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## Offensive Collateral Estoppel: Reconciling the Jury Trial Right and Judicial Convenience

Douglas A. Smoot  
*University of Dayton*

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**OFFENSIVE COLLATERAL ESTOPPEL: RECONCILING THE JURY TRIAL RIGHT AND JUDICIAL CONVENIENCE—*Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).**

INTRODUCTION

The interplay of collateral estoppel and the right to a jury trial involves a clash between judicial convenience and constitutional rights.<sup>1</sup> Collateral estoppel has long been an effective tool in guarding against inconsistent rulings<sup>2</sup> and in eliminating expensive and useless litigation.<sup>3</sup> The clash between judicial convenience and the right to a jury trial occurs when a party attempts to use collateral estoppel to prevent litigation of a particular issue although the opposing party has not had an opportunity to try that issue before a jury. The underlying question is whether the procedural technique of collateral estoppel can be employed to deprive a party of his seventh amendment<sup>4</sup> right to a jury trial.

The interaction between judicial convenience and the right to a jury trial was not well-defined in the evolution of common law. Traditionally, courts have favored the defensive use of collateral estoppel for the purpose of judicial economy.<sup>5</sup> Defensive collateral estoppel is employed by a defendant to prevent a plaintiff from retrying issues which he has already litigated in another action. Offensive collateral estoppel occurs when a plaintiff prevents a defendant from litigating previously litigated issues. Although offensive collateral estoppel has often been criticized, a rapidly growing trend now exists allowing and even encouraging the offensive use of collateral estoppel.<sup>6</sup>

In *Parklane Hosiery Co., Inc. v. Shore*,<sup>7</sup> the Supreme Court of the

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1. See *Dimick v. Schiedt*, 293 U.S. 474 (1935).

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

3. See, e.g., *Berner v. British Commonwealth Pac. Airlines*, 346 F.2d 532 (2d Cir. 1965); *Evergreens v. Nunan*, 141 F.2d 927 (2d Cir.), cert. denied, 323 U.S. 720 (1944).

4. "In Suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

5. A good analysis of the offensive and defensive uses of collateral estoppel may be found in Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

6. Offensive collateral estoppel was not favored in *Reardon v. Allen*, 88 N.J. Super. 560, 213 A.2d 26 (1965), and *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). Other courts have allowed the use of offensive collateral estoppel. See, e.g., *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash. & D. Nev. 1962).

7. 439 U.S. 322 (1979).

United States examined whether a party may use offensive collateral estoppel to prevent the relitigation of previously resolved issues of fact, and whether such use would violate a defendant's seventh amendment right to a jury trial. The Court concluded that the proper use of offensive collateral estoppel does not violate the defendant's right to a jury trial. Broad discretion in determining whether to allow the use of offensive collateral estoppel in a particular case, however, was left in the hands of the trial court.

#### FACTS OF THE CASE

Leo Shore filed a class action suit against Parklane Hosiery Co., Inc. in the District Court for the Southern District of New York alleging that the defendant had violated certain sections of the Securities Exchange Act of 1934.<sup>8</sup> The complaint stated that the defendant had issued a materially false and misleading proxy statement concerning a merger. The plaintiff sought damages and rescission of the merger. Before the suit came to trial, however, the Securities and Exchange Commission (SEC) filed suit against the same defendant seeking injunctive relief. The action basically alleged the same complaint of the issuance of a materially false and misleading proxy statement. The SEC action resulted in a finding that the proxy statement was materially false and misleading, and a declaratory judgment was granted in favor of the SEC. That judgment was affirmed by the Court of Appeals for the Second Circuit.<sup>9</sup>

Shore, the plaintiff in the first action, then claimed that, because of the ruling against Parklane Hosiery Co., Inc., in the SEC action, the defendant was collaterally estopped from relitigating the falsity of the proxy statement in Shore's class action. The plaintiff moved for a partial summary judgment. The district court denied the motion holding that the defendant had a seventh amendment right to a jury trial on the character of the proxy statement. The Court of Appeals for the Second Circuit reversed,<sup>10</sup> holding that because the defendant had a fair opportunity to litigate the issues in the prior nonjury trial, he was collaterally estopped from later having the same issues of fact resolved at a jury trial. The Supreme Court of the United States granted certiorari because of an intercircuit conflict.<sup>11</sup>

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8. 15 U.S.C. §§ 78j(b), 78n(a), 78t(a) (1976).

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

10. Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979).

11. A decision of the Court of Appeals for the Fifth Circuit in *Rachal v. Hill*, 435 F.2d 59 (5th Cir.), *cert. denied*, 403 U.S. 904 (1970), was in direct conflict with the decision of the Second Circuit Court of Appeals. *Rachal*, however, has undergone

## DECISION OF THE COURT

The Court concluded that it may be proper for a plaintiff to use collateral estoppel offensively. While the final decision lies in the discretion of the trial court some guidelines were established. The Court developed a two-pronged test to the effect that offensive collateral estoppel should not be allowed when either the plaintiff could have easily joined in the previous action, or the court determines that the estoppel would be unfair to the defendant. In the present case, the plaintiff could not have joined in the previous action because such joinder was prohibited by statute.<sup>12</sup> Furthermore, the application of offensive collateral estoppel was not unfair to the defendant. The Court determined that the defendant had every opportunity to fully and fairly litigate the proxy statement issue in the previous action and that there would be no procedural differences in the second action, such as a change in venue, which would likely produce a different outcome.

In expanding on the two-pronged test, the Court examined the two basic differences between offensive and defensive collateral estoppel. First, offensive collateral estoppel is not as effective as defensive collateral estoppel in promoting judicial economy. Oftentimes, a party can adopt a "wait and see" attitude in regard to a prior proceeding. He might then take advantage of a favorable judgment without being involved in the initial suit.<sup>13</sup> Thus, such party is not motivated to join in the initial suit but can wait and bring his own suit at a later time. Secondly, it may be unfair to require that a defendant, who for various reasons does not vigorously defend the first suit, acquiesce in the second action without an effective day in court.<sup>14</sup>

The Court examined collateral estoppel in light of the doctrine of mutuality of parties. Under the mutuality doctrine, collateral estoppel could only be used against a party when both parties in the suit were bound by the prior judgment. Prior to 1971, the doctrine of mutuality of parties limited the use of collateral estoppel to the parties involved in the initial action.<sup>15</sup> Thus, a party could litigate and lose certain

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strong criticism in recent years. See, e.g., Shapiro & Coquillette, *The Fetish of Jury Trials in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448-49 (1971).

12. 15 U.S.C. § 78u(g) (1976).

13. See, e.g., *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115 (1958); *Reardon v. Allen*, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965).

14. See note 3 *supra*.

15. See, e.g., *Buckeye Powder Co. v. E.I. du Pont de Nemours Powder Co.*, 248 U.S. 55 (1918); *Bigelow v. Old Dominion Copper & Smelting Co.*, 225 U.S. 111 (1912); RESTATEMENT OF JUDGMENTS § 93 (1942).

issues in one action and yet be allowed to relitigate the same issues in a subsequent action if a new party was involved.

Because of strong criticisms, however, the doctrine of mutuality of parties vis-à-vis defensive collateral estoppel was abandoned by the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.<sup>16</sup> The Court concluded that, in an instance of defensive collateral estoppel, the controlling safeguard should be whether the estopped party had a full and fair opportunity to litigate in the previous action<sup>17</sup> rather than requiring mutuality of parties.

The Court in *Shore* then held that the proper use of offensive collateral estoppel does not violate the right to a jury trial. The Court examined the "historical approach" in connection with the seventh amendment.<sup>18</sup> The "historical approach" essentially means that the basic purpose of the seventh amendment was to retain the jury trial right in circumstances in which the right would have existed in 1791.<sup>19</sup> In 1791, mutuality of parties had to exist in order for a court to allow collateral estoppel. Relying on the "historical approach," the defendant claimed that, because the mutuality doctrine is no longer viable, the use of collateral estoppel is no longer proper.

The Court reasoned that to hold as the defendant argued would be too rigid an interpretation of the seventh amendment. Procedural changes in the law do not change the intrinsic substantive bases of the seventh amendment.<sup>20</sup> The Court used several cases as precedent to show that, at common law, there was no right to a jury trial when the facts had been previously determined in an equitable action.<sup>21</sup> Thus, even though there could be no collateral estoppel without mutuality in 1791, the Court concluded that the defendant's basic seventh amend-

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16. 402 U.S. 313 (1971). In *Blonder-Tongue Laboratories, Inc.*, the Court abandoned the concept of mutuality of parties with respect to defensive collateral estoppel as applied to a matter of patent invalidity. But the Court recognized that factors such as crowded dockets might necessitate that a party not be given more than one opportunity to fully and fairly litigate the same issue.

17. "Permitting repeated litigation . . . as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'" *Id.* at 329 (quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)).

18. See note 4 *supra*.

19. *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

20. *Galloway v. United States*, 319 U.S. 372, 390-92 (1943). In *Galloway*, a party argued that a directed verdict was unconstitutional under the seventh amendment. The Court disagreed, holding that only the most fundamental elements of the jury trial right need be preserved.

21. *Katchen v. Landy*, 382 U.S. 323 (1966); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

ment right to a jury trial would not be violated today by allowing the use of collateral estoppel without requiring mutuality.

In his lone dissent, Justice Rehnquist contended that the defendant was denied his right to a jury trial. Relying on *Dimick v. Schiedt*,<sup>22</sup> Rehnquist argued that “[t]o hold otherwise is to rewrite the Seventh Amendment so that a party is guaranteed a jury trial in civil cases unless this Court thinks that a jury trial would be inappropriate.”<sup>23</sup>

#### ANALYSIS

##### A. *The Clash and Possible Solutions*

The Court in *Shore* rightly concluded that the clash between judicial convenience and the right to a jury trial could be resolved in favor of judicial economy in certain circumstances. The task becomes one of reconciling the common law device of collateral estoppel with the constitutional right of a jury trial. Traditionally, when there was a clash between judicial efficiency and a constitutional right, the constitutional right predominated.<sup>24</sup> The defendant in *Shore* argued that the prevailing trend in common law was to no longer require the mutuality doctrine as a prerequisite to the use of collateral estoppel.<sup>25</sup> He argued that this common law trend should give way to the right to a jury trial because a constitutional right should predominate over a trend in the common law. The defendant relied on *Dimick v. Schiedt*<sup>26</sup> where the Court held that to allow collateral estoppel and thereby deny the plaintiff his right to a jury trial would, in effect, change the constitution.<sup>27</sup> The Court in *Shore*, however, reasoned persuasively that

22. 293 U.S. 474 (1935). In *Dimick*, the Court examined whether a plaintiff in a personal injury case was entitled to a new jury determination of damages under the seventh amendment when the first determination was inadequate. The plaintiff refused to accept an award increased by the court. The Court held that even if the defendant had accepted the judge's compromise, the plaintiff was still entitled to a new trial to determine proper damages. The right to trial by jury was sufficient to override the consideration of judicial convenience.

23. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 348 (1979) (Rehnquist, J., dissenting).

24. See *Dimick v. Schiedt*, 293 U.S. 474 (1935).

25. The mutuality requirement began to decline in 1942. *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

26. 293 U.S. 474 (1935). See note 22 *supra*.

27. The Court wrote:

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk v. United States*, 290 U.S. 371 [1933]. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the com-

the defendant had misplaced his reliance on *Dimick*. The Court noted that *Dimick* was more concerned with the second clause<sup>28</sup> of the seventh amendment whereas *Shore* dealt with the first clause<sup>29</sup> of the seventh amendment. Thus, the Court could distinguish *Dimick* from *Shore* by correctly pointing to that difference.<sup>30</sup>

Several arguments exist favoring the Court's holding in *Shore*. One of the benefits of collateral estoppel is that it guards against inconsistent rulings.<sup>31</sup> Another positive effect of collateral estoppel is that it eliminates expensive and useless litigation.<sup>32</sup> The *Shore* Court agreed with the circuit court that Parklane Hosiery Co., Inc. had fully and fairly litigated the false proxy statement issue in a prior proceeding; thus, there were no genuine issues of material fact remaining to be litigated, a necessary condition for application of the seventh amendment.<sup>33</sup> To allow a jury in the present case "would violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the 'just, speedy and inexpensive determination of every action'."<sup>34</sup>

The reasoning of the *Shore* Court was in agreement with other decisions that the use of offensive collateral estoppel is justified by certain considerations of justice and equity.<sup>35</sup> A court must weigh all the facts to arrive at a fair conclusion. For example, a private shareholders' action is often foreseeable after there has been a prior SEC suit.<sup>36</sup> Thus, the defendant is never really placed in an unfair position because he has been put on guard to litigate the first action to the best of his ability. The Court recognized that Parklane Hosiery Co., Inc. was aware of a pending action by *Shore* and thus one could con-

mon law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution.

293 U.S. at 487.

28. "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

29. See note 4 *supra*.

30. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 336 n.23 (1979).

31. Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952).

32. *Id.*

33. Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815, 819 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979).

34. *Id.* at 821 (footnotes omitted) (quoting FED. R. CIV. P. 1).

35. "[N]o one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity." *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 333-34 (1971).

36. Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Ac-*

clude that the company would vigorously defend the SEC suit. It is possible, that in a case similar to *Shore*, the defendant will only seek a jury trial in the second suit because he realizes that collateral estoppel will then be at issue. Indeed, a jury trial in the second action would probably not be advantageous to the normal defendant in a securities action because, as a practical matter, the sympathy of a jury would tend to be with aggrieved shareholders rather than with a large corporation.<sup>37</sup>

One could argue, as did Justice Rehnquist in dissent, that the majority opinion in *Shore* essentially deprives the defendant of a jury trial. Justice Rehnquist could not accept that the denial of something as important as a jury trial could be explained as merely a procedural incident. Trial by jury adds a strong sense of legitimacy to the American system. Jury trials infuse the certitude, fairness, and common sense of the community into the legal environment.<sup>38</sup> There is a strong "public policy in favor of jury trials growing out of the Seventh Amendment."<sup>39</sup> Thus, public policy may dictate choosing a jury trial over judicial convenience. Indeed, the Court in *Dimick v. Schiedt*<sup>40</sup> held that the "right of trial by jury is one of ancient origin, characterized by Blackstone as 'the glory of English law' and 'the most transcendent privilege which any subject can enjoy'."<sup>41</sup>

The *Shore* Court reasoned that as long as there were no procedural changes in the second suit against Parklane Hosiery Co., Inc. then collateral estoppel could be used.<sup>42</sup> One could reasonably argue that the right to a jury trial is a procedural question, and that it would be unfair to deprive the defendant of a jury under the Court's own test. The Court did not explain what procedural changes would limit the use of collateral estoppel. This part of the Court's two-prong test is vague, and the Court should have elaborated exactly what it meant in generally referring to procedural changes. The only explanation the Court offered was a footnote in which the Court stated that "the presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum."<sup>43</sup> The Court's footnote did not adequately address the issue. It is difficult to conceive that an inconvenient forum can be classified as a procedural difference, prohibiting application of collateral estop-

37. Note, *Collateral Estoppel and the Right to a Jury Trial*, 57 NEB. L. REV. 863, 873 (1978).

38. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 498 (1966).

39. *McCook v. Standard Oil Co. of Cal.*, 393 F. Supp. 256, 259 (C.D. Cal. 1975).

40. 293 U.S. 474 (1935).

41. *Id.* at 485 (quoting 3 W. BLACKSTONE, *COMMENTARIES*\* 379).

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



pel, but that the intrinsic right to a jury trial is "basically neutral." The Court has drawn a subtle distinction without fully explaining its reasoning.

The *Shore* Court also reasoned that a purpose behind collateral estoppel is to save time because the plaintiff will not have to prove questions of fact that have already been litigated. But the time saved by avoiding a new trial may be lost by the time required to determine whether or not to allow collateral estoppel. The focus of the issues merely changes. An entirely new trial may be necessary to determine whether the first trial was fairly and fully litigated. Also, time may be wasted if the defendant has to appeal small acceptable judgments to avoid being collaterally estopped in later litigation.<sup>44</sup>

The question arises as to whether the *Shore* Court chose a fair and proper test. There are several possible solutions to the clash between judicial convenience and the constitutional right to a jury trial that the Court could have used. The first one, which was correctly chosen by the Court in *Shore*, is not to allow collateral estoppel in the second action if the plaintiff could have joined in the first suit.<sup>45</sup> Another solution would be to use an advisory jury in the first action<sup>46</sup> to preserve the party's seventh amendment right in the second action. This solution, however, has been strongly criticized because an advisory jury does not satisfy the constitutional right to a jury, and there is no authority for a judge to delegate his powers to such a panel.<sup>47</sup> The Court, therefore, acted responsibly in not using an advisory jury as part of the test. One final solution would be to use factual determinations in the prior SEC case as prima facie evidence in the later action, preserving the right to a jury trial by allowing such evidence to be rebutted.<sup>48</sup> This solution also has problems because it negates the role of collateral estoppel in allowing for a second trial. The purpose of collateral estoppel is to eliminate the need for a second trial on the same issues. This last solution does not eliminate the need for a second trial; it merely makes the issues therein easier to prove.

### B. *Shore and the "Historical Approach"*

The Court in *Shore* has taken steps to weaken the influence of the

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44. *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 767, 327 P.2d 111, 115 (1958).

45. The first suit referred to here was the first case to be decided. *Shore* involved a unique fact situation in that the first suit brought against Parklane Hosiery Co., Inc. was not the first suit decided.

46. FED. R. CIV. P. 39(c).

47. *SEC v. Wills*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,321 (D.D.C. Feb. 11, 1978).

48. *McCook v. Standard Oil Co. of Cal.*, 393 F. Supp. 256, 259-60 (C.D. Cal.

“historical approach” on modern courts. The “historical approach” involves an interpretation of the federal constitutional guarantee that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>49</sup> Courts have determined that the word “preserve” means that a jury trial must be granted in a particular situation if the right to a jury trial existed in such a situation in 1791, the year of the ratification of the seventh amendment.<sup>50</sup> For example, if one had a right to a jury trial in 1791 in a breach of contract action, then he would have a constitutional right to insist upon a jury trial in a similar contract dispute today.<sup>51</sup>

The *Shore* Court relied on recent developments in the common law which have limited the effect of the “historical approach.” For example, in *Colgrove v. Battin*,<sup>52</sup> the Court deviated from the “historical approach” because the matter did not directly concern a substantive issue, but was a procedural incident or detail.<sup>53</sup> New techniques must sometimes be used in a flexible legal system to preserve well-established notions of fairness. Indeed, one court has gone so far as to declare that following the letter of the “historical approach” “is often a tenuous procedure at best.”<sup>54</sup> There no longer exists the need to “freeze the jury trial at its 1791 level.”<sup>55</sup> One cannot expect the writers of the seventh amendment to have anticipated all the legal and social changes in the evolution of two hundred years of law.

*Shore* limits the importance of the “historical approach” in actions involving collateral estoppel, making it less necessary to engage in a 1791 analysis. Thus, courts can more readily look to current trends in the law to determine whether a jury trial is warranted at any particular time or under any particular circumstance. The case is significant in that it allows for the evolution of certain procedural interpretations in the law.

### CONCLUSION

*Shore* provides trial courts with a definitive test for determining when offensive collateral estoppel may fairly be used to achieve

49. U.S. CONST. amend. VII; See notes 18-19 and accompanying text *supra*.

50. See, e.g., *United States v. Wood*, 299 U.S. 123 (1936); *Dimick v. Schiedt*, 293 U.S. 474 (1935); *Parsons v. Bedford*, 28 U.S. 433 (1830).

51. For more background information, see generally F. JAMES, CIVIL PROCEDURE § 11.9 (1965); 1B MOORE'S FEDERAL PRACTICE ¶ 0.441, at 3771-74 (2d ed. 1974).

52. 413 U.S. 149 (1973).

53. *Id.* at 156 (citing *Galloway v. United States*, 319 U.S. 372, 390 (1943)).

54. *Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815, 822 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979).

55. *Id.*

judicial economy. Offensive collateral estoppel, as well as defensive use, is now permissible when the plaintiff could not have easily joined in the previous action and when the court determines that the estoppel would not be unfair to the defendant. The case represents an evolution from strict construction to a more flexible interpretation of the constitution. By allowing the plaintiff, Shore, to collaterally estop Parklane Hosiery Co., Inc. with respect to an essential factual element of Shore's case, the *Shore* decision has, in effect, signalled the death knell for the doctrine of mutuality of parties and weakened strict reliance on the traditional "historical approach" to the seventh amendment. What *Blonder-Tongue Laboratories, Inc.*<sup>56</sup> did to the mutuality doctrine and defensive collateral estoppel, *Shore* has carried over to offensive collateral estoppel. Thus, the doctrine of mutuality of parties now has little significance in the common law regarding offensive or defensive collateral estoppel.

Another implication of *Shore* is that the power of the SEC will be increased. The SEC will have greater leverage over violators because defendants will realize that a settlement will be more advantageous to them than a judgment. Collateral estoppel cannot be used with a settlement whereas it can be utilized after a court decision. The bargaining power of the SEC to induce a settlement will be increased.

The *Shore* Court holds that there is no violation of the seventh amendment if offensive collateral estoppel is allowed where the issues have been fully and fairly litigated in a previous equitable action. While the clash between judicial convenience and the right to a jury trial still exists, the Court has promulgated guidelines to achieve the maximum fairness to the defendant while allowing the plaintiff to take advantage of a previous favorable action. Thus, the ruling in *Shore* stands as a landmark decision in the proper use of offensive collateral estoppel.

*Douglas A. Smoot*

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56. See note 16 *supra*.