

## Civil Procedure

Eric M. Fink  
Elon Law School  
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# Preclusion

## 1 Introduction

### 1.1 Source

Common law doctrines of res judicata and collateral estoppel

- Restatement (2d) of Judgments distills the general principles
  - But requirements and application vary somewhat from state to state

### 1.2 Preclusion in State Court

#### U.S. Constitution, Art. IV, Sec. 1

*Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.*

This means state courts must give prior judgment from another state the same preclusive effect as in the state where it was rendered.

#### Example

1st suit in VA state court. 2nd suit in NC state court.

- NC court must follow VA law to determine what claims and issues are precluded by prior VA judgment.

### 1.3 Preclusion in Federal Court

#### 1.3.1 Preclusive effect of prior state court judgment on subsequent federal action

#### 28 U.S.C. § 1738

*The records and judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.*

This has same practical effect as full faith and credit clause

- Federal court must apply the preclusion law of the state where the original judgment was issued (i.e. just as a state court would)

### Example

1st suit in VA state court. 2nd suit in NC federal court.

- NC federal court must follow VA law to determine what claims and issues are precluded by prior VA judgment.

### 1.3.2 Preclusive effect of prior federal court judgment in a diversity action on subsequent state court action

#### **Semtek International, Inc. v. Lockheed Martin Corp. (US 2001)**

##### *Procedural History*

- Prior action:
  - Semtek sued Lockheed in California state court.
  - Lockheed removed to California federal court based on diversity.
  - District Court dismissed all claims “on the merits and with prejudice” on the ground that Semtek’s claims were barred by California’s two-year statute of limitations, and Court of Appeals affirmed.
- Second action:
  - Semtek sued Lockheed in Maryland state court, asserting same claims as in prior action.
    - Semtek asserted that the claims were not barred under Maryland’s three-year statute of limitations.
  - Lockheed removed to Maryland federal court based on federal question jurisdiction
    - Lockheed was a Maryland citizen and thus could not remove based on diversity.
  - The federal court remanded to Maryland state court because the federal issue arose as a defense, not part of plaintiff’s claims.
  - Maryland state court dismissed on grounds of res judicata.

##### *Holding*

- State courts must give the same effect to a prior judgment of a federal court in a diversity case the same preclusive effect that the state court would give to a prior state court judgment.

##### *Analysis*

- “[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.”
  - The Court rejects the argument that the issue is governed by FRCP Rule 41(b), which says that an involuntary dismissal (other than for lack of jurisdiction, improper venue, or failure to join a Rule 19 party) “operates as an adjudication on the merits”, unless the dismissal order says otherwise.
    - The Court says that the designation of a dismissal as “on the merits” under Rule 41(b) is primarily to bar the plaintiff from bringing the same claim(s) again *in the same court*, but does not necessarily mean that claim preclusion would apply.
  - Neither the Constitution nor any federal statute governs the issue.
    - The full faith & credit clause of the Constitution only governs the preclusive effect that one state’s court must give to the prior judgment of another state’s court.

- The federal full faith & credit statute (28 U.S.C. § 1738) only governs the preclusive effect that a federal court must give to the prior judgment of a prior state court.
- Absent any governing Constitutional provision, federal statute, or FRCP, it's up to the federal courts to determine the appropriate rule as a matter of federal common law.
- The Court “adopt[s], as the federally prescribed rule of decision, the [claim preclusion approach] that would be applied by state courts in the State in which the federal diversity court sits”
  - This rule is consistent with the policy of *Erie*, i.e. promote consistency between federal and state courts, to avoid forum shopping and inequitable administration of the laws.
  - Note that *Erie* does not directly apply here, because the issue is what a state court, not a federal court, must do. But the same principle fits in reverse.

#### Example

1st suit in VA federal court, deciding state-law claims under diversity jurisdiction. 2nd suit in NC federal court.

- NC federal court must follow VA state law to determine what claims and issues are precluded by prior VA judgment, the same as if the prior judgment had been from a VA state court.

## 1.4 Claim v. Issue Preclusion:

### 1.4.1 Claim Preclusion (*res judicata*)

Effect of prior litigation on *claims not litigated* in the prior action

### 1.4.2 Issue Preclusion (*collateral estoppel*)

Effect of prior litigation on *issues litigated and decided* in the prior action

## 1.5 Rationale

#### Finality

- Prevent relitigation of matters already decided
  - Concern: Fairness to parties

#### Consistency

- Prevent inconsistent results in different lawsuits
  - Concern: Legitimacy of & confidence in judicial system

#### Efficiency

- Prevent duplicative litigation through claim splitting
  - Concern: Judicial resources, burden on parties

## 2 Claim Preclusion

### 2.1 Standard

A valid and final judgment precludes the parties to the prior action from asserting the same claim(s) in a subsequent action.

See Restatement (2d) of Judgments § 17

- Bars claims that were decided in prior action.
  - Includes claims arising from same transaction/occurrence, even if they were not asserted in prior action.

### 2.2 Requirements of Prior Judgment

A valid, final judgment, on the merits, between the same parties.

#### 2.2.1 Valid

A judgment is valid if court had subject matter jurisdiction over claim(s) and personal jurisdiction over defendant(s).

#### 2.2.2 Final

A judgment is final when there is nothing left for the trial court to decide.

- Dismissal under Rule 12(b)(6)
  - Final if the court dismisses all claims.
  - But not final if the court dismisses only some claims.
- Summary judgment
  - Summary judgment in favor of the defendant or plaintiff on all claims is final (because there is nothing left to be decided at trial).
  - Partial summary judgment is not final (because there are still issues to be decided at trial).

Some courts treat judgment as final even if an appeal is pending.

#### 2.2.3 On the Merits

*Judgments on the Merits*

- Dismissal for failure to state a claim—Rule 12(b)(6)
  - But some state courts treat this as non-merits
- Dismissal for failure to prosecute
- Judgment on the Pleadings—Rule 12(c)
- Default judgment
  - Unless court lacked personal jurisdiction over defendant
- Dismissal based on statute of limitations

- Majority view: dismissal is on the merits, because it extinguishes the plaintiff's claim.
- Minority view: dismissal is not on the merits, because it only extinguishes entitlement to a remedy, not the claim itself.
- Summary judgment on the entire claim in favor of either party
- Consent Decree (settlement rendered as a judgment)

#### *Dismissals not on the merits*

- Lack of jurisdiction
- Improper venue
- Failure to join a necessary party (Rule 19)
- Defect in process or service

### **Federated Dept. Stores, Inc. v. Moitie (US 1981)**

#### *Procedural History*

- Antitrust claim against department store
  - Trial court granted defendant's Rule 12(b)(6) motion to dismiss failure to state a claim.
  - Some plaintiffs appealed
    - Court of Appeals eventually reversed and remanded.
- Instead of joining in the appeal, two plaintiffs (Moiite & Brown) filed a new suit in state court.
  - Defendant removed to federal court<sup>1</sup> and then moved for summary judgment based on claim preclusion.
    - Claim preclusion is an affirmative defense and is commonly raised in a motion for summary judgment.
  - Trial court granted motion, but Court of Appeals reversed, on grounds that it was unfair to preclude Moitie & Brown from proceeding with their claims, given the successful appeal by the other plaintiffs in the first suit.

#### *Holding & Analysis*

- Claims properly dismissed based on claim preclusion, where plaintiffs could have joined in appeal instead of bringing new action.
- Dismissal of prior suit under Rule 12(b)(6) was on the merits for preclusion purposes.
- Fact that dismissal of first suit was ultimately reversed on appeal does not negate the basis for claim preclusion.
- Moitie & Brown were trying to have it both ways: Try their luck in new suit, but also get benefit of a favorable appeal in original suit.

### **2.2.4 Same parties**

Specifically, the *party against whom claim preclusion is asserted* must have been a *claimant* (i.e. either the plaintiff or a defendant who asserted a counterclaim or crossclaim) in the prior action

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<sup>1</sup>Federal courts have exclusive subject matter jurisdiction over federal antitrust claims.

- Includes those in privity<sup>2</sup> with parties to prior suit.

### **Freeman v. Lester Coggins Trucking (5th Cir. 1985)**

- Father sued for personal injuries sustained in automobile accident
  - Judgment for defendant
- Father brought 2nd suit, on his own behalf and as legal representative of wife & children, for wrongful death of child in same accident
  - Father's own claim precluded
  - Representative claims not precluded, because no "virtual representation"
  - Wife & children (personally or through legal representative) were not required to join or intervene in the first action

### **Taylor v. Sturgell (US 2008)**

Court rejects "virtual representation" theory where plaintiff in second action was not legal representative of, nor in privity with, plaintiff in first action

- Preclusion of non-party requires an express or implied legal relationship
  - Representation by same attorney is insufficient
  - Ordinary social relationship is insufficient
- Circumstances where claim preclusion may apply to non-party:
  - Non-party agrees to be bound
  - Non-party is successor in legal interest
  - Non-party was adequately represented by party with the same interests (e.g. class action; suits by trustees, guardians, or other fiduciaries)
  - Non-party "assumed control" over the prior litigation
  - Non-party is acting as a proxy for original party, i.e. bringing second suit as designated representative of party to prior action.
  - Statutory scheme "expressly forecloses successive litigation by nonlitigants"

## **2.3 Claims Precluded By Prior Judgment**

Where the requirements are satisfied, the prior judgment precludes all claims arising out of the same transaction, or series of transactions, out of which the claim(s) decided in the prior action arose.

### **Restatement (2d) of Judgments § 24(2)**

*What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.*

The Restatement's transactional test is functionally equivalent to "same transaction or occurrence" standard for joinder and "CNOF" standard for supplemental jurisdiction.

<sup>2</sup>"Privity" is a term for a legal relationship in which the parties have a mutual legal interest or right (e.g. property interests, rights under a contract, etc.). It may be based on contract or on a special social relationship (e.g. parent and minor child).

- But some states use a narrower test for same claim

### 2.3.1 Merger & Bar

These terms simply describe the application of claim preclusion depending on which party prevailed in the prior action. In either case, the practical effect is the same: All claims arising out of the same transaction as those decided in the prior action are precluded in any subsequent action.

#### Merger

Where the prior judgment was in favor of the plaintiff, any previously unasserted claims arising out of the same transaction are said to “merge” into the judgment.

#### Bar

Where the prior judgment was in favor of the defendant, any previously unasserted claims arising out of the same transaction are said to be “barred” by the prior judgment.

### Rush v. City of Maple Heights (Ohio 1958)

#### Facts

- Plaintiff brought two separate suits arising out of single accident
  - Suit 1: Property damage to her motorcycle
  - Suit 2: Personal injuries

#### Holding & Analysis

- Second claim precluded based on merger with judgment in first
- Court follows the majority rule:
  - Both property damage and personal injury claims arising from same incident form a single action for res judicata purposes.
    - Exception where insurer acquires interest in property damage claim (but not personal injury claim) by assignment or subrogation.
- Court rejects minority rule:
  - Property damage and personal injury claims form separate actions where plaintiff's case turns on different evidence.
    - Artifact of common law pleading.

### Jones v. Morris Plan Bank of Portsmouth (Va. 1937)

#### Facts

- Jones bought a car on credit. Seller assigned its interest in the loan to Bank.
  - Jones was to repay the loan in 12 monthly installments.
  - The note (i.e. the loan agreement) contained an acceleration clause: “The whole amount of this note (less any payments made hereon) becomes immediately due and payable in the event of nonpayment at maturity of any installment thereof.”
  - In other words, if Jones missed any payment, the entire remaining balance of the loan would be due immediately.

- Title to the car remained with the seller until Jones paid off the loan.

#### *Procedural History*

- Bank sued Jones (Suit 1) after he missed two loan payments.
  - Bank's suit did not seek payment of entire loan balance, as it could have done under the acceleration clause
    - Bank obtained default judgment on the two missed payments
    - Jones satisfied the judgment
- After Jones missed another payment, Bank brought another suit (Suit 2) to collect that missed payment.
  - Jones asserted that claim preclusion (based on the judgment in Suit 1) barred Suit 2.
  - Bank voluntarily dismissed Suit 2, then repossessed the car and sold it to satisfy the unpaid loan balance.
- Jones sued Bank for conversion, asserting that Bank had no right to repossess the car.

#### *Arguments*

- Jones
  - Because of acceleration clause, entire amount became due when he missed first two payments.
  - Claims for balance of loan were merged with claims for two missed payments. Upon satisfaction of 1st judgment title passed to Jones.
- Bank
  - Seller retained title to car until entire purchase price was repaid.
  - Bank had right to repossess the car and sell it to satisfy the unpaid loan balance.

#### *Analysis & Holding*

- Application of res judicata turns on the nature of the transaction
  - Single, indivisible contract for entire amount?
  - Divisible, separate contracts for each installment?
- Court concludes there was a single, indivisible contract.
- Under the acceleration clause, once Jones defaulted the first time, the entire outstanding loan balance became due immediately.
  - Under "same evidence" theory, there was a single claim for the full amount, not separate claims for each monthly installment.
- The judgment in Suit 1 therefore barred any further claims for the unpaid balance.
  - Once Jones satisfied the judgment in Suit 1 (which extinguished all remaining claims by the Bank for payment under the note), the note was fully satisfied, title to the car passed from the seller to Jones, and the Bank had no right to repossess.

### **2.3.2 Application to Counterclaims**

If defendant asserted no counterclaim in prior action, claim preclusion does not apply (because the defendant was not a *claimant*).

- But the compulsory counterclaim rule has the same effect.



- Purpose of compulsory counterclaim rule is to put plaintiff and defendant on an equal footing in having to bring all their related claims in the same action.

If a defendant asserted a counterclaim (whether compulsory or permissive) in the prior action, claim preclusion would apply to any unasserted claims arising from the same transaction/occurrence.

### Example

Denise is employed by Plastico. Denise's employment contract with Plastico includes a provision that, in the event Denise leaves her job and goes to work for one of Plastico's competitor, she may not solicit business from any of Plastico's customers. Denise is fired and then goes to work for Universal Plastics, a competitor of Plastico.

Plastico sues Denise, alleging that she has solicited business from Plastico's customers. Denise asserts a counterclaim against Plastico, alleging that she was fired in breach of her employment contract.<sup>3</sup> The case ends with a valid, final judgment on the merits of both Plastico's claim and Denise's counterclaim.

Denise then brings a suit against Plastico for employment discrimination, alleging that she was fired based on her gender. The claim is barred by the judgment in the first suit, because it arises out of the same occurrence as Denise's counterclaim in the prior suit.

### 2.3.3 Exception

Where the court (or other tribunal) issuing the prior judgment had (a) limited subject matter jurisdiction, or (b) limited remedial power, that judgment will not preclude:

- Transactionally-related claims over which the prior court/tribunal lacked subject matter jurisdiction, or
- Claims for additional relief beyond the power of the prior court/tribunal

### Nestor v. Pratt & Whitney (2d Cir. 2006)

#### *Procedural History*

- Plaintiff filed discrimination complaint with state human rights commission
  - Commission decides in favor of Plaintiff & state court affirmed.
  - N.B. In Title VII cases, federal courts will not give preclusive effect to state administrative agency decision, unless affirmed by a court.
- Plaintiff then brought a Title VII suit in federal court, seeking additional statutory remedies that were unavailable in the administrative proceeding.
  - Defendant moved to dismiss on res judicata grounds

#### *Holding*

- No preclusion, where Plaintiff seeks statutory remedies that were not within the jurisdiction of the state agency

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<sup>3</sup>Even though both claims are based on the same employment contract, Denise's counterclaim would most likely be permissive, because Plastico's firing of Denise, and Denise's alleged solicitation of Plastico's customers, are separate and independent occurrences.

### 3 Issue Preclusion

“A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment.”

See Restatement (2d) of Judgments § 17(3)

#### 3.1 Requirements

##### 3.1.1 Valid and Final Judgment

- Valid
  - Same as for claim preclusion, i.e. court must have had jurisdiction.
- Final
  - Some courts take a more relaxed view of “final judgment” for purposes of issue preclusion than for claim preclusion.

Note that, unlike claim preclusion, issue preclusion may apply even if the prior judgment was not on the merits.

- If prior action was decided on procedural grounds, issue preclusion may apply to the procedural issue
  - e.g. First case is dismissed based on lack of personal jurisdiction over the defendant. Plaintiff brings new suit against same defendant in same state. Defendant may assert issue preclusion on lack of personal jurisdiction, even though court didn’t decide the first suit on the merits.

##### 3.1.2 Same Issue

Issue preclusion may apply to issue of fact or law.

#### **O’Neal v. Remington Arms Co., LLC (D.S.D. 2014)**

##### *Facts*

- Plaintiff’s husband was killed when a rifle, manufactured by Remington, accidentally discharged.
  - Plaintiff alleged that the accident was the result of a design defect in the rifle’s safety mechanism.
- Plaintiff asserted issue preclusion against Remington on the issue of the manufacturing defect, based on judgments in previous cases against Remington.<sup>4</sup>

##### *Holding*

- Issue preclusion does not apply to the issue of a manufacturing defect, where the prior cases involved different goods.
  - Court distinguishes “design defect” and “manufacturing defect” theories of products liability.
  - Design defect applies to all items made according to the same design.
  - But manufacturing defect is the specific to the manufacture of each item.

<sup>4</sup>This is an example of non-mutual offensive issue preclusion.

**Cromwell v. County of Sac (US 1876)***Facts and Procedural History*

- Plaintiff demanded payment on bond issued by county
  - Prior action: plaintiff presented matured coupons
    - Judgment for county, where plaintiff failed to show he gave value
  - Subsequent action: plaintiff presented later-maturing coupons
    - County asserted issue preclusion re: validity of coupons

*Holding & Analysis*

- Court treats each coupon as a separate contract/transaction, and issue of whether Cromwell gave value for each coupon as a distinct issue.
  - So prior action does not preclude plaintiff from showing he gave value for other coupons.
- Cf. *Jones v. Morris Plan Bank* (claim preclusion)

**3.1.3 Actually Litigated**

An issue is regarded as actually litigated when the parties contest and put on evidence regarding the issue.

- If a defendant admits or stipulates to an issue, it is not actually litigated.

**3.1.4 Default Judgments, Consent Judgments, Confession of Judgment**

- Issue preclusion normally will not apply to legal and factual issues pertaining to liability
  - But some court will give issue preclusive effect to default judgments in some circumstances

**3.1.5 Necessary to the Judgment****Rios v. Davis (Texas Ct. of Civil Appeals 1963)***Facts & Procedural History*

- Suit arises out of a collision between a truck, owned by Popular Dry Goods and driven by Rios, and a car driven by Davis.
- First action: Popular sues Davis for damage to truck
  - Davis asserts defense of contributory negligence against Popular.
  - Davis impleads Rios as 3rd party defendant, and asserts a claim against Rios for damage to Davis's car.<sup>5</sup>
  - Jury found that Popular, Rios, and Davis were all negligent, and that each party's negligence was a proximate cause of the collision.
    - Based on those findings, the court entered judgment in favor of Davis on the claim by Popular, and in favor of Rios on the claim by Davis.

<sup>5</sup>It's not clear from the opinion, but it appears that, unlike under FRCP Rule 14(a), Texas law (as in some other states) permitted joinder of a third-party defendant for claims of direct liability to the third-party plaintiff and not only for claims of derivative liability based on contribution or indemnification.

- Second action: Rios sues Davis for personal injuries Rios sustained in the same accident.<sup>6</sup>
  - Davis asserts defense of contributory negligence, and further asserts that issue preclusion applies based on the jury's finding that Rios was negligent in the prior suit.

### **Holding**

- Issue preclusion does not apply against Rios on the issue of whether he was negligent.
- The jury's finding that Rios was negligent was not necessary to the judgment.
  - Since the judgment in favor of Rios was based on Davis's contributory negligence, it didn't really matter whether the jury found Rios negligent or not.
- But does issue preclusion apply against Davis on the issue of whether he was negligent?
  - Given the finding that Rios was negligent, the finding that Davis was also negligent was essential to the judgment in favor of Rios.

## **3.1.6 Alternate Sufficient Grounds**

### **National Satellite Sports, Inc. v. Elliadis, Inc. (6th Cir. 2001)**

#### **Facts**

- Suit arose out of a pay-per-view broadcast of a boxing match.
  - NSS had exclusive rights to commercial broadcasts, and Time Warner had exclusive rights to residential broadcasts.
  - A commercial establishment aired the broadcast using a residential account with Time Warner.
  - NSS sued Time Warner under the Federal Communications Act, arguing that allowing the commercial establishment to air the broadcast through Time Warner's residential service violated the Act.
- In a prior suit, arising out of a different broadcast, NSS also sued Time Warner for improperly allowing a commercial establishment to air the broadcast through Time Warner's residential service.
  - In that case, NSS asserted both a claim under the Federal Communications Act and a claim based on the distribution contracts for the broadcast.
  - Time Warner moved for summary judgment, arguing that NSS lacked standing to assert a claim under the Federal Communications Act and that the distribution contracts prohibited NSS from suing to enforce the broadcast rights.
    - The court granted summary judgment in favor of Time Warner on both the statutory and contract claims.
- Time Warner argued that the judgment in the prior suit precluded NSS from relitigating the issue of whether it had standing to sue under the Federal Communications Act.

#### **Holding**

- Issue preclusion does not apply where the prior judgment rested on alternative grounds, either of which would have been sufficient to support the judgment.

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<sup>6</sup>Under the FRCP, this would have been a compulsory counterclaim, and Rios would have been precluded from bringing it in a separate suit. But Texas may not have had a compulsory counterclaim rule at the time.

- In the prior case, the court determined that the distribution contracts prohibited NSS from bringing any suit to enforce the broadcast rights, and also ruled that NSS failed to state a claim under the Federal Communications Act.
  - Since the decision based on the contracts was sufficient to support a judgment in favor of Time Warner on both the contract and statutory claims, the decision that NSS also lacked standing under the Broadcast Act was not really necessary for the judgment.
- The court notes that the Restatement (2d) adopts the “modern” view that, where a judgment rests on alternative independent grounds, neither one is necessary, so issue preclusion will not apply.
  - Court also notes that some courts take the contrary position.

## 3.2 Mutuality

Issue preclusion only applies *against parties to the prior action*.

- A party in Suit 2 who was not a party in Suit 1 is not precluded from relitigating issues decided in Suit 1 (absent privity between that party and someone who was a party to the prior action).

But someone who was not a party to the prior action (“new party”) may be able to assert issue preclusion against someone who was a party to the prior action (“repeat party”).

### *Defensive Non-Mutual Issue Preclusion*

New party asserts issue preclusion as defense to claim by repeat party.

### *Offensive Non-Mutual Issue Preclusion*

New party asserts issue preclusion in support of claim against repeat party.

### 3.2.1 Defensive Non-Mutual Issue Preclusion

#### **Bernhard v. Bank of America (Cal. 1942)**

##### *Procedural History*

- Bernhard asserted claim against Cook (executor of estate) in probate proceeding, asserting claim to funds that Bernhard alleged belonged to the estate.
  - Cook claimed funds were a gift to Cook from decedent, properly excluded from estate assets.
    - Probate court held that funds belonged to Cook.
- Bernhard brought new suit against Bank where funds had been deposited, asserting that Bank wrongfully paid funds to Cook instead of to the estate.
  - Bank, which was not a party to the probate proceeding, asserted that Bernhard was precluded from relitigating the issue of whether the funds belonged to Cook.

##### *Analysis & Holding*

- Fact that Bank was not a party to the prior action did not necessarily mean Bank could not assert issue preclusion against Bernhard, who was a party to that prior action.
- Bernhard had full and fair opportunity to litigate the issue and every incentive to do so.
- In effect, Bernhard was trying to get a favorable result by choosing a different adversary.

**Blonder-Tongue Labs v. Univ. of Illinois Foundation (US 1971)***Procedural History*

- Foundation brought suit for patent infringement and lost on ground that patent was invalid
- Foundation then brought another suit for infringement of the same patent, this time against a new defendant, Blonder-Tongue, which asserted that Foundation was precluded from relitigating the issue of the patent's validity.

*Holding*

- Supreme Court approves uses of defensive non-mutual issue preclusion against party to prior action.
- But party may defeat preclusion by demonstrating that it “did not have ‘a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.’”

**3.2.2 Offensive Non-Mutual Issue Preclusion****Parklane Hosiery Co. v. Shore (US 1979)***Procedural History*

- SEC brought a successful action against Parklane for a false and misleading proxy statement
- Shareholders of Parklane then brought class action suit, and asserted that Parklane was precluded from relitigating the issue of whether the proxy statement was false and misleading

*Holding & Analysis*

- Court approves offensive non-mutual issue preclusion in Shareholders' action
  - Shareholders could not have joined in the prior SEC action (because the SEC Act didn't allow private parties to join or intervene).
  - Parklane had incentive to litigate the issue fully in the SEC action.
  - Parklane had the same procedural opportunities in the first action (e.g. discovery, etc.).
- But Court notes factors that would weigh against offensive non-mutual issue preclusion:
  - New party had opportunity to join in prior action but opted to wait and see what happened.
  - Stakes in prior action were small, reducing repeat party's incentive to litigate fully in that action.
  - Procedural rules in prior action were more restrictive, limiting repeat party's ability to litigate the issue fully in that action.
  - There are inconsistent prior adjudications of the issue.

**Example**

Action 1: Truck Driver sues Company for unpaid overtime wages.

- Driver is entitled to overtime pay only if she is Company's employee, not if she is an independent contractor.
- Company denies that Driver is an employee, and the issue is actually litigated in the suit.

Action 2: Plaintiff sues Company for injuries resulting from a collision with truck operated by Driver

- Company is liable to Plaintiff only if Driver is employee, not independent contractor.

- The legal standard for deciding whether Driver is an employee is the same in both cases.

*If Driver wins first suit:*

Court may allow Plaintiff in second suit to assert non-mutual offensive issue preclusion against company on issue of Driver's employee status.

- Plaintiff could not have joined or intervened in first suit, because the two claims arise from completely separate transactions/occurrences (even though the issue of the drivers status as an employee or contractor is common to both claims)
- But company may argue stakes in prior action were much lower (maybe amount of overtime was only a few hundred dollars), or the procedural rules were more restrictive (e.g. if driver brought the overtime claim in an administrative tribunal or arbitration instead of court).

*If Company wins first suit:*

Even assuming judgment in favor of Company was based on a finding that Driver was not an employee, issue preclusion will not apply against Plaintiff in second action.

- Plaintiff was not a party to the first action, so they cannot be bound by that judgment.