ISSUE PRECLUSION: PARKLANE HOSIERY CO. v. SHORE, REVISITED

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I. INTRODUCTION

Nearly four years have passed since *Parklane Hosiery Co. v. Shore*[1] was decided by the Supreme Court, in which the use of "offensive issue preclusion"[2] was approved for federal courts.[3] This facet of the decision was not unforeseen since the Court had signalled its view on the subject in 1970 in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[4]

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1. 439 U.S. 322 (1979).

2. This article will use the term "issue preclusion," the modern counterpart for "collateral estoppel," to define the doctrine which prevents the litigation of issues already adjudicated in a prior judicial proceeding; it is an aspect of the broader concept of "claim preclusion" or "res judicata," which prevents the relitigation of claims judicially determined. *See* Allen v. McCurry, 101 S. Ct. 411, 414 (1980); Board of Supervisiors v. Chicago & Northwestern Transp. Co., 260 N.W.2d 813, 816 (Iowa 1977) (claim preclusion); Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971) (issue preclusion); 2 A. VESTAL & P. WILLSON, IOWA PRACTICE § 65.03, at 508-09 (1974).

Issue preclusion may be asserted either "offensively" as a sword or "defensively" as a shield. In the former situation a plaintiff seeks "to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party," Parklane Hosiery Co. v. Shore, 439 U.S. at 326 n.4; in the latter situation a defendant seeks "to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost with another defendant." *Id.*; *accord*, Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971).

3. Parklane Hosiery Co. v. Shore, 439 U.S. at 331.

4. 402 U.S. 313, 324-29 (1971). The Court, in *Blonder-Tongue Laboratories*, approved the

What was surprising, however, was the Court's attempt to reconcile the policies of preclusion with the rules of procedure relating to joinder:[5]

> [O]ffensive use of [issue preclusion] does not promote judicial economy in the same manner as defensive use does. . . . Since a plaintiff will be able to rely on a previous judgment against a 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. [cites omitted]. Thus offensive use of [issue preclusion] 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.
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> . . . *The general rule should be that in cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use of offensive [issue preclusion].*[6]

Significantly, the *Parklane* Court failed to set forth criteria by which trial courts in their discretion were to determine whether this "general rule" should not be applied.

The principal focus of this article is on the application of offensive issue preclusion in light of the *Parklane* rule. The article first presents a brief discussion of the policies underlying issue preclusion in general. It then examines the impact of the *Parklane* rule on the application of offensive issue preclusion, comparing sundry approaches in its interpretation. Finally, it suggests an alternative methodology for courts in determining whether application of offensive issue preclusion is warranted in a given situation.

II. Issue Preclusion; the Rule of Mutuality

In general, issue preclusion serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing

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defensive use of issue preclusion in a patent litigation case. *Id. See In re* Evans, 267 N.W.2d 48, 51 (Iowa 1978). While the Court in *Blonder-Tongue Laboratories* did not decide whether the offensive use of the doctrine would be allowed, it noted that other courts had permitted such use. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. at 329-30 n.19, citing Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); United States v. United Airlines, Inc., 216 F. Supp. 709, 728-29 (E.D. Wash., D. Nev. 1962), *aff'd sub nom.*, United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). *See generally* 31 A.L.R.3d 1044 (1970).

5. The *Parklane* decision spawned several law review commentaries. *E.g.*, Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 Hastings L.J. 755 (1980); George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan. L. Rev. 655 (1980); Statman, *The Defensive Use of Collateral Estoppel in Multidistrict Litigation After Parklane*, 83 Dick L. Rev. 469 (1979).

6. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. at 329-30 (emphasis added).

inconsistent decisions, encourage reliance on adjudication."[7] Recognition of these policies, however, is but the first step in determining the appropriateness of applying issue preclusion. Often a grant or denial of its application will defeat one policy while forwarding another. As a result, all relevant factors involved in a particular case must be weighed and balanced as a prerequisite to ruling on a plea of preclusion.[8] Each case merits individual consideration.

The traditional rule of issue preclusion provided that if an essential fact or issue was actually and necessarily litigated on the merits and determined by a valid, final judgment, that determination was conclusive between the same parties or their "privies"[9] in a subsequent proceeding.[10] A companion rule to the identity-of-parties requirement limited application of preclusion to instances in which only a party who would have been bound by the prior judgment could invoke it in a subsequent proceeding.[11] This "rule of mutuality"[12] was essentially premised on a sense of fairness: since a stranger to the first action would not have been bound by the judgment and thus would not have incurred any of the risks of litigation, that person should not be

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7. Allen v. McCurry, 101 S. Ct. 411, 415 (1980); *see* Montana v. United States, 440 U.S. 147, 153-54 (1979); A. VESTAL, RES JUDICATA/PRECLUSION V-7 to V-12 (1969). *See also* Standefer v. United States, 100 S. Ct. 1999 (1980).

8. "If one attempts to apply the concept in its generalized form to a factual situation, it is almost impossible to respond in a rational, responsible manner." A. VESTAL, *supra* note 7, at V-13; *see* RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 14 (Tent. Draft No. 7, 1980).

9. "Privy" denominates a nonparty "for whose benefit and at whose direction a cause of action is litigated." Montana v. United States, 440 U.S. 147, 154, n.5 (1979); *accord*, Morris v. Gressette, 425 F. Supp. 331, 334 (D.S.C. 1976), *aff'd.*, 432 U.S. 491, 499 (1977); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 379 (Iowa 1972).

10. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977); A. VESTAL, *supra* note 7, at V-189 to V-206; 2 A. VESTAL & P. WILLSON, IOWA PRACTICE § 65.03, at 508-09 (1974). In Iowa, four requirements must be satisfied before issue preclusion can be applied: "(1) The issue [in each suit] must be identical. (2) The issue must have been raised and litigated in the [first suit]. (3) The issue must have been material and relevant to the disposition of the first suit, and (4) [Resolution of the issue] must have been necessary and essential to the resulting judgment [in the first suit]." Brigdon v. Covington, 298 N.W.2d 279, 281 (Iowa 1980); Schneberger v. United States Fidelity & Guar. Co., 213 N.W.2d 913, 917 (Iowa 1973).

11. *E.g.*, Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912). "It is a principle of general elementary law that estoppel of a judgment must be mutual." *Id.*; *accord*, RESTATEMENT OF JUDGMENTS § 93, at 459-60 (1942). This principle was premised in part on the notion that a lawsuit is generally a two-party affair, and thus "its effects should not go beyond the immediate parties." RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 9 (Tent. Draft No. 7, 1980). The rule was not, however, without its exceptions. *See* RESTATEMENT OF JUDGMENTS §§ 94-111, at 467-530 (1942).

12. Usually the requirements of mutuality and identity of parties are coextensive. However, mutuality is the broader of the two: "Thus, when one is party or privy to prior litigation, but would not have been bound if the judgment had been to the contrary, then a plea of [issue preclusion] is precluded in the second action due to the absence of mutuality." Indiana St. Highway Comm'n v. Speidel, 70 Ind. App. 569, ___, 392 N.E.2d 1172, 1177 (1979); *see* Goolsby v. Derby, 189 N.W.2d 909, 915 (Iowa 1971).

allowed to assert it against one of the original parties.[13]

Mutuality, however, was abandoned as a requirement for asserting issue preclusion by the California Supreme Court in the 1942 case of *Bernhard v. Bank of America*.[14] In the landmark decision authored by Justice Roger Traynor, the court in *Bernhard* held that the pertinent inquiry was not whether the party asserting issue preclusion would have been bound by the prior judgment, but whether the party against whom preclusion was sought was a party to the first proceeding.[15] The decision represented a new and more functional approach to the application of issue preclusion which eventually became hedged on one primary safeguard: the existence of a "full and fair opportunity" for the precluded party to litigate the disputed issue in a prior action.[16]

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13. This reasoning, however, did not curtail criticism of the rule of mutuality, "a maxim which one would suppose to have found its way from the gaming table to the bench." 7 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 171 (J. Bowring ed. 1843); *see* Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). "The argument [against abandoning mutuality] is merely that the application of [issue preclusion] makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of fairness of the rules of [preclusion]." *Id.* at 421; A. VESTAL, *supra* note 7, at V-300 n.58. Some courts still adhere to the rule of mutuality. *E.g.*, Armstrong v. Miller, 200 N.W.2d 282, 288 (N.D. 1972).

14. 19 Cal. 2d 807, 122 P.2d 892 (1942).

15. *Id.* at ___, 122 P.2d at 895. The reasoning of Justice Traynor is often quoted:

> The criteria for determining who may assert a plea of [issue preclusion] differ fundamentally from the criteria for determining against whom a plea of [issue preclusion] may be asserted. The requirements of due process of law forbid the assertion of a plea of [issue preclusion] against a party unless he was bound by the earlier litigation. . . . There is no compelling reason . . . for requiring that the party asserting the plea of [issue preclusion] must have been a party, or in privity with a party, to the earlier litigation.
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> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was bound by a previous action should be precluded from asserting it as [issue preclusion] against a party who was bound by it is difficult to comprehend.

Id. This rule abandoning the requirement of mutuality has been termed the "rule of nonmutuality," or more commonly, "unilateral estoppel" or "the *Bernhard* doctrine." *See* Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971).

16. *See* United States v. United Airlines, Inc., 216 F. Supp. 709, 728-29 (E.D. Wash., D. Nev. 1962), *aff'd sub nom.*, United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

As the Supreme Court recently stated in *Allen v. McCurry:*

> In recent years, this Court has reaffirmed the benefits of [issue preclusion,] . . . finding the policies underlying it to apply in contexts not formerly recognized at common law. . . . But one general limitation the Court has repeatedly recognized is that the concept of [issue preclusion] cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.

101 S. Ct. 411, 415 (1980); *see* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971); Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25,

Notwithstanding that *Bernhard* constituted the "widest breach in the citadel of mutuality,"[17] courts were slow to permit nonparties to assert offensive issue preclusion for two interrelated reasons.[18] First, it had been argued that offensive use would not further judicial economy in instances where similar claims, arising out of a common transaction or event, were held by a number of individuals.[19] As a practical matter, the filing of an action by one plaintiff against the common defendant would encourage other potential plaintiffs to "wait and see" the outcome of that proceeding.[20] If the plaintiff received a favorable judgment, the others could then file similar suits and assert pleas of preclusion on the issue of liability; while if the defendant received a favorable judgment, the others would not be bound by it and could litigate the issue of liability anew.[21] Thus, instead of a single trial of the issues, a series of lawsuits would possibly result. Second, it had been argued that since application of offensive issue preclusion would not discourage serial litigation, it would be unfair to subject an initially-successful defendant to the recurring costs and problems of litigating an issue once adjudicated.[22] In such instances, permitting potential plaintiffs to "wait on

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31 (1965).

17. Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

18. *E.g.*, Mackris v. Murray, 397 F.2d 74, 79-80 (6th Cir. 1968); Spettigue v. Mahoney, 8 Ariz. App. 281, ___, 445 P.2d 557, 564 (1968); Albernaz v. Fall River, 346 Mass. 336, ___, 191 N.E.2d 771, 773 (1963); Reardon v. Allen, 88 N.J. Super. 560, ___, 213 A.2d 26, 32 (1965). *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968). It is interesting to note that while these decisions generally relied upon Professor Currie's reasoning in Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); *see* notes 19-22 *infra* and accompanying text, Currie later endorsed decisions which emphasized the fairness of the precluded party's full and fair opportunity to litigate, *see* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1957).

19. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 287-88, n.15 (1957). Recognizing this problem, Professor Semmel proposed two complementary rules which would further judicial economy: (1) a party which could have "joined" another person in a prior litigation but failed to do so, is bound by an adverse determination of the issues in subsequent litigation with the party which was not joined; and (2) except for cases in (1), a party which could have "joined" in the first action but failed to do so, is barred from asserting the first judgment as issue preclusion against a party to the first action. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1471-79 (1968).

20. *See* Norfolk & W. Ry. v. Bailey Lumber Co., ___ Va. ___, ___, ___ S.E.2d ___, ___ (1981).

21. An individual who was neither a party nor a privy to an adjudication cannot be bound by the judgment under the due process clause. Hansberry v. Lee, 311 U.S. 32, 40 (1940). *See generally* Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1963).

22. Currie, *supra* note 19, at 285-88; *see* Note, 47 N.C. L. REV. 690, 693-94 (1969). Professor Vestal, however, has made this practical observation:

> Writers have been troubled . . . by the possibility that a defendant might be sued successively until he loses. It is feared that in a spurious class suit the other members of the class would wait for the first winning plaintiff and then claim preclusion. Although this is a possibility, the usual result would be that if the defendant wins in the

the sidelines until the end of the game" would not forward the policy of protecting parties from the burdens of duplicative litigation. Absent the protection which the rule of mutuality afforded, a defendant would be required "to defend every suit to the utmost, risking everything against the chance of winning as to a single claim."[23] In summary, the desire to avoid subjecting a party to repeated litigation and to preserve increasingly scarce judicial resources gave rise to the hesitancy toward applying offensive issue preclusion.[24]

III. The Parklane Case and its Progeny

Although courts and commentators were divided on the use of issue preclusion as a "sword,"[25] the *Parklane* Court held that "the preferable approach" was not to foreclose the use of offensive issue preclusion, "but to grant trial courts broad discretion to determine when it should be applied."[26] As the Court indicated, the palladium for the precluded party was not the symmetry of mutuality, but the more pragmatic determination of whether there had been a prior full and fair opportunity to litigate the issue.[27] However, cognizant of the criticisms levied against the offensive use of the doctrine, the Court fashioned its general rule of joinder: "[I]n cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use" of offensive issue preclusion.[28]

Despite the *Parklane* Court's failure to specify the means by which plaintiffs can "easily have joined in the earlier action,"[29] three possibilities

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first, he will win the subsequent suits or that such cases will not be tried.

A. Vestal, *supra* note 7, at 318; *accord*, Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27, 56 (1964). In addition, "waiting" plaintiffs may risk a running of the statute of limitations if they delay in the filing of their petitions. *See* Annual Report, Nat'l. Comm'n. for the Review of Antitrust Law and Prac., 80 F.R.D. 511, 598 nn.18 & 19 (1979).

23. Currie, *supra* note 19, at 287-88; *see* Note, 1969 Ariz. St. L.J. 678, 683.

24. The split in jurisdictions on the use of offensive issue preclusion is hardly surprising. As Professor Vestal has observed, "the whole area is in a state of flux." A. Vestal, *supra* note 7, at V-339.

25. *Compare* Speaker Sortation Systems v. United States Postal Serv., 568 F.2d 46, 48-49 (7th Cir. 1978) *and* Morris v. Gressette, 425 F. Supp. 331, 334 (D.S.C. 1976), *aff'd*, 432 U.S. 491 (1977) (permitting offensive issue preclusion) *with* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457 (1968), *and* the cases cited in note 18, *supra* (denying offensive issue preclusion).

26. Parklane Hosiery Co. v. Shore, 439 U.S. at 331.

27. *Id.* at 332-33; *see* A. Vestal, *supra* note 7, at V-303, V-340.

28. Parklane Hosiery Co. v. Shore, 439 U.S. at 331. In a footnote the Court indicated that other considerations, on balance, could offset the application of its general rule. *Id.* at 332 n.17. The Court cited *S.E.C. v. Everest Management Corp.*, which recognized that the "complicating effect" of additional parties in a lawsuit might "outweigh the advantages of a single disposition of the common issues." 475 F.2d 1236, 1240 (2d Cir. 1972).

29. The Court merely stated that its rule of joinder "is essentially the approach" of the Restatement (Second) of Judgments, *Parklane Hosiery Co. v. Shore*, 439 U.S. at 331 n.16, which, according to section 88(8), lists seven "compelling circumstances that make it appropri-

readily present themselves:[30] joinder,[31] intervention,[32] and consolidation.[33] Accordingly, under the *Parklane* rule, any plea of issue preclusion will be routinely denied upon the mere failure to invoke any of these three procedures. But none of these procedures allows for automatic joinder. Rather, considerations of judicial economy, fairness, and prejudice to the parties inhere in all three procedures: (1) the test for permissive joinder of plaintiffs is whether the claims "aris[e] out of or respecting the same transaction [or] occurrence," and there is a "question of law or fact common to all" plaintiffs;[34] (2) the test for intervention is whether the intervenor is "interested in the subject matter of the litigation, or the success of [any] party to the action";[35] and (3) the test for consolidation is whether the actions "involve

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ate that the party be permitted to relitigate" an issue. RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976 App.). Restatement section 88 provides:

> A party precluded from relitigating an issue with an opposing party . . . is . . . precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include . . . whether:
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> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
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> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
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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;*
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> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
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> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;
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> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based.

Id. (emphasis added). Although the Restatement terms these "compelling" factors, it also indicates that each is merely *a* factor to be considered in determining whether offensive issue preclusion is to be applied in a subsequent action. *See id.*, Illustrations 3-4. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4, 1977).

30. *See generally* F. JAMES, CIVIL PROCEDURE §§ 10.7-10.10 (1965).

31. *E.g.*, IOWA R. CIV. P. 23; *see* FED. R. CIV. P. 20(a).

32. *E.g.*, IOWA R. CIV. P. 75; *see* FED. R. CIV. P. 24(b)(2).

33. *E.g.*, IOWA R. CIV. P. 185(a); *see* FED. R. CIV. P. 42(a); 28 U.S.C. § 1404(a) (1976).

34. *See* note 31 *supra*. Iowa's rule 23 is interpreted broadly as it applies to the joinder of multiple actions. Wheeler v. Walker, 197 N.W.2d 585, 589 (Iowa 1972).

35. *See* note 32 *supra*. Iowa's rule 75 "is to be liberally construed to reduce litigation and expeditiously determine matters before the court." Rick v. Boegel, 205 N.W.2d 713, 717 (Iowa 1973). Generally, a court is justified in its denial of intervention if allowance would cause undue

common questions of law or fact," absent a showing of prejudice.[36] These broad tests reflect a practical understanding that the problems involved in the addition of one or more parties to a lawsuit may outweigh the savings in judicial resources incurred in a single trial of the issues. Moreover, such problems are not limited to the parties. The insertion of additional parties into a lawsuit will likely lead to a more difficult and hence less error-free trial for the court, especially as it affects the clarity and conciseness of the instructions to the jury.[37]

The problem with the *Parklane* analysis is that it ignores the practicalities of multiparty litigation.[38] There may be several reasons,[39] wholly unrelated to a contemplated use of issue preclusion, for not becoming a party plaintiff in another lawsuit.[40] Before joining another action, counsel will normally consider a myriad of factors, including the undesirability of sharing

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delay or prejudice the rights of the original parties. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1913, at 552 (1972). Thus, although a plaintiff was historically the master of his suit, intervention involves a balancing of competing interests of the litigant, the intervenor, and the public. *Id.* § 1901, at 465.

36. *See* note 33 *supra*. Iowa's rule 185 is liberally construed for the purpose of combining in one litigation all of the claims arising out of the same transaction or event. Liberty Loan Corp. v. Williams, 201 N.W.2d 462, 464 (Iowa 1972). However, a grant or denial of consolidation is within the discretion of the trial court. Schupbach v. Schuknecht, 204 N.W.2d 918, 920 (Iowa 1973).

37. 2 R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE CASES FOR THE BEST SETTLEMENT OR TRIAL RESULT 1106-08 (1974).

> How does a [trial court] honor the right and duty of all attorneys to cross and direct examination? Who goes first? What are limits on cross examination between defendants with similar goals? How to coordinate counsel, the pre-trial, and ultimately trial? At pretrial hearings, does one counsel speak? How to deal with common motions—is there one brief from each defendant or one prepared by the defendants and joined by them all?

PARNELL, *The Coordinated Group Defense*, 22 For the Defense (No. 12) 16, 17 (1980).

38. "Above all, the problems in [the] area of [issue preclusion] turn on broad questions of policy and practicality. . . . B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, ___, 278 N.Y.S.2d 596, ___, 225 N.E.2d 195, 200 (1967) (Breitel, J., dissenting); *see* Tone & Stifler, *Joinder of Parties and Consolidation of Multiple Actions*, 1967 U. ILL. L.F. 209.

> To the extent that modern multiparty litigation has eliminated repetition of testimony, duplication of effort, and inconsistent verdicts, it has achieved understandably desirable results. Counterbalanced against such considerations of convenience, however, are historial notions of the fair conduct of litigation. To the extent that a plaintiff loses control of the prosecution of his case, or loses sight of his case because its effective management has become impractical, the desire for expedient resolution of all relevant issues becomes of secondary importance.

Id. at 209.

39. *See* R. GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE 216-17 (1980); R. KEETON, TRIAL TACTICS AND METHODS 435 (1973).

40. Generally, when the precluded issue is one of law and not of fact, a party may have little reason to remain separate from another proceeding. *See* Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

control of the litigation,[41] of associating with an unpalatable plaintiff,[42] of receiving a premature or compromised award of damages,[43] of trial delay,[44] of losing certain procedural rights,[45] of litigating in an inconvenient forum,[46] and of the possibility of general confusion as to each plaintiff's proof and theory of recovery.[47] The efficacy of the *Parklane* rule is therefore questionable: Plaintiffs will not be coerced into joining a lawsuit if their chances for recovery or for higher awards of damages will thereby be jeopardized.[48]

How have the courts dealt with the problem of a plaintiff's justifiable refusal to join in an earlier action, and whether such a refusal has any bearing on the application of the *Parklane* rule? A perusal of the case law indicates that despite its "general" denotation, most courts have refused to rigidly interpret and apply the rule.[49] More flexible approaches have been

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41. *See* 2 R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE FOR THE BEST SETTLEMENT OR TRIAL RESULT 1106-08 (1974).

42. *Id.*

43. *See* Baker v. Waterman S.S. Corp., 11 F.R.D. 440, 440-41 (S.D.N.Y. 1951); R. KEETON, TRIAL TACTICS AND METHODS 435 (1973).

> If the controversies are claims of several plaintiffs against a single defendant, it is generally to the defendant's advantage to have the cases consolidated. Trial is less expensive and, if liability is established, the jury is likely to be influenced toward more conservative damage findings by consideration of the total sum they are awarding against the defendant.

Id.

44. For example, "[i]nstead of one or two phone calls to set up a deposition, it now may take twenty phone calls and an act of God" in multiparty litigation. Parnell, *The Coordinated Group Defense*, 22 For the Defense (No. 12) 16, 17 (1980). More important, "[e]specially from the view of the plaintiff, the longer a trial lasts, the more chance there is that something will go wrong." R. GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE 216 (1980).

45. An intervenor does not necessarily take a case as he or she finds it; a court may impose certain conditions to intervention. *E.g.*, Boston Tow Boat Co. v. United States, 321 U.S. 632, 633 (1944) (intervenor denied right of independent appeal); *see* Lederleitner & Nolan, *Criteria for Intervention*, 1967 U. ILL. L.F. 299, 303. "Among the conditions to intervention . . . have been the prohibiting of seeking delay of the trial date; prohibiting against further discovery; limiting the intervenor's complaint to the issue of the original pleading; and requiring intervenor to waive jury trial." *Id. See also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

46. This is more likely to be a factor in, for example, products liability cases arising in federal court. In Iowa, the doctrine of forum non conveniens has been recently adopted and applied. *See* Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725, 729 (Iowa 1981).

47. Thus, where it is alleged that a plaintiff was contributorily negligent, another plaintiff may be at "cross purposes" with the first. Atkinson v. Roth, 297 F.2d 570, 575-76 (3d Cir. 1961); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 172-73 (Tent. Draft No. 3, 1976).

48. *See generally* Pickholz & Brodsky, *An Assessment of Collateral Estoppel and SEC Enforcement Proceedings After Parklane Hosiery Co. v. Shore*, 28 AM. U. L. REV. 37, 44-45 (1978).

49. Since issue preclusion is a matter of substantive law, the *Parklane* decision, although persuasive, is not binding on state courts. *See* Gatewood v. Fiat, S.P.A., 617 F.2d 820, 826 n.11 (D.C. Cir. 1980).

devised within the framework of *Parklane* to determine the applicability of offensive issue preclusion. Five cases are illustrative.

(1) When a television broadcasting tower collapsed, the owners of the tower sued the manufacturer of the structure and received a jury verdict on a theory of express warranty.[50] Thereafter, the lessees of the tower sued the manufacturer on the same theory and moved for summary judgment on the issue of liability, claiming the manufacturer was prevented from relitigating the issue.[51] The court, in *Midcontinent Broadcasting Co. v. Dresser Industries, Inc.*, noted that "[a]lthough at the time of [the first lawsuit] it was apparent . . . that all parties knew the likelihood of future litigation, no effort was made to join potential plaintiffs such as [the lessees]."[52] Under the general rule of *Parklane*,[53] then, the court should have denied the motion; however, partial summary judgment was granted:

> The fairness aspects of *Parklane* do not prevent the use of offensive [issue preclusion] in this case. [The defendant] vigorously and aptly litigated all issues in the prior action. [The defendant] was aware at that time that other actions would be likely to follow and could have sought joinder of the potential plaintiffs. No procedural advantages are presented in the present actions that would alter the determination of liability in a new trial. Nor is the judgment relied upon by the plaintiff for [issue preclusion] inconsistent with other judgments. . . .
>
> The second aspect of *Parklane*'s "general test," however, does raise concern for it is technically true that [the plaintiffs] as well as other lessees not party to this motion, could have joined the prior litigation as permissive parties under Rule 20 of the Federal Rules of Civil Procedure. Although this court cannot determine precisely why the plaintiffs did not join in the first action, it appears that their primary reason was their inability to ascertain damages until months after the first trial, and not to elude the initial resolution of liability. Thus we exercise our discretion in favor of plaintiffs and hold that [the defendant] can be [precluded] from relitigating the issue of liability.[54]

Thus, by focusing on the reasons why the plaintiffs failed to join in the first lawsuit, the court reached the correct result. It indicated, however, that if there had been a showing that the plaintiffs intentionally failed to join in order to insulate themselves from the risks of litigation, a different result

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50. Community Television Servs., Inc. v. Dresser Indus., Inc., 435 F. Supp. 214, 215 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979).

51. Midcontinent Broadcasting Co. v. Dresser Indus., Inc., 486 F. Supp. 858, 859-60 (D.S.D. 1980).

52. *Id.* at 859.

53. *See* text accompanying note 6 *supra*.

54. Midcontinent Broadcasting Co. v. Dresser Indus., Inc., 486 F. Supp. at 862; *see* Carr v. District of Columbia, 646 F.2d 599, 605-06 (D.C. Cir. 1980) (noting "compelling reasons" for plaintiff's avoidance of joinder).

might have been warranted.[55]

(2) A similar approach was employed in *W. J. Roberts & Co. v. S. S. Hellenic Glory*.[56] Cargo carried on the defendant's ship had been damaged at sea. Two separate actions were filed by the owners of certain cargo interests, the first resulting in a judgment against the defendant for its failure to exercise due diligence to make the vessel seaworthy.[57] On the basis of this judgment the plaintiffs in the other action moved for summary judgment on the issue of liability.[58] The motion was granted, *Parklane* notwithstanding:

> While it is true that plaintiffs here might have intervened in the [first] case, it is also true that the defendants could have consolidated both cases for trial. In fact, this is a classic [case] for consolidation. The possibility of the existence of [issue preclusion] must have been evident at the time the instant suit was filed. The argument that plaintiffs should not be permitted to adopt a "wait and see" attitude which does not promote judicial economy is equally applicable to the defendants.[59]

Thus, because the circumstances suggested the two actions would have been consolidated had *a* party so moved, the burden was placed on the defendant to avoid application of offensive issue preclusion by seeking consolidation.

(3) Another case in which the *Parklane* rule was not followed is *Starker v. United States*.[60] The *Starker* case involved a taxpayer's attempt to employ offensive issue preclusion to foreclose the government from denying nonrecognition treatment of a land-exchange agreement.[61] An earlier action based on the same agreement had been brought by the government against the taxpayer's son and daughter-in-law on essentially the same issue, and was decided adversely to the government.[62] The trial court, which rendered its decision prior to *Parklane*, refused to apply issue preclusion.[63] The Court of Appeals for the Ninth Circuit reversed, stating:

> The Court's "general rule," that a plaintiff who could "easily have joined" a first suit cannot assert [issue preclusion] in a second, raises . . . troublesome questions. It is unclear from *Parklane Hosiery* what type of "ease" is relevant. In the present case, Fed. R. Civ. P. 20 may have technically authorized [the taxpayer's] joinder in his son and daughter-in-law's refund suit. The [taxpayer's] suit differs from that of his son in so many respects, however, that there are numerous possible explanations why [the taxpayer]—or for that matter, [his son and daughter-in-law]—might have wanted the lawsuits tried separately. We decline to

55. Midcontinent Broadcasting Co. v. Dresser Indus., Inc., 486 F. Supp. at 862.
56. 471 F. Supp. 1002, 1003 (S.D.N.Y. 1979).
57. *Id.*
58. *Id.*
59. *Id.*
60. 602 F.2d 1341 (9th Cir. 1979).
61. *Id.* at 1343-44.
62. *Id.* at 1343.
63. *Id.* at 1344.

> speculate on motivation. This is not a case in which a litigant adopted a "wait-and-see" attitude for the obvious purpose of eluding the binding force of an initial resolution of a simple issue. Thus, we exercise our discretion in favor of [the taxpayer] that the government can be [precluded] as against him because of the final resolution of [his son's and daughter-in-law's] suit.[64]

In essence, the court held that if the defendant relied on the *Parklane* rule in order to relitigate the issue, it was required to make some preliminary showing that the plaintiff had deliberately refused to become a party to the first action for the "obvious" purpose of employing issue preclusion.[65]

(4) The defendant's inability to prove that the plaintiff's failure to join in an earlier action was a deliberate attempt to avoid the risks of litigation also occurred in *In re Transocean Tender Offer Securities Litigation.*[66] In that case several minority shareholders of a corporation, who had "opted out" of a state court class action brought by other minority shareholders against certain corporate fiduciaries, filed similar actions against the same defendants in federal court.[67] The state court action resulted in a judgment against the fiduciaries on the theory that they had violated their duty of candor to the minority shareholders.[68] The federal court plaintiffs sought to preclude the relitigation of the fiduciaries' liability on the basis of the state court judgment.[69] Although the case antedated *Parklane,* the fiduciaries' arguments were the same: that it would be unfair to allow "members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one," and that application of preclusion would be inconsistent with the policy underlying the rules of joinder.[70] The court responded:

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64. *Id.* at 1349-50. GAF Corp. v. Eastman Kodak Co., ___ F. Supp. ___, ___ (S.D.N.Y. 1981) Two separate actions, which the defendant had unsuccessfully moved to consolidate, were brought by the plaintiffs against the defendant for, *inter alia,* violations of federal antitrust law. *Id.* After the first suit proceeded to judgment against the defendant, the remaining plaintiff sought to preclude the relitigation of the defendant's liability on this issue in a motion for summary judgment, *Parklane* notwithstanding. *Id.* Upon the court's review of the order denying consolidation, the motion was granted because "[t]he complexity of each case and the fact that counter claims were being asserted by [defendant] against [the plaintiff in the first suit], coupled with the fact that, at [defendant's] insistence, both cases were jury trials, indicates that [plaintiff] is not the 'wait and see' plaintiff contemplated by Parklane Hosiery." *Id. Accord,* Collins v. Seaboard Coastline R.R., 516 F. Supp. 31, 33 (S.D. Ga. 1981) (after husband received jury verdict in personal injury action against railroad, wife brought separate action for loss of consortium and asserted issue preclusion; offensive use allowed because "[a]lthough the court will not speculate why [the wife] declined to join her husband's suit . . ., it is clear that her purpose was not to elude the binding force of an adverse judgment").

65. *See* Starker v. United States, 602 F.2d at 1349-50.

66. 455 F. Supp. 999 (N.D. Ill. 1978).

67. *Id.* at 1001.

68. *Id.* at 1002-03.

69. *Id.* at 1003.

70. *Id.* at 1006 (quoting American Pipe v. Utah, 444 U.S. 538, 547 (1947)).

> To not apply [issue preclusion] because the opt out plaintiffs might be "waiting on the sidelines" would undermine the important policy reasons for applying [it]. Courts which have enforced the offensive use of [issue preclusion] have not considered the motives of those plaintiffs who, though not joining in the first lawsuit, seek the benefit of the judgment in a subsequent lawsuit. . . . This court will likewise not indulge in exploring the motives of the opt out plaintiffs who seek to assert [preclusion against the defendants here].[71]

Reasoning that the "key considerations" for applying offensive issue preclusion were a full and fair opportunity to litigate and a furthering of judicial economy, the court would not allow the defendants "to breathe life back into the defunct mutuality doctrine in a new guise,"[72] and granted the plaintiffs' motion for summary judgment on the issue of liability.[73]

(5) In contrast to the preceding approaches, the Supreme Court of Iowa applied the *Parklane* rule literally and without question in *Hunter v. City of Des Moines*.[74] *Hunter* was one of two separate actions arising out of a collision between two automobiles at a street intersection. Both actions, one by the driver and owner of one of the vehicles, and the other by a passenger, were filed against the defendant city.[75] Each suit alleged the defendant had negligently failed to maintain the street intersection.[76] Although the city moved to consolidate the two lawsuits, the motion was denied by the trial court.[77] The passenger's action proceeded to trial first and resulted in a judgment against the city.[78] With this judgment in hand, the plaintiffs in the *Hunter* action filed an application of law points, asserting the city was barred from relitigating its liability.[79] The application was denied by the

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71. *Id.* at 1008.
72. *Id.* at 1007.
73. *Id.* at 1009.
74. 300 N.W.2d 121 (Iowa 1978).
75. *Id.* at 122.
76. *Id.* (failure to remove a snowpile in vicinity of intersection allegedly obstructed the driver's vision).
77. The defendant sought interlocutory review of the trial court's ruling on consolidation, which was granted. Hunter v. City of Des Moines, No. 24-13607 (Polk Co. Dist. Ct., application filed March 28, 1979). The plaintiffs joined in the passenger's filed resistance to consolidation for purposes of appeal. *Id.* (plaintiffs' resistance to application to appeal filed April 3, 1979). The Supreme Court of Iowa summarily affirmed the ruling of the trial court. *Id.* (order filed April 6, 1979). Apparently the motion was denied and the ruling affirmed for a variety of reasons: (1) extensive testimony in the passenger's suit was irrelevant to the plaintiffs' suit; (2) the passenger sought damages of $150,000 for personal injuries while the owner and the driver sought $1100 property and $25,000 personal injury damages respectively, and the likelihood of a compromised award of damages would have been increased as a result of consolidation; (3) an additional party was involved in the passenger's suit which was not involved in the plaintiff's suit; and (4) as a general matter, the issues in the passenger's suit were "already complex." *Id.* (plaintiffs' resistance to application to appeal filed April 3, 1979).
78. Hunter v. City of Des Moines, 300 N.W.2d at 122.
79. *Id.*

trial court.[80] In the trial of this second action, the city prevailed and judgment was entered in its favor.[81]

On appeal, the judgment was affirmed.[82] The court generally endorsed the use of offensive issue preclusion, and adopted the Restatement (Second) of Judgments provision[83] upon which the Supreme Court in *Parklane* based its general rule.[84] The Restatement provision indicated that the application of offensive isssue preclusion might turn on whether a plaintiff "could have effected joinder in the first action between himself and his present adversary."[85] This limitation is interpreted in the comments to the Restatement:

> A person in such a position that he might *ordinarily* have been expected to join as plaintiff in the first action, but who did not do so, may be refused the benefits of "offensive" issue preclusion where the circumstances suggest that he wished to avail himself of the benefits of a favorable outcome without incurring the risk of an unfavorable one. Such a refusal may be appropriate where the person could *reasonably* have been expected to intervene in the prior action, and *ordinarily* is appropriate where he withdrew from an action to which he had been a party. *Due recognition should be given, however, to the normally available option of a plaintiff to prosecute his claim without the encumbrance of joining with others whose situation does not substantially coincide with his own.*[86]

This comment was not discussed by the *Hunter* court. Neither did it discuss the trial court's observation, upon denying the city's motion to consolidate, that a single trial of the issues "could and no doubt would, present an unwieldy proceeding."[87] Yet the court concluded it would be inappropriate, in view of the *Parklane* and the Restatement rules, to apply offensive issue preclusion since the plaintiffs "could easily have effected joinder in the [first] action, but failed to do so"; that fact alone "provided the basis for denying offensive application of issue preclusion in this case."[88]

In summary, the five cases discussed indicate two distinct approaches to the general rule of *Parklane*. One court has literally applied the rule; thus, if it appears that a plaintiff could have effected joinder in an earlier action, the

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80. *Id.*
81. *Id.*
82. *Id.* at 126.
83. *See* note 29 *supra.*
84. *Id.*
85. *Id.*
86. RESTATEMENT (SECOND) OF JUDGMENTS § 88, Comment *e* (Tent. Draft No. 3, 1976 App.). While the *Parklane* and *Hunter* courts relied on the 1975 version of the Restatement, section 88 had been revised in 1976. *See id.* Perhaps significantly, the adjective "compelling" was added to the text of section 88(8). *See* note 29 *supra.*
87. Hunter v. City of Des Moines, No. 24-13607 (Polk Co. Dist. Ct., order filed February 9, 1979).
88. Hunter v. City of Des Moines, 300 N.W.2d at 126.

judgment will not be available to the plaintiff for purposes of preclusion.[89] But a literal interpretation of *Parklane,* whether intended by the Supreme Court or not,[90] ignores the practical problems associated with multiparty litigation. The *Hunter* decision is thus illustrative of the vice of the *Parklane* rule: that in establishing an apparently immutable rule for applying offensive issue preclusion, "broad generalizations may be meaningless, or even worse, misleading."[91] In following the path of *Parklane,* the Iowa court looked to see if the plaintiffs "could have effected joinder" in the first lawsuit, and, since they had not, determined they could not preclude relitigation of the defendant's liability even though there were valid reasons for their failure to become parties to the first lawsuit.[92] The absence of symmetry in employing preclusion, created by the discarding of the mutuality rule, mandated an absolute, affirmative duty on the part of the plaintiff to effect joinder.

On the other hand, the trend of the courts is away from the appealing simplicity of a literal interpretation of the *Parklane* rule toward a more prudential, more perspicacious analysis in determining whether to apply offensive issue preclusion.[93] This line of cases, in essence, holds that there is no presumption of any irregularity in a plaintiff's failure to become a party to an earlier proceeding, and that a defendant, who has once been afforded a full and fair opportunity to litigate an issue in dispute, must show that application of the *Parklane* rule is justified.[94] The task remains to cull the principles from these decisions and arrange them in a manner whereby courts can efficaciously rule on pleas of offensive issue preclusion.

IV. A Methodology for Resolving Pleas of Offensive Issue Preclusion

The *Parklane* Court established two *conditio sine qua non* for applying issue preclusion: the existence for the precluded party of an opportunity to fully and fairly litigate the issues in a prior proceeding, and the absence of unfairness as a result of its application.[95] The particular facts of *Parklane,* however, required the Court to focus on the second condition, since

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89. *See* notes 74-88 *supra* and accompanying text.

90. "It's too late to correct it," said the Red Queen: "when you've once said a thing, that fixes it and you must take the consequences." *Through the Looking Glass,* The Complete Works of Lewis Carroll 255 (Vintage Books ed. 1976).

91. A. Vestal, *supra* note 7, at V-274; *see* Pinto Trucking Service, Inc. v. Motor Dispatch, Inc., 485 F. Supp. 484, 488 (N.D. Ill. 1980).

92. *See* note 77 *supra.* Similarly, another court has retained the rule of mutuality in cases where offensive use of issue preclusion "is sought to be invoked in one of a series of damage suits arising from a common disaster." Norfolk & Western Ry. v. Bailey Co., ___ Va. ___, ___, ___ S.E.2d ___, ___ (1981).

93. *See* text accompanying notes 50-72 *supra.*

94. *Id.*

95. 439 U.S. at 327-28, 330; *see* Allen v. McCurry, 101 S. Ct. 411, 415 n.7 (1980).

problems of unfairness were more likely to arise when issue preclusion was asserted offensively.[96] These problems, the Court concluded, could be alleviated by the general rule of joinder.[97] The rule was thus intended to insure that application of offensive issue preclusion would "not reward a . . . plaintiff who could have joined in the previous action."[98]

Though it conflicts with the overriding consideration in applying issue preclusion—the existence of a full and fair opportunity to litigate the issue in dispute—the policy of not rewarding plaintiffs who have idly stood by while others do battle is not unwarranted.[99] First, under the rules of procedure relating to joinder, "the impulse is toward entertaining the broadest scope of action consistent with fairness to the parties."[100] Second, encouraging a single trial of all claims arising out of the same transaction or event will, in most instances, preserve judicial resources and diminish the likelihood of vexatious litigation and inconsistent decisions.[101]

The controlling principle should be that an adjudication in which the precluded party had a full and fair opportunity to litigate the issues should stand unless, in the interest of justice, "some compelling countervailing consideration necessitates relitigation."[102] The objective in denying offensive use of issue preclusion is to "punish" those plaintiffs who have intentionally refrained from becoming parties to an earlier proceeding for the salient purpose of asserting the doctrine. Accordingly, where joinder, intervention, or

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96. 439 U.S. at 329-30.

97. *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1471-77 (1968); Note, 1969 ARIZ. ST. L.J. 678, 684-87. Professor Vestal has observed that *statutes* have required a plaintiff to sue with another party to recover for injuries suffered as a result of a common occurrence or lose out completely on the claim, but adds that such forced joinder is "very rare" since two separate claims are involved. A. VESTAL, *supra* note 7, at V-57 to V-59.

98. Parklane Hosiery Co. v. Shore, 439 U.S. at 331-32. *But see In re* Transocean Tender Offer Sec. Litigation, 455 F. Supp. 999, 1007 (N.D. Ill. 1978).

99. *See* RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 6 (Tent. Draft No. 7, 1980) "Decisions in the modern law of [preclusion] . . . should [be] necessarily shaped by the statutory provisions of the system of civil procedure." *Id.*

100. United Mine Workers of Am. v. Gibb, 383 U.S. 715, 724 (1966); *accord*, Liberty Loan v. Williams, 201 N.W.2d 462 (Iowa 1972). "The modern trend evidenced by the almost universal reform in rules and laws affecting civil procedure is to combine in one litigation all actions arising out of one transaction, and all rules of civil procedure are to be liberally construed to this end." *Id.* at 464.

101. While intervention reduces court congestion, it does not necessarily improve the efficiency of individual cases. Brunet, *A Study in the Allocation of Scarce Resources: The Efficiency of Federal Intervention*, 12 GA. L. REV. 701, 719-20 (1978). Thus, at some point, the addition of new parties and issues will reach diminishing marginal returns.

102. Hossler v. Barry, 403 A.2d 762, 769 (Me. 1979); *accord*, RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, Comment on clause *e*, at 39 (Tent. Draft No. 4, 1977); *see* Carr v. District of Columbia, 646 F.2d 599, 605 (D.C. Cir. 1980) (plaintiffs who "might have joined in [an] earlier action" not barred from asserting offensive issue preclusion since there were "compelling reasons" for maintaining a separate lawsuit).

consolidation are available but are not employed as means for joining an action, the general inquiry involves an examination of the plaintiff's motives, and whether there is good cause in remaining separate from the action.[103] The question should be whether a plaintiff would have sought to become a party absent the availability of offensive issue preclusion. Specifically, reference should be made to the practical tests of the three forms of joinder.[104] Moreover, in contrast to the Court's reasoning in *Parklane*, the presumption should be that a plaintiff's failure to join another action was not for the purpose of "ambushing" a defendant.[105] Consideration should also be given to the original parties in the other lawsuit, and whether their rights might be adversely affected by the inclusion of new parties.

Admittedly, due to its casuistric nature, the application of this analysis may be rather difficult to consistently administer.[106] Yet it is designed to give courts sufficient flexibility to apply preclusion in a manner which forwards the underlying policies of joinder and preclusion, and also to avoid the sometimes conflicting results obtained by indiscriminate applications of the *Parklane* rule.[107] It thus contemplates those instances in which: (1) a defendant has the capability to consolidate two or more actions,[108] (2) a

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103. "A presiding Justice should carefully evaluate the reasons why a now plaintiff did not join in and have his claim adjudicated in the first action." Hossler v. Barry, 403 A.2d 762, 769-70 (Me. 1979).

104. *See* text accompanying notes 34-36 *supra;* Friends for All Children, Inc. v. Lockheed Aircraft Corp., 497 F. Supp. 313, 317-18 (D.D.C. 1980) (the defendant aircraft corporation "cannot be heard to complain because plaintiff failed to join" in prior litigation of a common issue since it "consistently opposed any consolidation of the damage claims").

105. *See* Hossler v. Barry, 403 A.2d 762, 769 (Me. 1979); RESTATEMNT (SECOND) OF JUDGMENTS § 88, Comment *e* at 165 (Tent. Draft No. 3, 1976 App.).

106. "The life of the law has not been logic: it has been experience." O. HOLMES, THE COMMON LAW 1 (1923). Moreover, such a determination can hardly be said to be more difficult for a court than ascertaining the precise issues necessarily and essentially litigated in the prior suit where a jury rendered a general verdict. *See* Oldham v. Pritchett, 599 F.2d 274, 281 (8th Cir. 1979). The *Oldham* court stated:

> Our conclusion [applying issue preclusion] is reinforced by the fact that Judge Collinson presided over both actions in the court below. Having presided over the course of the first trial, Judge Collinson's determination of its [preclusive] effect vis-a-vis the [defendant's] claims is predicated on more than a cold record and accordingly is entitled to great weight.

Id. See also Melbourn v. Benham, 292 N.W.2d 355 (S.D. 1980).

> 107. [I]n an "ideal" world the courts would make a detailed inquiry into the circumstances of the former judgment to determine the fairness of allowing [a] plea of [issue preclusion]. . . . [D]edicated judges . . . would never accept the easy course of generalization as a substitute for . . . justice in the individual case.

Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 29 (1965); *see* A. VESTAL, *supra* note 7, at V-560.

108. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88(3), (Tent. Draft No. 3, 1976 App.). In addition, a defendant may be able to "effect joinder" by: (1) initiating an action for declaratory judgment, *e.g.*, IOWA R. CIV. P. 261-69; *see* FED. R. CIV. P. 57; (2) through the provisions for necessary joinder, *e.g.*, IOWA R. CIV. P. 25(a); *see* FED. R. CIV. P. 19; or (3) interpleader, *e.g.*,

court concludes a joint trial on the issue of liability will adequately protect a plaintiff,[109] (3) a plaintiff may be compelled to become a party to an action or lose the right to later plead issue preclusion,[110] or (4) the disputed issue is one of law and not of fact.[111] The analysis allows a court, in ruling on a plea of preclusion, to consider and weigh every factor relevant to a party's opportunity to litigate, to any resulting unfairness, to the rewarding of an undeserving plaintiff, as well as to the general policies regarding judicial resources, burdens of litigation, and reliance on the adjudicatory process.

V. Conclusion

If courts rigidly adhere to *Parklane* it will be clear that the rule of mutuality is a dead letter in form only. The proper method for determining whether to apply offensive issue preclusion in a particular case begins with a balancing of all the factors which have bearing on the underlying policies of joinder and preclusion. It is necessary to approach questions of application in a functional manner. Plaintiffs' counsel must carefully examine the benefits and costs of proceeding against a defendant alone or participating as a laboring oar in another plaintiff's lawsuit. Defense counsel, too, should weigh similar considerations, and determine what options, if any, are available to compel a single trial of multiple actions.[112] Most important, courts must go beyond the rudiments of the *Parklane* rule and take into account

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Iowa R. Civ. P. 35-36; *see* Fed. R. Civ. P. 22.

109. A trial court has the power to sever particular issues, *e.g.*, Iowa R. Civ. P. 185(b), and the exercise of this power may be particularly appropriate in multiparty litigation. *Compare* 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 943, at 187 (1961) ("[t]he trial piecemeal of separate issues in a single suit is not to be the usual course") *with* Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265, 1268 (1959) (separate trials of liability and damages "will eliminate or reduce so-called 'nuisance' cases in which liability is doubtful").

110. *E.g.*, *In re* Yarn Processing Patent Validity Litigation, 472 F. Supp. 174 (S.D. Fla. 1979). In that case the court was confronted with pretrial multidistrict litigation concerning the enforcement of certain patents. A declaratory ruling on a matter of law, which would determine the enforceability of the patents, was sought by some but not all of the plaintiffs. The court ordered that the plaintiffs not participating in the motion could not later assert issue preclusion on the same issue upon remand of their actions to the transferor court for trial, refusing to allow "parties to consolidated pretrial action to *deliberately* stand by while others litigate their interest, in the hope of receiving additional opportunities to relitigate a question if decided adversely." *Id.* at 177 (emphasis added); *accord*, 2 W. Barron & A. Holtzoff, Federal Practice and Procedure, § 572, at 125 (1968 supp.).

111. *See* note 40 *supra;* Montana v. United States, 440 U.S. 149, 162-63 (1979) (issue preclusion applicable to question of law); *see generally* A. Vestal, *supra* note 7, at V-246 to V-251.

112. For a defendant facing consecutive litigation of a common issue, "the best strategy . . . is to attempt to pick the best case possible and try it, before suffering an adverse judgment elsewhere." Crapster, *Collateral Estoppel in the Multi-Plaintiff Products Case*, Iowa Defense Counsel Ass'n, 1980 Annual Meeting, 73, 78.

the practical problems facing the parties and the trial court in multiparty litigation.[113]

113. [T]he relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress, and [a c]ourt ought not to be so far bound and tied by rules . . . as to be compelled to do what will cause injustice in the particular case.

Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).