. The Two-Dismissal Rule operates only if expressly adopted in a jurisdiction. In essence, the rule prevents a plaintiff who has twice voluntarily dismissed actions based on a claim from suing a third time on the same claim.

28. FED. R. CIV. P. 24. Permissive intervention allows a party to intervene "when an applicant's claim of defense and the main action have a question of law or fact in common." *Id.*

29. *See Parklane*, 439 U.S. at 339. In products liability cases, prior inconsistent judgments will often prevent the application of offensive collateral estoppel. *See, e.g.*, Setter v. A.H. Robins Co., 748 F.2d 1328 (8th Cir. 1984); Sandoval v. Superior Court, 190 Cal. Rptr. 29, 140 Cal. App. 3d 932 (1983).

action that would likely cause a different result.[30] Both of these factors are embodied in the *Restatement of Judgments.*[31]

Thus, the procedural opportunities and restraints built into the Federal Rules of Civil Procedure help to provide both parties a fair opportunity to litigate. Furthermore, judicially created safeguards, incorporated into the *Restatement of Judgments*, help to ensure that offensive collateral estoppel is properly invoked.

Substantive Factors

To ensure a fair application of offensive collateral estoppel, substantive factors must be taken into account. Foremost is the incentive to litigate vigorously, which has as its considerations the foreseeability of subsequent lawsuits and the amount of damages involved in the lawsuits.

For example, in a wrongful death action arising out of a mass accident, the damages in individual cases will vary substantially.[32] In addition, some states, like Arizona, do not limit recovery to pecuniary losses but also allow recovery for loss of consortium, and mental pain and suffering.[33] Such variables may make the prediction of damages in a wrongful death action difficult for the defendant and could result in unforeseeable damages. The defendant is usually aware, however, by virtue of the accident itself, that potential liability is great and thus there is usually a strong incentive to litigate vigorously.

For example, in *United States v. United Air Lines, Inc.*,[34] an airline was held liable to the remaining plaintiffs after there had been an adverse adjudication in the prior action which was a consolidated action of twenty-four plaintiffs. Due to the number of parties involved in the first adjudication, and the total number of people involved in the accident, the defendant was aware that the potential damages were great. As a result, there was a strong incentive to litigate vigorously and there was no unfairness in holding the defendant liable to the remaining plaintiffs.

The problem of unforeseeability of damages may arise where a few plaintiffs are involved in an accident and their injuries vary substantially. The first plaintiff may have a broken arm and minimal damages, thereby leaving the defendant with little incentive to litigate. The second plaintiff may be paralyzed from the accident making it fairly foreseeable to the defendant that this plaintiff may sue. However, the paralyzed plaintiff may wait to see the outcome of the first lawsuit before taking any action. The

30. *See Parklane*, 439 U.S. at 333-337 (trial by jury held not to be a procedural opportunity likely to cause a different result).

31. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

32. *See* ARIZ. REV. STAT. ANN. § 12-613 (1956).

Arizona's wrongful death statute provides that the jury is to determine what is just and fair compensation in light of the circumstances. Therefore, the jury is asked to place a value on the loss of a deceased person's life which requires an evaluation of a number of factors, including the deceased individual's financial status and earning potential.

Id.

33. Jeffery v. United States, 381 F. Supp. 505, 510 (D. Ariz. 1974); City of Tucson v. Wondergem, 105 Ariz. 429, 432., 466 P.2d 383 (1970).

34. 216 F. Supp. 709.

disparity in damages between the first and second plaintiff may be so great that in all fairness the defendant should not be precluded from relitigating the issue of liability a second time. The disparity in damages themselves as a limitation on offensive collateral estoppel will only be an important factor in cases where the defendant had little incentive to litigate the first time—cases involving a small number of potential plaintiffs with substantially varying claims.

In sum, a court should deny offensive collateral estoppel where a defendant had little incentive to litigate due to unforeseen liability or due to a great disparity in damages.

ANALYSIS OF TYPES OF CASES WHERE OFFENSIVE COLLATERAL ESTOPPEL IS APPLIED

Offensive collateral estoppel should be applied to the interpretation of instruments subject to the law of the case. The construction of a contract has long been recognized as the type of issue subject to this doctrine.[35] The law of the case resembles res judicata in that it prevents "interminable" litigation. However, it applies only to separate proceedings within the same case to settle the law of that particular case, and does not end litigation but only cuts it down to an unknown degree.[36] Since the courts are willing to give this type of finality to a contract, it seems that a contract case should be subject to offensive collateral estoppel.

This reasoning was in fact applied in *Zdanok v. Glidden Company*,[37] where an employer was bound by the "law" of the first case where the issue was the construction of a collective bargaining agreement. The court in *Zdanok* reasoned that the defendant had a full and fair opportunity to vigorously litigate the prior action in a convenient forum, did not face a series of similar actions, and could foresee future claims.[38] Moreover, the court found it significant that the construction of a written contract by a judge was different from a factual question of negligence subject to varying appraisals by different juries.[39]

Other instruments particularly vulnerable to the law of the case are deeds, wills, and construction of statutes.[40] In these situations in which the courts are willing to give finality to the law of a case within the same action, asserting the judgment offensively in subsequent actions should be allowed. As long as procedural and substantive factors are satisfied so that the defendant had a full and fair opportunity to litigate in the first action, there is no rational justification for not allowing offensive collateral estoppel.

Another area where offensive collateral estoppel is effective is status de-

35. Note, *Law of the Case*, 5 STAN. L. REV. 751, 759 (1953), *citing* Leese v. Clark, 20 Cal. 387, 418 (1862) (issue and fact situations that are especially vulnerable to the law of the case are those which are stable in nature, including construction of a contract or a statute).

36. *See* Note, *supra* note 35, at 754, 757; J. MOORE, *supra* note 1, ¶ 0.405(2).

37. 327 F.2d 944 (2d Cir. 1964).

38. *Zdanok*, 327 F.2d at 956.

39. *Zdanok*, 327 F.2d at 956.

40. *See* Note, *supra* note 35, at 759.

terminations. Since a determination of status[41] does not involve merely a personal judgment,[42] unlike a negligence action, the application of offensive collateral estoppel should be allowed. The Restatement[43] applies the principles of both claim and issue preclusion to status determinations. Due to the future ramifications of a status determination, there is presumably a strong incentive to litigate vigorously the first time. Cases where the courts have allowed status determinations to be pled as collateral estoppel are separation and divorce proceedings. For example, in *Statter v. Statter*,[44] a husband's prior successful action for separation on the grounds of cruelty and abandonment precluded a subsequent annulment action brought by the wife based on fraud.

In the area of negligence, many courts have applied a case-by-case approach, allowing offensive collateral estoppel as long as there was a full and fair opportunity to litigate the first time.[45] An area of negligence where extra discretion should be exercised when invoking offensive collateral estoppel is the mass tort situation. Here, there is the potential for encouraging plaintiffs to wait to see if the outcome is favorable before bringing a lawsuit. While other reasons, economic or otherwise, may exist that would prevent a plaintiff from pursuing his claim immediately, the failure of a plaintiff to join a lawsuit in the mass tort situation is a significant factor in determining whether offensive collateral estoppel should be allowed.

The area of products liability presents unique problems in the application of collateral estoppel because of the role strict liability plays in these cases. Once a plaintiff has shown that the manufacturer placed an unreasonably dangerous product on the market,[46] the problem arises as to against

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41. RESTATEMENT (SECOND) OF JUDGMENTS § 31 comment a (1982).

a. Scope. "Status" includes various forms of continuing legal relations between an individual and society as a whole, such as citizenship, or between an individual and one or more other specific persons, such as marriage and the parent-child relationship. It includes legal relations of indefinite term, such as citizenship or marriage, and ones that are usually transitory, such as custody or the state of a person's being so mentally disturbed as to require suspension of the capacity to manage his own affairs.

Proceedings for the determination of status include divorce and annulment actions, filiation proceedings, proceedings for termination of a parent-child relationship (sometimes referred to as termination of parental rights), adoption proceedings, actions to revoke citizenship, proceedings for appointment of a conservator or guardian of property for a person who lacks capacity to manage his own affairs, and similar procedures.

Id.

42. *See* Currie, *supra* note 24, at 295.

43. RESTATEMENT (SECOND) OF JUDGMENTS § 31 (1982).

(1) A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action:

(a) With respect to the existence of the status, and rights and obligations incident to the status which under the procedures governing the action are ordinarily determined therein, in accordance with the rules of claim preclusion stated in §§ 18-26 and subject to the qualifications stated in § 13 concerning judgments granting or denying continuing relief;

(b) With respect to issues determined in the action, in accordance with rules of issue preclusion stated in §§ 27-28.

Id.

44. 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957).

45. *Zdanok*, 327 F.2d 944.

46. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

(1) One who sells any product in a defective condition unreasonably dangerous to the

whom this finding is to be conclusive. A recent line of cases in the Fifth Circuit dealt with the issue of which parties would be bound to a determination that asbestos was unreasonably dangerous.

In *Borel v. Fibreboard Paper Products Corporation*,[47] the court held that under the circumstances, the defendants' failure to adequately warn the plaintiffs of asbestos dangers rendered the product unreasonably dangerous.[48] In *Hardy v. Johns-Manville Sales Corp.*,[49] there were two groups of defendants, those involved in the prior *Borel* litigation and those not involved. The court held that it was error to hold defendants who manufactured asbestos, but who were not parties or in privity in the *Borel* case, to the finding that products containing asbestos were unreasonably dangerous. The fact that the defendants in *Hardy* were engaged in the manufacture of asbestos-containing products was not enough to show privity with the *Borel* defendants.

As to the *Hardy* defendants who were involved in the *Borel* litigation, the court denied collateral estoppel because the *Borel* judgment, while conclusive as to the general matter of a duty to warn on the part of manufacturers of asbestos-containing insulation products, was ambiguous as to certain key issues.[50] Collateral estoppel was also denied against these defendants due to the presence of inconsistent verdicts.[51] Lastly, application of collateral estoppel with regard to the *Borel* defendants would be unfair because it is very doubtful that these defendants could have foreseen that their $68,000 liability to Borel would foreshadow multimillion dollar asbestos liability.[52]

An unsuccessful attempt to hold other defendant manufacturers to the

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user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer, without substantial change in the condition in which it is sold.

Id.

47. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

48. The defendants argued that the trial court erred in refusing to instruct the jury that liability could not be imposed if the utility of the product outweighed the danger involved. This argument, based on the RESTATEMENT (SECOND) OF TORTS § 402A comment k, exempts sellers from strict liability when products are unavoidably unsafe and certain qualifications are met, including a proper warning. Since adequate warnings were lacking in *Borel*, the court refused the defendants instruction on the utility of the product.

See also, Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (failure to warn the consumer, (or make provision for his being warned) of risk of contracting polio from polio vaccine, rendered the product unreasonably dangerous, subjecting the manufacturer to strict liability).

49. 681 F.2d 334 (5th Cir. 1982).

50. *Id.* at 344-45. First, the issue as to when a duty to warn attaches is a jury question and it is impossible to determine what the jury in *Borel* decided under the facts of the case. Second, a determination that a product is so unreasonably dangerous as to require a warning is necessarily relative to the scientific knowledge generally known or available to the manufacturer at the time the product in question was placed in the stream of commerce. Third, the plaintiffs' exposure to asbestos in *Hardy* was different from that of the plaintiff in *Borel*. Lastly, some of the products involved in *Hardy* might be different than those in *Borel*.

51. RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) (1982). Collateral estoppel is unfair to a defendant if "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue." The court in *Hardy* was informed that there had been approximately seventy similar cases thus far tried around the country, and approximately one-half in favor of the defendants.

52. *Hardy*, 681 F.2d at 346.

Borel findings on asbestos was made in *Migues v. Fibreboard Corp.*[53] The lower courts in the above cases may have been relying on strict liability as the basis for holding liable those manufacturers who had not had an opportunity to litigate. Even in a products liability case, a defendant is entitled to his day in court.

Jury cases are another area where offensive collateral estoppel can be applied. Commentators have suggested, however, that jury cases are not suitable for applying offensive collateral estoppel since juries are often distrusted, particularly when they compromise the liability issue.[54] The compromised verdict problem is addressed by the Restatement[55] as a limiting factor in applying collateral estoppel. Therefore, the only reason advanced for not giving a jury decision as much effect as a decision by a court is distrust. This reasoning, however, undercuts the purpose of the jury; a court relies on the good sense of a group of people who bring their individual experiences and ideas to bear on their decision.

Jury decisions have in fact been given collateral estoppel effect.[56] Thus, even though jurors rely on their own subjective experiences, absent a compromise verdict, a jury decision in the prior litigation should not be considered a critical factor in a court's determination to allow or disallow offensive collateral estoppel.

COLLATERAL ESTOPPEL IN ARIZONA PRIOR TO *SPETTIGUE V. MAHONEY*

Prior to *Spettigue v. Mahoney*,[57] which was affirmed by *Standage Ventures, Inc. v. Arizona*,[58] and *DiOrio v. City of Scottsdale*,[59] the Arizona courts had not determined to what extent collateral estoppel would be allowed. Several cases, however, had set the stage for rejecting offensive collateral estoppel.[60]

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53. 662 F.2d 1182 (5th Cir. 1981). The court held that not all asbestos products are unreasonably dangerous as a matter of law. Thus, the plaintiffs could not use stare decisis as the basis for holding the defendant/asbestos manufacturers to the findings in *Borel*.

54. *See* Currie, *supra* note 24, at 321. BLACK'S LAW DICTIONARY (5th ed. 1981).

> *Compromise verdict.* One which is reached only by the surrender of conscientious convictions on one material issue by some jurors in return for a relinquishment of matters in their like settled opinion on another issue, and the result is one which does not hold the approval of the entire panel.

Id.

55. RESTATEMENT (SECOND) OF JUDGMENTS § 29(5) (1982).

> (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 apparently was based on a compromise verdict or finding.

Id.

56. *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (jury determination that United Airlines was liable for the death of passengers as a result of a plane wreck was given preclusive effect in second lawsuit against United Air Lines).

57. 8 Ariz. App. 281, 445 P.2d 557 (1968).

58. 114 Ariz. 48-0, 562 P.2d 360 (1977).

59. 2 Ariz. App. 329, 408 P.2d 849 (1965).

60. Magma Copper Co. v. Naglich, 60 Ariz. 43, 131 P.2d 357 (1942) (findings and awards from workers compensation claim were not given collateral estoppel effect in a second lawsuit brought by the deceased employee's spouse against the employer for death benefits); Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 203 P.2d 633 (1949) (findings by the Industrial Commission as to harmful amounts of silicon dioxide dust in the air were not given collateral estoppel effect in a subsequent lawsuit brought by an employee against Phelps Dodge); Fox v. Weissbach, 76 Ariz. 91, 259 P.2d 258

In *Magma Copper Co. v. Naglich*[61] the Industrial Commission would not allow into evidence an award made in favor of an injured workman during his life, in a subsequent proceeding brought against his employer by his widow for death benefits. Even though both actions arose out of the same factual situation, the court reasoned that there were two distinct rights involved; the right of an injured party to compensation during his lifetime, and the right of dependents to death benefits.[62]

In *Phelps Dodge Corp. v. Ford*[63] findings by the Industrial Commission as to harmful amounts of silicon dioxide dust in the air were not given collateral estoppel effect in a subsequent lawsuit brought by an employee against Phelps Dodge. Although the court recognized that it could take judicial notice of its own decisions and facts, the court concluded that the binding effect of the prior holdings was limited to parties who actually litigated in those cases.[64]

This type of case is not as susceptible to error as a case where negligence is at issue. The physical fact that there was silicon dioxide in the air is an objective finding and not subject to widely varying determinations. Thus, *Phelps Dodge* would have been an excellent candidate for the application of offensive collateral estoppel.

In *Fox v. Weissbach*,[65] the court excluded evidence of a prior judicial determination that the vehicle in question was community property. The court ruled that the prior finding could not be taken advantage of by a stranger to the prior litigation in a proceeding aimed at subjecting the automobile to a community debt. The court held that since the former wife was not collaterally attacking the divorce judgment, she could offer testimony to prove that the automobile was not community property.[66]

The former wife in *Fox*, however, had every incentive to litigate the issue vigorously in the first proceeding. Also, no new procedural opportunities existed in the second lawsuit that would have made a difference. Thus, the holding in *Fox* was not supported by the usual criteria used to deny the application of offensive collateral estoppel because the creditor could not easily join in the earlier action and the wife had a full and fair opportunity to litigate the issue the first time.

SPETTIGUE V. MAHONEY AND ITS AFTERMATH

It was not until 1965, twenty-three years after the *Bernhard*[67] decision,

(1953) (finding that vehicle was community property could not be used preclusively by a creditor attempting to subject the vehicle to a community property debt in a subsequent lawsuit).

61. 60 Ariz. 43, 131 P.2d 357 (1942).

62. *Id.* at 50, 131 P.2d at 360.

63. 68 Ariz. 190, 203 P.2d 633 (1949).

64. *Id.* at 197, 203 P.2d at 638.

65. 76 Ariz. 91, 259 P.2d 258 (1953).

66. *Id.* The appellee argued that the appellant (the wife in the divorce proceedings) was attempting to collaterally attack the divorce judgment and was precluded because a collateral attack on a judgment will not be sustained unless the judgment is void on its face. The court determined that the appellant was not denying the validity of the divorce judgment, and therefore the testimony to establish the vehicle as her separate property was not a collateral attack on the judgment.

67. 19 Cal. 2d 807, 122 P.2d 892 (1942).

that Arizona judicially declared that collateral estoppel could be used in a second action by a stranger to the first action.[68] However, in *DiOrio* collateral estoppel was used defensively; there was no mention of offensive collateral estoppel.[69]

Spettigue made clear that the courts were unwilling to go beyond *DiOrio*. The first Restatement,[70] which recognizes defensive collateral estoppel, was adopted in Arizona; offensive collateral estoppel was rejected.[71] The fear of adopting offensive collateral estoppel was that the multiple claimant anomaly, where plaintiffs develop a wait and see attitude toward litigation, would be encouraged.[72] Also, the court emphasized the importance of the adversary system in Arizona and stated that it would be unfair to declare one person the loser to a person he or she has never met in the courtroom.[73] The court also stressed that since plaintiffs exercise complete dominion over claims, offensive collateral estoppel is unfair to defendants.[74]

The *Spettigue* court refused to recognize that, on the facts of the case, offensive collateral estoppel could have been applied fairly. First, a limited number of potential plaintiffs existed—only two cars were involved in the accident. Second, the state had every incentive to litigate vigorously in the first proceeding because the potential damages for two wrongful deaths was great. In addition, the state could easily have foreseen a subsequent lawsuit since Arizona law holds the state liable for injuries resulting from the state's negligence in maintaining highways.[75] As the court in *Parklane* recognized, it was foreseeable to the state that subsequent private lawsuits would follow a successful judgment against the government. Finally, although the plaintiff in *Spettigue* could have been joined in the first lawsuit, there may have been valid reasons for not joining.[76]

In light of the foregoing factors, it may have been proper to allow offensive collateral estoppel in *Spettigue*. As the court in *Spettigue* conceded, col-

68. *DiOrio*, 2 Ariz. App. 329, 408 P.2d 849. There were two alternative grounds of decision and yet the Arizona Court of Appeals saw merit in adopting the *Bernhard* doctrine and in abandoning the requirement of mutuality. Either the indemnitor-indemnitee exception to mutuality, RESTATEMENT OF JUDGMENTS § 96 (1942), or the derivative liability exception, RESTATEMENT OF JUDGMENTS § 99 (1942), would have sufficed as the basis for the decision.

69. *See supra* note 68. The first proceeding arose out of a motorcycle-automobile accident. The motorcycle driver sued the automobile driver for injuries and the automobile driver was found negligent. In a subsequent lawsuit the automobile driver sued the City of Scottsdale, who employed the motorcycle driver, on the theory of *respondeat superior*. Since the automobile driver had been found negligent, the court of appeals held that the City of Scottsdale could use defensive collateral estoppel to prevent his action.

70. RESTATEMENT OF JUDGMENTS § 93 (1942).

71. *Standage Ventures, Inc.*, 114 Ariz. 480, 562 P.2d 360.

72. *Spettigue*, 8 Ariz. App. at 287, 445 P.2d at 563.

73. *Id.* at 286, 445 P.2d at 562: "[C]ontest rules seldom provide that one contestant must be declared the loser to a competitor that he has never met on the field of contest."

74. *Id.* at 287, 445 P.2d at 563. Some of the fears articulated by the court were adopted from Professor Currie's views. Currie later retracted from what he felt had been over-generalizations, including his view on the multiple claimant anomaly and the argument that the party with the initiative should not be able to assert an estoppel offensively. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1965).

75. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963).

76. The fact that the plaintiff in *Spettigue* was a minor may have been a factor in his failure to join in the first lawsuit.

lateral estoppel would have prevented a great deal of relitigation involving much of the same evidence. The court's rationale for not allowing collateral estoppel was based on fears of bad consequences that might materialize in other cases, but not in *Spettigue*.

The Arizona Court of Appeals in *Wetzel v. Arizona State Real Estate Department*[77] allowed collateral estoppel to be applied offensively in the revocation of a broker's license based on a previous disbarment proceeding where the defendant's dishonest and bad reputation had been established. The court refused to apply the first Restatement, and reasoned since *Spettigue* was premised on the first Restatement, its foundation was eroded by the Restatement (Second),[78] which addressed the concerns of the *Spettigue* court.

The court's approval of offensive collateral estoppel, based on the facts of the case, involved an analysis of the safeguards written into the Restatement (Second). The court considered the most important factor to be whether the defendant had a full and fair opportunity to litigate in the first proceeding.[79] The court's analysis determined that: (1) the plaintiff in the second suit could not have joined his revocation action with the disbarment proceedings, (2) the defendant had strong incentive to litigate vigorously in the disbarment proceeding, as his right to practice law was in jeopardy, (3) the procedural safeguards were similar in both actions, and (4) the requirements of due process applied equally in both forums.[80] By adopting the Restatement (Second), the *Wetzel* court recognized a discretionary approach to offensive collateral estoppel—an approach designed to effect justice and promote judicial economy.

The impact of *Wetzel* will be limited because it is a court of appeals decision in direct conflict with a prior Arizona Supreme Court decision. Not only is the court of appeals bound by a prior determination of the Arizona Supreme Court,[81] but a decision to disaffirm a state supreme court decision is reserved solely to that court.[82]

One limited way to apply offensive collateral estoppel in Arizona was recognized in *Food For Health Co., Inc. v. 3839 Joint Venture*.[83] In *Food For Health*, the Arizona Court of Appeals struggled with whether issue preclusion was being invoked defensively or offensively. The plaintiff/lessee pled constructive eviction based upon a prior judgment holding that the defendant/lessors forfeited the premises. The court determined that defensive collateral estoppel was being invoked because the lessee was not using the prior judgment affirmatively to establish his claim, but rather to prevent the lessors from asserting the defense of wrongful forfeiture to his claim.[84] The court reasoned that this was not offensive collateral estoppel as defined by

77. 151 Ariz. 330, 727 P.2d 825 (1986).
78. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).
79. *Wetzel*, 151 Ariz. at 334, 727 P.2d at 829.
80. *Id.* at 334, 727 P.2d at 829.
81. Bade v. Arizona Dep't. of Transportation, 150 Ariz. 203, 722 P.2d 371 (Ct. App. 1986).
82. McKay v. Industrial Comm'n, 103 Ariz. 191, 438 P.2d 757 (1968).
83. 129 Ariz. 103, 628 P.2d 986 (1981).
84. *Food For Health*, 129 Ariz. at 107, 628 P.2d at 990.

the Restatement,[85] because the plaintiff was merely asserting a defense to a claim which had been adjudicated previously. Therefore, the plaintiff was allowed to estop the defense to his claim in a summary judgment proceeding.

In cases where offensive collateral estoppel has been invoked, a party asserts the prior determination against the opponent to preclude the opponent from relitigating defenses to the claim. The court in *Food For Health* failed to recognize that this is the logical consequence of offensive collateral estoppel. Instead, the court based its decision on the wording of the doctrines, not their effects, in concluding that since the plaintiff was *defending* a claim, he was using collateral estoppel defensively. The effect was to allow the plaintiff to obtain the benefits of the prior adjudication offensively and declare the defendant the loser on the issue.

Food For Health indicates that at least one Arizona court has construed its way around offensive collateral estoppel to get the result it desired. It appears that the Arizona courts are backing away from *Spettigue*, and are starting to see merit in allowing offensive collateral estoppel.

OFFENSIVE COLLATERAL ESTOPPEL IN OTHER JURISDICTIONS: THE CALIFORNIA AND NEW YORK APPROACHES

Both New York and California allow offensive collateral estoppel. Other states have also adopted offensive collateral estoppel, applying it in a wide variety of cases.[86] California takes a more hostile view of the doctrine, making it difficult to invoke because of policy considerations.[87] In addition, California goes beyond the Restatement (Second) in determining fairness to the defendant. For example, in *O'Connor v. O'Leary*,[88] the court refused to apply the doctrine because it would not have furthered judicial economy. *O'Connor* involved a wrongful death action in which the plaintiffs sought to assert collateral estoppel by judgment against the defendant on the issues of contributory negligence and assumption of the risk. The defendant was the employer of O'Leary who had been found guilty of involuntary manslaughter in a prior proceeding. The plaintiffs contended that a conviction in a

85. RESTATEMENT OF JUDGMENTS § 93 (1942).

86. 1) Texas, *Bonniwell*, 633 S.W.2d 553. In lawsuits arising out of an airplane wreck, where the issue in the pending litigation was identical to the issue raised in the previous suit by a different plaintiff, an airplane manufacturer was allowed to use offensive collateral estoppel to bar relitigation of cross action for indemnity over and against the carrier; 2) Colorado, Bassett v. Board of Dental Examiners, 727 P.2d 864 (Colo. 1986). In a disciplinary proceeding against a dentist, the State Board of Dental Examiners was granted partial summary judgment on the issue of whether the dentist's treatment of patients had been negligent. Offensive collateral estoppel on the issue was granted because in a prior malpractice action the issue had been adjudicated against the dentist; 3) New Jersey, Shubeck v. Ordek, 167 N.J. Super. 121, 400 A.2d 544 (1979). In a comparative negligence personal injury action brought by a passenger against the host driver and driver of the other automobile involved in the accident, the plaintiff (passenger), used the district court findings in a motion for summary judgment to establish that the host driver was 100% negligent. By bringing a motion for summary judgment against the host driver, plaintiff was held to have released driver of the other automobile from liability even though no motion was made covering this. Thus, the plaintiff was left to pursue her damage claim against the host driver alone; McIntyre v. ILB Investment Corp., 172 N.J. Super. Ct. Law Div. 415, 412 A.2d 810 (1979). Plaintiff and her assignor offensively used findings of the Bureau of Securities, dealing with defendant's sale of unregistered securities, to bar further litigation of this issue.

87. O'Connor v. O'Leary, 56 Cal. Rptr. 1, 247 Cal. App. 2d 646 (1967).

88. *Id.*

manslaughter case was conclusive proof of the defendant's negligence. The court refused to apply offensive collateral estoppel because it would have put the defendant in the highly disadvantageous position of having to assert that its employee was not negligent, despite the previous judgment of negligence; it would have immunized the defenses of contributory negligence and assumption of the risk; and it would have presented unnecessarily complicated issues to the jury.[89]

One of California's stated public policies denies offensive collateral estoppel by different persons against a single defendant or group of defendants growing out of a single accident.[90] If this policy were adopted in Arizona, offensive use of collateral estoppel would be denied in the *Spettigue* situation. The reason California refuses to apply the doctrine in this instance is fear that this would promote litigation and subvert sound principles of judicial administration looking to equal justice for all.[91] However, denying the use of the doctrine does not necessarily discourage plaintiffs from bringing suit, because a previous judgment in favor of a plaintiff will usually encourage a second plaintiff that a valid claim exists. Therefore, since plaintiffs will still be encouraged to pursue their claims, the application of offensive collateral estoppel will work to decrease litigation on issues previously adjudicated. Denying offensive collateral estoppel in this situation denies its use in an area where it is most applicable and can further the goal of judicial economy.

On the opposite side of the spectrum is New York where offensive collateral estoppel is used liberally. One line of cases where there was potential for abuse of the doctrine involved a finding of gross negligence against a utility company. The first case, *Food Pageant v. Consolidated Edison Company of New York*,[92] involved a finding of gross negligence on the part of Consolidated Edison as a result of a blackout. *Food Pageant* was followed by two subsequent lawsuits where the plaintiffs used the finding of gross negligence offensively against Consolidated Edison.[93] Unlike mass tort litigation where there is a foreseeable number of potential plaintiffs, the number of potential plaintiffs could not be ascertained by the utility company. This in turn could have led to liability far beyond what the utility company could foresee. In addition, there was great potential for a flood of substantially varying claims. For instance, one plaintiff might claim damages from physical injuries sustained from falling downstairs, as occurred in *Shaid v. Consolidated Edison of New York, Inc.*,[94] while another may claim economic loss of business during the blackout. It is unclear where the New York courts would have drawn the line if more than two plaintiffs had pursued claims against Consolidated Edison. Although only two lawsuits followed the first determination, it seems that New York would have allowed subsequent plaintiffs to take advantage of the findings against Consolidated Edison.

89. *Id.*

90. Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958).

91. *O'Connor*, 56 Cal. Rptr. 1, 247 Cal. App. 2d 646.

92. 54 N.Y.2d 167, 429 N.E.2d 738, 445 N.Y.S.2d 60 (1981).

93. Goldstein v. Consolidated Edison Co. of N.Y., Inc., 93 A.D.2d 589, 462 N.Y.S.2d 646 (1983), *cert. denied*, 469 U.S. 1210 (1985); *Shaid*, 95 A.D.2d 610, 467 N.Y.S.2d 843.

94. 95 A.D.2d 610, 467 N.Y.S.2d 843 (1983).

THE FUTURE OF COLLATERAL ESTOPPEL IN ARIZONA

Arizona must find a middle ground if and when it adopts offensive collateral estoppel. The Restatement (Second) approach which incorporated the two-pronged test adopted by the Supreme Court in *Parklane Hosiery*,[95] provides safeguards that will help to ensure a fair application of the doctrine. Other factors, both procedural and substantive, can further safeguard its application. Therefore, the case by case discretionary approach that has been applied broadly by the federal courts could provide the Arizona courts with a useful tool to aid in promoting judicial economy.

Although the Arizona Supreme Court refused to sanction offensive collateral estoppel in *Standage Ventures*,[96] the lower courts indicate that the issue may soon have to be reconsidered. Since the Arizona courts have viewed the Restatement with favor when the law is not settled,[97] the next logical step in the progression of offensive collateral estoppel in Arizona may be the adoption of the Restatement (Second) which was written after the *Spettigue* decision. Limiting offensive collateral estoppel under the Restatement (Second) approach, which involves a case by case analysis, is more reasonable than to deny its use entirely.

95. 439 U.S. 332 (1979).
96. 114 Ariz. 480, 562 P.2d 360 (1977).
97. 8 Ariz. App. 281, 283, 445 P.2d 557, 559 (1968).