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NOTE

REDUCING THE UNFAIR EFFECTS OF NONMUTUAL ISSUE PRECLUSION THROUGH DAMAGES LIMITS

Steven P. Nonkes†

INTRODUCTION

More than sixty-five years after *Bernhard v. Bank of America National Trust & Savings Ass'n*,¹ nonmutual issue preclusion is still not universally accepted. Despite acceptance of the *Bernhard* doctrine by federal courts, most state courts, and the drafters of the *Restatement (Second) of Judgments*, a sizable number of skeptics are still unconvinced, and serious concerns over the fairness of nonmutuality remain. Courts and commentators have advanced various proposals for limiting the negative effects of nonmutuality while maintaining the perceived efficiency gains that nonmutual issue preclusion provides. None of these proposals, however, have been widely accepted. This Note proposes a method of alleviating the most serious fairness concerns while generally maintaining the benefits of nonmutuality: adoption of per se rules limiting the amount recoverable in damages by a plaintiff who relies upon offensive nonmutual issue preclusion to establish an element of the cause of action.

Issue preclusion² is a component of res judicata law,³ whereby any finding by a court⁴ is binding upon the litigants and their

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¹ 122 P.2d 892 (Cal. 1942).

² Issue preclusion is also correctly referred to as collateral estoppel. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. b (1982). The terms "issue preclusion" and "collateral estoppel" are used interchangeably herein.

³ Res judicata law can be generally divided between claim preclusion and issue preclusion. See *Jarosz v. Palmer*, 766 N.E.2d 482, 487 (Mass. 2002). Claim preclusion can be further divided into the doctrines of merger and bar: merger prevents a successful litigant from pursuing the same claim and receiving duplicate awards; bar prevents an unsuccessful litigant from relitigating the claim. See *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985).

⁴ Typically, issue preclusion requires that (1) the issues be identical; (2) the issue has been actually litigated; (3) the issue has been decided; and (4) the issue was necessary to the prior judgment. See ABA SECTION OF ANTITRUST LAW, BUSINESS TORTS AND UNFAIR COMPETITION HANDBOOK 367 (2d ed. 2006); see, e.g., *Allmerica Fin. Corp. v. Certain Underwrit-*

privies⁵ in subsequent litigation.⁶ Issue preclusion operates to prevent relitigation of an issue even if the underlying claim between the parties is different from that in the first suit.⁷ It conserves judicial resources by precluding the relitigation of issues that have already been decided by a court.⁸ It “is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again.”⁹ Traditionally, issue preclusion requires mutuality—both the party asserting issue preclusion and the party against whom issue preclusion is asserted must have been parties to the prior action.¹⁰ Over time, criticism of the mutuality requirement grew, primarily due to concerns for efficient use of judicial resources.¹¹ Today, many courts have carved out an exception to the requirement of mutuality whereby one who was not a party to the prior litigation may rely upon its findings to bind an opponent who was a party to the prior litigation.¹² Primary reasons for doing so include judicial efficiency and assurance of consistent results.¹³ Allowing issue preclusion in the absence of mutuality

ers at Lloyd’s, London, 871 N.E.2d 418, 433 n.27 (Mass. 2007) (“Collateral estoppel only applies where an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.” (internal quotation marks omitted)); Rille *ex rel.* Estate of Rille v. Physicians Ins. Co., 728 N.W.2d 693, 702 n.13 (Wis. 2007). The *Restatement (Second) of Judgments* takes the position that the issue must have been “actually litigated” and that, to have preclusive effect, findings must have been “essential to the judgment.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); see Allan D. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 466–97 (1981).

⁵ See *Gramatan Home Investors Corp. v. Lopez*, 386 N.E.2d 1328, 1332 (N.Y. 1979).

⁶ See *id.* at 1331 (“Collateral estoppel, together with its related principles, merger and bar, is but a component of the broader doctrine of *res judicata* which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.”).

⁷ *Jarosz*, 766 N.E.2d at 487–88 (“[T]he determination is conclusive in a subsequent action between the parties whether on the same or *different claim*.” (emphasis added) (quoting *Cousineau v. Laramee*, 448 N.E.2d 756, 758 n.4 (Mass. 1983))).

⁸ See *Gramatan Home Investors Corp.*, 386 N.E.2d at 1331 (noting that issue preclusion is “so necessary to conserve judicial resources by discouraging redundant litigation”).

⁹ *Id.*

¹⁰ See 1 A.C. FREEMAN & EDWARD W. TUTTLE, A TREATISE OF THE LAW OF JUDGMENTS § 428 (5th ed. 1925) (“No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way.”); Lewis A. Grossman, *The Story of Parklane: The “Litigation Crisis” and the Efficiency Imperative*, in CIVIL PROCEDURE STORIES 387, 390–91 (Kevin M. Clermont ed., 2004).

¹¹ See *infra* Part II.

¹² See *infra* notes 45, 51, 59, 61 and accompanying text.

¹³ See Grossman, *supra* note 10, at 390 (“Legal commentators have traditionally advanced three main arguments to justify *res judicata*: ‘First, it protects litigants from harassment through the litigation of the same claim or issue. Second, the principle helps to preserve the prestige of the courts by avoiding inconsistent judgments A third end served by preclusion . . . is the saving of the courts’ time by avoiding repetition of litiga-

raises serious fairness concerns, however, and it may distort the litigation process by providing incentives for litigants to overlitigate, lulling them into underlitigating, or causing them to shift the timing of their suits. Paradoxically, in multiplaintiff scenarios, it may even result in an increase in litigation by giving plaintiffs an incentive to avoid joinder.¹⁴ Commentators have proposed various methods for limiting the negative consequences of nonmutuality while maintaining the benefits it provides,¹⁵ and courts have created exceptions to nonmutuality, generally adopting a flexible approach.¹⁶ This has led to a considerable degree of uncertainty as to whether nonmutual issue preclusion will apply in a given case.¹⁷

This Note proposes another method of maintaining the efficiency gains that can result from nonmutual issue preclusion while limiting the worst of the unfair effects of nonmutuality and giving greater predictability to whether nonmutual issue preclusion will apply: limiting the amount of damages that a plaintiff who relies on nonmutual issue preclusion may recover.

Part I of this Note outlines the traditional requirement of mutuality for issue preclusion. Part II gives an overview of the “modern trend” away from a requirement of mutuality,¹⁸ and then outlines some of the principal criticisms of nonmutuality. Part III examines

tion.” (alteration in original) (quoting Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968)); see, e.g., Schwartz v. Pub. Adm’r, 246 N.E.2d 725, 731 (N.Y. 1969) (“[I]t is difficult to tolerate a condition where, on relatively the same set of facts, one fact-finder, . . . may hold the driver liable, while the other [fact-finder] exonerates him.”).

¹⁴ Because later plaintiffs would be able to benefit from prior litigation with an earlier plaintiff without danger of being bound by issues that were decided, “[p]laintiffs who might otherwise join together, or intervene, in a single lawsuit under modern permissive joinder rules would have incentive to sue separately and to hang back awaiting another plaintiff’s favorable result.” ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 176 (2001). Not only will this foster repetitive litigation, but it may also cause suits to be protracted, as plaintiffs may attempt to delay progress in their own action in hopes that another plaintiff will achieve a favorable result before their own suit concludes.

¹⁵ See *infra* Part III.B.

¹⁶ See CASAD & CLERMONT, *supra* note 14, at 176–79. For example, some courts that have abandoned mutuality have followed the approach of the *Restatement (Second) of Judgments*, which states that nonmutual issue preclusion is appropriate “unless [the party to be precluded] lacked a full and fair opportunity to litigate the issue in the initial action or unless other special circumstances justify relitigation.” *Id.* at 174 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982)). The Second Restatement lists some specific circumstances in which nonmutuality should not apply, but the list also includes when “[o]ther compelling circumstances make it appropriate that the party be permitted to relitigate the issue.” RESTATEMENT (SECOND) OF JUDGMENTS § 29(8) (1982).

¹⁷ Cf. CASAD & CLERMONT, *supra* note 14, at 177–79. This uncertainty undermines the efficiency gains that nonmutual issue preclusion is intended to produce. See *infra* Part III.A.3.

¹⁸ *Norfolk & W. Ry. v. Bailey Lumber Co.*, 272 S.E.2d 217, 219 (Va. 1980) (refusing to follow the “modern trend” of abrogating the requirement of mutuality).

some proposed reforms, short of abrogating nonmutuality, that scholars have put forth to limit the negative effects of nonmutual issue preclusion.

Part IV examines the potential effects of limits on damages recoverable in cases in which a plaintiff relies upon offensive nonmutual issue preclusion to establish an element of the cause of action. Part IV analyzes three regimes of damages limits: a fixed cap on the amount of damages that a plaintiff can recover if the plaintiff relies on nonmutual issue preclusion to establish an element of the claim; a system whereby a plaintiff relying on nonmutual issue preclusion cannot recover more in damages than did the plaintiff in the prior case on which the present plaintiff relies to establish any element of the claim; and a system whereby damages in any case where the plaintiff relies on nonmutual issue preclusion to establish any element of the claim are limited to a fraction of the damages awarded in the prior case on which the present plaintiff relies for issue preclusion *or* the most recent preceding case that also relied on the original case as a basis for issue preclusion.

I

BACKGROUND—TRADITIONAL REQUIREMENT OF MUTUALITY

Traditionally, issue preclusion required mutuality—both the party asserting issue preclusion and the party against whom issue preclusion was being asserted must have been parties to the prior action.¹⁹ Additionally, those in privity with the parties could be bound by any findings necessary to the result.²⁰

Over time, courts developed well-defined exceptions to the requirement of mutuality where the relationship between the prior litigant and the party seeking to use nonmutual issue preclusion would make it unjust for a court to refuse preclusion.²¹ Where multiple parties would be liable for the same act, a judgment that one of those

¹⁹ See 1 FREEMAN & TUTTLE, *supra* note 10, § 428; Grossman, *supra* note 10, at 390–91.

²⁰ RESTATEMENT OF JUDGMENTS § 93 (1942); see also Gramatan Home Investors Corp. v. Lopez, 386 N.E.2d 1328, 1332 (N.Y. 1979) (“[C]ollateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well.”).

²¹ See 1 FREEMAN & TUTTLE, *supra* note 10, § 429 (“Notwithstanding the self-evident justice and propriety of the rule that estoppels must be mutual, and that no man shall bind another by an adjudication which he himself is at liberty to disregard, instances are not rare where the rule has been denied or overlooked by courts and judges The doctrine of mutuality has been held inapplicable in certain classes of cases where persons not parties to a judgment have been allowed its benefit apparently on the theory that they were ‘so connected in interest or liability with the parties that the judgments when recovered could be regarded as virtually recovered for them.’” (quoting Hill v. Bain, 23 A. 44, 45 (R.I. 1885))).

parties was not liable could be used by the other parties.²² Another traditional exception existed where the liability of one party arose solely from the conduct of another.²³ Joint obligees, absent fraud or collusion, would be bound by a judgment against a co-obligee.²⁴ A judgment determining the question of insurance coverage has traditionally been preclusive in a subsequent action by another injured person against the insurer.²⁵ Yet another traditional exception to the requirement of mutuality arose when a defendant in the subsequent litigation had a right of indemnity against a party in the prior litigation.²⁶ Similarly, a judgment in favor of a third party against a servant might establish a limit to the damages possible in a subsequent, related suit against the master.²⁷ But some courts allowed an exception to the general requirement of mutuality only for defensive uses of is-

²² RESTATEMENT OF JUDGMENTS § 100 (1942).

²³ *Id.* § 99 (“A valid judgment on the merits and not based on a personal defense, in favor of a person charged with the commission of a tort or a breach of contract, bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely upon the existence of a tort or breach of contract by such person, whether or not the other person has a right of indemnity.”); *see, e.g.*, *Christianson v. Hager*, 64 N.W.2d 35 (Minn. 1954) (giving preclusive effect to a prior judgment that no assault had occurred in a subsequent suit against the proprietor of the ballpark where the assault was alleged to have taken place).

²⁴ RESTATEMENT OF JUDGMENTS § 102 (1942); *see, e.g.*, *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191 (2d Cir. 1970).

²⁵ An example is *Wright v. Schick*, 16 N.E.2d 321 (Ohio 1938). After Althea Wright and Bertie Wright were injured in an automobile accident with Schick, Althea and Bertie sued separately. *Id.* at 323. At the trial of Althea’s case, a jury found that Schick’s liability insurance was in force at the time of the accident. *Id.* at 323. The Ohio Supreme Court ruled that the trial court was correct in giving the determination of insurance coverage preclusive effect in the subsequent trial over Bertie’s claim. *Id.* at 327.

²⁶ This situation commonly arose when a third party had a claim against a servant, but the third party could also pursue the same claim against the master. *See* RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 749 (9th ed. 2007). For example, if the third party sued the master (which was likely because the master tended to have more money), then the master would have a right of indemnification against the servant. If the third party first sued the servant, and the defendant servant prevailed on the issue of his or her own liability, then courts would allow the master, in subsequent litigation, to use the prior holding in the servant’s favor to preclude the third party from relitigating the issue of the servant’s liability. Because the master would have the right of indemnity against the servant, a victory by the third party against the master would essentially have undone the servant’s victory in the first suit. Therefore, most courts permitted an exception to the mutuality requirement and allowed the master, who was not a party to the prior litigation, to use the prior judgment to estop the third party from relitigating the issue of liability. *See* RESTATEMENT OF JUDGMENTS § 96(1)(a) (1942); *see, e.g.*, *Laffoon v. Waterman S.S. Corp.*, 111 F. Supp. 923, 928 (S.D.N.Y. 1953). If the third party sued the master/indemnitee first, however, the judgment would not have preclusive effect in a subsequent suit against the servant/indemnitor. *See* RESTATEMENT OF JUDGMENTS § 96(2) (1942); *see, e.g.*, *Makariw v. Rinard*, 336 F.2d 333, 335 (3d Cir. 1964).

²⁷ *See* RESTATEMENT OF JUDGMENTS § 96(1)(b) (1942); FIELD ET AL., *supra* note 26, at 749 n.a. (“[A] judgment for *T* against *S* for \$200 fixed that as the maximum liability of *M* if *T*, not having satisfied his judgment against *S*, sued *M*.” (citing *Pinnix v. Griffin*, 20 S.E.2d 366 (N.C. 1942))).

sue preclusion,²⁸ reasoning that only in this context would this secondary liability rationale be implicated.²⁹

II

THE DECLINE OF THE MUTUALITY REQUIREMENT

The doctrine of mutuality has long been criticized.³⁰ Indeed, Jeremy Bentham noted:

There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not.³¹

Over time, criticism of the traditional requirement of mutuality grew.³² These arguments focused on the perceived unfairness of allowing a party who lost in a prior litigation to relitigate the same issue against a different party.³³ Even so, support remained firm for the proposition that the one *against* whom issue preclusion could be asserted must have been party to the prior action.³⁴

²⁸ Nonmutual collateral estoppel—as well as collateral estoppel generally—can be categorized as either offensive or defensive. See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289–322 (1957); see also James L. Stengel & Laurie Strauch Weiss, *Issue and Claim Preclusion*, in 1 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 14:25 (Robert L. Haig ed., 2d ed. 2005) (defining offensive and defensive uses of issue preclusion). Offensive nonmutual collateral estoppel (or issue preclusion), as its name suggests, arises when a plaintiff who was not a party to the prior litigation seeks to use a finding from the prior litigation against the present defendant. See *United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984). On the other hand, defensive nonmutual collateral estoppel (or issue preclusion) arises when a defendant seeks to preclude a plaintiff from relitigating an issue that was decided against the present plaintiff in a prior action to which the present defendant was not a party. See *id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979)).

²⁹ See *CASAD & CLERMONT*, *supra* note 14, at 172 (citing, as an example, *Elder v. N.Y. & Pa. Motor Express, Inc.*, 31 N.E.2d 188 (N.Y. 1940)).

³⁰ See Pennington v. Snow, 471 P.2d 370, 376 (Alaska 1970); Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1461 (1968).

³¹ 3 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 579 (1827).

³² Cf. Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 303 (1929) (“It may be argued that better administration of law would result if the rule simply demanded that the one against whom a former judgment is used shall have been a party to that judgment, or shall have been in privity with one who was a party, without demanding that the one seeking to use the judgment shall likewise be so situated.” (emphasis omitted)).

³³ See, e.g., *id.* (“[A] litigant, having lost a battle on questions of fact, is permitted to reopen all the old issues in a second action, provided he has a new adversary not in a position to set up the former judgment as determining those matters.”).

³⁴ Cf., e.g., *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971) (“Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial. . . . [as where] a person who is not a party but who controls an action”); ANN E. WOODLEY, *LITIGATING IN FEDERAL COURT: A GUIDE TO THE RULES* 107

In 1934, a Delaware court adopted a broad fairness exception to mutuality, stating:

[A] plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one.³⁵

In *Bernhard v. Bank of America National Trust & Savings Ass'n*³⁶ the California Supreme Court announced a broad doctrinal shift toward nonmutual collateral estoppel. A probate court had previously decided that contested money had actually been given by the decedent to the executor of her estate as a gift.³⁷ *Bernhard*, appointed executrix after discharge of the prior executor, brought a civil suit against the bank that had given the money to the prior executor, alleging that the bank had wrongly distributed the money.³⁸ The California Supreme Court found that, despite not having been a party to the prior action in probate court, the present executrix of the estate could be bound by the finding of the probate court that the contested money was a gift to the prior executor.³⁹ Because the bank would have had a right of indemnity against the prior executor, this situation would have fit within the traditional indemnitor-indemnitee exception.⁴⁰ Thus, the statements about nonmutual collateral estoppel in the opinion were technically dicta, albeit highly influential dicta.⁴¹

As of 1965 about a dozen states had embraced *Bernhard*, according to a tally by Professor Brainerd Currie, once a critic of the "*Bernhard* doctrine."⁴² Professor Currie observed that the number of adherents to *Bernhard* would have been larger, but many states had not had occasion to consider the issue since *Bernhard* and many cases

(1999) (defining use of nonmutual issue preclusion against a stranger to the prior action as a violation of due process).

³⁵ *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 263 (Del. Super. Ct. 1934).

³⁶ 122 P.2d 892 (Cal. 1942).

³⁷ *Id.* at 893.

³⁸ *Id.*

³⁹ *Id.* at 895–96.

⁴⁰ See *CASAD & CLERMONT*, *supra* note 14, at 175.

⁴¹ See *id.* (noting that Justice Traynor's *Bernhard* opinion "constituted dicta, which perhaps explains Justice Traynor's failure to qualify carefully all the wide implications of his influential opinion").

⁴² Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 27, 38–46 (1965).

that came before state high courts fell into the traditional exceptions.⁴³

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,⁴⁴ the Supreme Court held that defensive use of nonmutual collateral estoppel is possible in federal courts.⁴⁵ The Foundation sued a customer of Blonder-Tongue, alleging patent infringement.⁴⁶ In a previous suit against a different party, however, the patent claim that Blonder-Tongue's customer had allegedly infringed had been found invalid.⁴⁷ The Supreme Court determined that the Foundation was estopped from asserting infringement⁴⁸ because it had had a "full and fair opportunity"⁴⁹ to litigate the issue of validity of the patent claim in the prior suit.

In *Parklane Hosiery Co. v. Shore*,⁵⁰ the Supreme Court held that even offensive use of nonmutual collateral estoppel is possible in federal courts.⁵¹ The Court further held that, even when the prior adjudication did not allow for a jury, the Seventh Amendment right to a jury trial in civil suits⁵² was not necessarily violated by application of nonmutual collateral estoppel, even though the party would otherwise have had a right to have a jury in the present action.⁵³ Shore, a stockholder, sued Parklane, alleging that it had issued false financial statements.⁵⁴ While that action was pending, the SEC sued Parklane and won declaratory judgment against the company.⁵⁵ Shore then moved for partial summary judgment, asserting that Parklane was estopped from relitigating the issues that had been decided in the SEC litigation.⁵⁶ The Supreme Court held that Parklane could be subject to nonmutual collateral estoppel, stating that "the preferable approach for dealing with [problems arising from nonmutuality] in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be

⁴³ *Id.* at 27.

⁴⁴ 402 U.S. 313 (1971).

⁴⁵ *See id.* at 350.

⁴⁶ *Id.* at 315-16.

⁴⁷ *Id.* at 314-15.

⁴⁸ *Id.* at 350.

⁴⁹ *Id.* at 347.

⁵⁰ 439 U.S. 322 (1979).

⁵¹ *See id.* at 331.

⁵² U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

⁵³ *Parklane*, 439 U.S. at 337.

⁵⁴ *Id.* at 324.

⁵⁵ *Id.* at 324-25.

⁵⁶ *Id.* at 325.

applied.”⁵⁷ The Court mentioned several arguments against offensive use of nonmutuality, but concluded that they did not apply in this case because Shore could not have joined the prior action, the company had ample incentive to litigate fully against the SEC, civil suits were not only foreseeable but were actually in progress when the SEC litigation took place, and the procedural differences—primarily a jury—would not have yielded a different result.⁵⁸

Today, most states have abandoned mutuality for both defensive and offensive applications of collateral estoppel.⁵⁹ A sizable minority,

⁵⁷ *Id.* at 331.

⁵⁸ *Id.* at 329–32.

⁵⁹ See, e.g., *Wetzel v. Ariz. State Real Estate Dep't*, 727 P.2d 825, 829 (Ariz. Ct. App. 1986) (approving of offensive nonmutual collateral estoppel); *Johnson v. Union Pac. R.R.*, 104 S.W.3d 745, 751 (Ark. 2003) (stating that offensive collateral estoppel should be permissible, but only in limited circumstances); *Bassett v. State Bd. of Dental Exam'rs*, 727 P.2d 864, 866 (Colo. Ct. App. 1986) (allowing offensive use of nonmutual collateral estoppel); *Aetna Cas. & Sur. Co. v. Jones*, 596 A.2d 414, 422–23 (Conn. 1991) (“[M]utuality of parties is no longer required to invoke collateral estoppel.”); *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995); *Mastrangelo v. Sandstrom, Inc.*, 55 P.3d 298, 303 (Idaho 2002); *Herzog v. Lexington Twp.*, 657 N.E.2d 926, 930 (Ill. 1995); *Tofany v. NBS Imaging Sys., Inc.*, 616 N.E.2d 1034, 1038 (Ind. 1993) (allowing offensive use of nonmutual collateral estoppel); *Hossler v. Barry*, 403 A.2d 762, 766 (Me. 1979) (“[T]he doctrine of mutuality of estoppel should no longer govern the application of collateral estoppel in the courts of this State.”); *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 907 (Minn. 1996) (allowing offensive use); *In re Caranchini*, 956 S.W.2d 910, 914 (Mo. 1997) (same); *Cover v. Platte Valley Pub. Power & Irrigation Dist.*, 75 N.W.2d 661, 668 (Neb. 1956) (same); *Cutter v. Town of Durham*, 411 A.2d 1120, 1121 (N.H. 1980) (same); *State v. Gonzalez*, 380 A.2d 1128, 1136 (N.J. 1977) (allowing a criminal defendant to rely upon nonmutual collateral estoppel to suppress evidence that a coindictor had successfully moved to suppress in a separate hearing); *Silva v. State*, 745 P.2d 380, 384 (N.M. 1987) (“[W]e hold that the doctrine of defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; and that the doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action.”); *Koch v. Consol. Edison Co. of N.Y.*, 468 N.E.2d 1, 6 (N.Y. 1984) (allowing offensive use of nonmutual issue preclusion); *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1188 (Or. 1976) (“[W]e discarded the requirement of mutuality as a prerequisite to collateral estoppel . . .” (citing *Bahler v. Fletcher*, 474 P.2d 329, 338 (Or. 1970))); *In re Estate of Ellis*, 333 A.2d 728, 730–31 (Pa. 1975) (allowing offensive nonmutual collateral estoppel); *Doe v. Doe*, 551 S.E.2d 257, 259 (S.C. 2001) (same); *Scott v. City of Newport*, 857 A.2d 317, 321 (Vt. 2004) (“[W]e have abandoned the doctrine of mutuality . . .”); *United Pac. Ins. Co. v. Boyd*, 661 P.2d 987, 990 (Wash. Ct. App. 1983) (allowing offensive nonmutual collateral estoppel); *State ex rel. Leach v. Schlaegel*, 447 S.E.2d 1, 3–4 (W. Va. 1994) (allowing offensive nonmutual collateral estoppel in a civil suit where a matter had been decided in a prior criminal proceeding); *Sumpter ex rel. Michelle T. v. Crozier*, 495 N.W.2d 327, 335 (Wis. 1993) (concluding that both offensive and defensive uses are permissible); *Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper*, 743 P.2d 857, 864–65 (Wyo. 1987) (allowing defensive use of nonmutual collateral estoppel but strongly indicating in dicta that it would follow *Bernhard* and *Parklane*).

Massachusetts generally allows offensive nonmutual collateral estoppel. See, e.g., *Coastal Oil New Eng., Inc. v. Citizens Fuels Corp.*, 769 N.E.2d 309, 312 (Mass. App. Ct. 2002); see also, e.g., *Bar Counsel v. Bd. of Bar Overseers*, 647 N.E.2d 1182, 1185 (Mass.

however, retain the traditional mutuality requirement.⁶⁰ Still others allow only defensive use of nonmutual collateral estoppel.⁶¹

1995) (“We see no basis for withholding preclusive effect of civil findings in a subsequent disciplinary action against an attorney. . . . We conclude that the offensive use of collateral estoppel is appropriate in bar disciplinary proceedings.”); *Aetna Cas. & Sur. Co. v. Niziolek*, 481 N.E.2d 1356, 1362 (Mass. 1985) (allowing offensive collateral estoppel in a civil proceeding based upon a guilty verdict in a prior criminal proceeding). *But cf. Niziolek*, 481 N.E.2d at 1362 (denying issue-preclusive effect to a guilty plea, but stating that it could be used as evidence in the subsequent civil proceeding). Massachusetts allows only defensive nonmutual collateral estoppel when the prior adjudication was before an administrative agency. *See, e.g., Tuper v. N. Adams Ambulance Serv., Inc.*, 697 N.E.2d 983, 985–86 (Mass. 1998).

⁶⁰ *See, e.g., Redmond v. Bankester*, 757 So. 2d 1145, 1151 n.2 (Ala. 1999) (requiring mutuality of collateral estoppel); *Cook Inlet Keeper v. State*, 46 P.3d 957, 966 (Alaska 2002) (same); *Dep’t of Human Res. v. Fleeman*, 439 S.E.2d 474, 475 (Ga. 1994) (same); *Regency Park, LP v. City of Topeka*, 981 P.2d 256, 265 (Kan. 1999) (same); *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992) (“For purposes of both res judicata and collateral estoppel in this state, only parties or their privies may take advantage of or be bound by the former judgment.”); *Scales v. Lewis*, 541 S.E.2d 899, 901 (Va. 2001) (“[T]here also must be ‘mutuality,’ *i.e.*, a litigant cannot invoke collateral estoppel unless he would have been bound had the litigation of the issue in the prior action reached the opposite result.” (quoting *Angstadt v. Atl. Mut. Ins. Co.*, 457 S.E.2d 86, 87 (Va. 1995))).

Florida has allowed only a narrow exception to the mutuality requirement: “[W]here a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he has received the effective assistance of counsel, then the defendant/attorney in a subsequent civil malpractice action brought by the criminal defendant may defensively assert collateral estoppel.” *Zeidwig v. Ward*, 548 So. 2d 209, 214 (Fla. 1989). The Florida Supreme Court has emphasized the narrow scope of that ruling. *See, e.g., E.C. v. Katz*, 731 So. 2d 1268, 1270 (Fla. 1999); *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). Conversely, there is a federal requirement that, if winning on a § 1983 claim would “render a conviction or sentence invalid,” then before pursuing the § 1983 claim in federal court, the “§ 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994). This federal rule forecloses the possibility that the § 1983 plaintiff would later use the results of the § 1983 litigation for issue-preclusion purposes in an attempt to overturn the criminal conviction or sentence.

⁶¹ *See, e.g., Chambers v. Ohio Dep’t of Human Servs.*, 145 F.3d 793, 801 n.14 (6th Cir. 1998) (“In Ohio, the general rule is that mutuality of parties is a prerequisite to the offensive use of issue preclusion.” (citing *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978 (Ohio 1983))); *Doe v. Doe*, 52 P.3d 255, 264–65 (Haw. 2002); *Penn. v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 399 (Iowa 1998) (“[I]ssue preclusion does not require mutuality of parties if it is being invoked defensively against a party so connected to the former action as to be bound by that resolution.” (citing *Brown v. Kassouf*, 558 N.W.2d 161, 163 (Iowa 1997))); *Rourke v. Amchem Prods., Inc.*, 863 A.2d 926, 938 (Md. 2004) (in dictum) (“[W]e have yet to formally embrace *offensive* non-mutual collateral estoppel.”); *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 852 (Mich. 2004) (adopting defensive nonmutual collateral estoppel); *Thomas M. McInnis & Assocs., Inc. v. Hall*, 349 S.E.2d 552, 560 (N.C. 1986) (allowing only defensive nonmutual collateral estoppel); *Trinity Indus., Inc. v. McKinnon Bridge Co.*, 77 S.W.3d 159, 185 (Tenn. Ct. App. 2001) (“In Tennessee the offensive use of collateral estoppel requires that the parties be identical in both actions. Without saying so specifically, however, Tennessee has not required party mutuality in applying defensive collateral estoppel.” (citations omitted)).

III

MODERN ANALYSES OF NONMUTUAL ISSUE PRECLUSION

A. Modern Criticisms of Nonmutual Preclusion

In *Parklane*, the Supreme Court laid out many of the principal criticisms of offensive use of nonmutual issue preclusion: it “does not promote judicial economy in the same manner as defensive use does”;⁶² it may be unfair to a defendant because, “[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable”;⁶³ it may be unfair to allow a plaintiff to rely on a judgment that was inconsistent with prior judgments in favor of the defendant;⁶⁴ it may be unfair to apply offensive collateral estoppel “where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.”⁶⁵ An additional, related criticism is that unfairness is compounded if the result of the first litigation was incorrect.⁶⁶

1. *Fairness*

The most obvious implication of nonmutual collateral estoppel is that, when offensive use is possible, plaintiffs enjoy an increased likelihood of recovery.⁶⁷ Subsequent plaintiffs may benefit from a victory

⁶² *Parklane*, 439 U.S. at 329.

⁶³ *Id.* at 330.

⁶⁴ *Id.*

⁶⁵ *Id.* at 331. The *Restatement (Second) of Judgments* reflects consideration of these fairness concerns by providing for an exception to its general rule of nonmutuality if a party “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.” *RESTATEMENT (SECOND) OF JUDGMENTS* § 29 (1982). To illustrate these circumstances, the Second Restatement includes a number of ambiguous examples. *See id.* §§ 28(2)–(5), 29(1)–(8). *Parklane* involved a situation in which there had been no jury right, and thus no jury trial, in the prior action, which the SEC had brought seeking only declaratory judgment. Thus, in *Parklane*, the Supreme Court determined that allowing nonmutual collateral estoppel did not violate the Seventh Amendment right to a jury trial, even though the defendant was never able to have its case heard by a jury. *See Parklane*, 439 U.S. at 335–37. Some courts go so far as to allow nonmutual issue preclusion based on judicially approved arbitration. *See, e.g., Miles v. Aetna Cas. & Sur. Co.*, 589 N.E.2d 314, 317 (Mass. 1992) (“An arbitration decision can have preclusive effect in a subsequent suit between the same parties or their privies.”); *cf. Mark Lightner, Comment, Pre-Hearing Discovery in Arbitration and Its Impact on the Application of Nonmutual Offensive Collateral Estoppel*, 38 *ARIZ. ST. L.J.* 1111, 1117–18, 1126–38 (2006) (arguing that the procedural limitations typical in arbitration warrant caution in allowing it to be a basis for issue preclusion).

⁶⁶ *See* Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 *REV. LITIG.* 391, 409–15 (1993).

⁶⁷ *See* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 *MICH. L. REV.* 612, 641–45 (1978) (demonstrating that in multiplaintiff litigation, non-mutual collateral estoppel provides a greater expected total award due to the increased probability of a favorable finding if the suits are brought in series); *cf. Waggoner, supra*

by a prior plaintiff, but their chances of success suffer little prejudice when the defendant successfully defends against a prior plaintiff.⁶⁸ Moreover, should the plaintiffs, as a group, decide to sue in seriatim, “[t]he first plaintiff might very well be selected for being the most sympathetic of all potential plaintiffs.”⁶⁹ The ability of earlier plaintiffs, as plaintiffs, to select the forum compounds the advantage to subsequent plaintiffs.⁷⁰

Forum selection becomes especially important not only because of the tactical advantages that various courts might offer, but also because the *res judicata* law of the rendering forum determines the issue-preclusive effects of a judgment.⁷¹ Plaintiffs in early suits can

note 66 (proposing requiring mutuality for collateral estoppel, largely out of fairness concerns, but also proposing that *res judicata* should not require mutuality—arguing that a plaintiff should not be able to pursue claims against defendants one at a time but rather should be forced to choose between waiving claims or proceeding against all defendants with all claims arising from a single transaction). Other commentators, in examining pressure on litigants to settle, have noted the same effect. See, e.g., Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21, 45 (noting that as a result of nonmutual collateral estoppel, “[a] victory for a given plaintiff would then mean a victory (as to common issues) for the plaintiffs in all subsequent actions”); Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 HARV. L. REV. 1940, 1941 (1992) [hereinafter *Economic Analysis*] (noting that “a defendant who obtains an adverse judgment is bound by that judgment in all future suits against him” and that “a later plaintiff may bind the defendant to a judgment that may itself be inconsistent with prior judgments in the defendant’s favor”).

⁶⁸ See Hay, *supra* note 67, at 45; Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 454 (1960); *Economic Analysis*, *supra* note 67, at 1941–42. However, successive litigation may afford the common defendant an opportunity to hone its litigation strategy.

⁶⁹ CASAD & CLERMONT, *supra* note 14, at 176.

⁷⁰ See *id.*

⁷¹ See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); 28 U.S.C. § 1738 (2006) (“[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State”); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (holding that a federal court hearing a § 1983 claim must give a state court judgment from a criminal trial the same collateral estoppel effect that the state would apply and stating that “Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so” (citing 28 U.S.C. § 1738)); *Rourke v. Amchem Prods., Inc.*, 863 A.2d 926, 935 (Md. 2004) (“[I]n determining the preclusive effect to be given to the judgment of a State court, the claim and issue preclusion rules of the State that rendered the judgment must govern.” (citing *Bd. of Pub. Works v. Columbia Coll.*, 84 U.S. 521 (1873))); see also *Columbia Coll.*, 84 U.S. at 529 (“No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered.”); cf. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–09 (2001) (stating that the *claim-preclusive* effects of a judgment rendered by federal courts sitting in diversity are determined by federal common law, and deciding that, as a matter of federal common law, a dismissal on the merits by a federal court sitting in diversity will generally have the same claim-preclusive effects as under “the law that would be applied by state courts in the State in which the federal diversity court sits”). But cf. *Donnell v. City of Cedar Rapids*, 437 F. Supp. 2d 904, 922 (N.D. Iowa 2006) (denying issue-preclusive effect

choose fora that give their judgments issue-preclusive effects. Later plaintiffs may therefore induce early plaintiffs to select fora with liberal nonmutual issue-preclusive effects, and these later plaintiffs have no danger of suffering the consequences of this choice.⁷²

A defendant facing multiple plaintiffs may feel increased pressure to settle because of the possibility that subsequent plaintiffs could use an adverse finding.⁷³ In a typical dispute between one plaintiff and one defendant, a case will settle if one party faces a serious disadvantage at trial;⁷⁴ usually only “[d]ifficult cases falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially in their predicted outcomes.”⁷⁵ Because of the potential of liability to many future plaintiffs that could result from a loss in the present suit, a defendant facing the application of nonmutual collateral estoppel may see an expected cost far in

to an award from a state arbitration proceeding). See generally Robert C. Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981). Not only must federal courts give a state court judgment the full preclusive effect that the rendering state court would give it, but the federal courts also cannot give a state court judgment more preclusive effect than the rendering state court would give it. See *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984)).

⁷² To what extent plaintiffs may collude in the choice of a forum without being determined to be a party-in-fact, and thus bound by the judgment although not a nominal party, is unclear.

⁷³ See *Economic Analysis*, *supra* note 67, at 1944 (“[T]he true beneficiaries of the current rule are not the subsequent plaintiffs, but rather the *prior* plaintiffs. By winning the race to the courthouse (and hence to the settlement table), these plaintiffs can extort considerably more from the defendant in settlement than they could expect to recover at trial and, under certain circumstances, more than they could possibly recover at trial.”); cf. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 226 (2004) (arguing that placing too much pressure on defendants to settle largely eliminates incentives to take precautionary measures). But cf. Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1950 (2000) (“[E]ven a defendant willing to risk the full damages liability that would follow a fair adjudication of liability will settle for fear that the sheer mass of self-identified victims will overwhelm reason and force a finding of liability.”). For a comprehensive discussion of how nonmutuality affects expected outcomes and settlement incentives, see generally *Economic Analysis*, *supra* note 67. But see Hay, *supra* note 67, at 41–51 (explaining that “settlement will prevent relitigation of the common issue regardless of whether there is nonmutual preclusion” and that the main benefit of nonmutual collateral estoppel is therefore in relation to “the substantive terms that parties can successfully demand in settlement”). Whether settlement agreements should have preclusive effect is also a matter of debate. See, e.g., Seth Nesen, Note, *The Benefits of Applying Issue Preclusion to Interlocutory Judgments in Cases That Settle*, 76 N.Y.U. L. REV. 874, 874–78 (2001); Maureen Castellano, *The Secret Deal That Won the Prozac Case*, N.J. L.J., May 1, 1995, at 1.

⁷⁴ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 138 (2002).

⁷⁵ *Id.* The decisional criterion is approximately the point at which expected outcomes are equal. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998).

excess of the plaintiff's potential gain from a victory.⁷⁶ Because a rational defendant will tend to settle a suit if the expected costs of litigation plus the expected outcome exceeds the cost of settlement,⁷⁷ nonmutual collateral estoppel increases the amount at which a defendant would rationally be willing to settle.⁷⁸ This results in a significant increase in settlement leverage for plaintiffs, who see no change in their expected recovery.⁷⁹ This settlement advantage can be especially powerful for plaintiffs in early suits.⁸⁰

Alternatively, should the first case go to trial, there is an unfair effect upon the first plaintiff: the defendant will have a much greater incentive to litigate, inevitably leading to a mismatch of resources committed to litigation tilted in favor of the defendant.⁸¹ Factors favoring settlement are often strong, however, and future effects of collateral estoppel are often uncertain, so it is unclear how severe an impact this tendency has on litigation, especially when compared to other fairness concerns.⁸²

Fairness concerns become especially poignant in the context of criminal proceedings.⁸³ Setting aside the effects of preclusion *in crim-*

⁷⁶ See *Economic Analysis*, *supra* note 67, at 1953–54.

⁷⁷ This is not universally true; defendants may have other rational reasons to litigate rather than settle: for example, to delay payment or to develop a reputation for rejecting claims.

⁷⁸ See *Economic Analysis*, *supra* note 67, at 1953–54.

⁷⁹ This is based on an assessment of one plaintiff's expected recovery and neglects the potential for a preceding favorable result on which the plaintiff can rely. The plaintiff's expected recovery will be the probability of victory multiplied by the amount of damages recovered. Of course, in reality, there are multiple potential outcomes, so the expected recovery is the integral of all expected outcomes multiplied by their probabilities. Additionally, the result is also a function of the quantity of resources devoted to litigation, so that too should be treated as a variable quantity when comparing the expected outcome to a settlement offer.

⁸⁰ See *Economic Analysis*, *supra* note 67, at 1953–54. *But see* Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 183–84 (1984) (discussing conflicting views of the effects of collateral estoppel on settlements and describing the “judicial view of the efficacy of collateral estoppel in stimulating settlements” as “apparently inflated”).

A plaintiff with related claims against multiple defendants would pose a near-mirror image of this analysis. In that scenario, each defendant would face only the prospect of a small loss (compared to the plaintiff's potential loss of all future claims against other defendants), so the defendant may have a lesser incentive to litigate or settle than the plaintiff. See Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685, 736–38 (2005).

⁸¹ See Green, *supra* note 80, at 184–85.

⁸² See *id.* at 185–86 (concluding that “the possibility of future preclusion may generate some inefficiencies in the form of intensified litigation, but the overall impact is probably not as significant as other matters”). The availability of nonmutual collateral estoppel can also influence witness testimony: “Nonmutual issue preclusion means that nonparty witnesses have reason to cooperate—and perhaps to testify in a particular manner—when they stand to benefit from the nonmutual issue-preclusive effect of a judgment.” Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 960 (1998).

⁸³ Although the doctrine of issue preclusion originated in civil litigation, its

inal proceedings, there are heightened fairness concerns surrounding the preclusive effects of criminal proceedings.⁸⁴ Not only do the results of criminal trials have issue-preclusive effects, but even guilty pleas can have issue-preclusive effects. Criminal defendants faced with civil liability may feel pressure to settle civil claims quickly to avoid the additional distraction while the criminal case is ongoing.⁸⁵ Allowing a civil plaintiff to rely on the findings in a criminal case gives that plaintiff an incentive to wait and see what the government discovers, effectively giving one party to a civil suit the advantage of the government's superior investigatory power and resources.⁸⁶ Moreover, a criminal defendant could reveal incriminating information in civil discovery⁸⁷—this may cause the defendant to use delay tactics in defending the civil suit, compounding the pressure on the defendant to settle the civil suit.⁸⁸

2. *Right to a Jury in Civil Trials*

Although the Supreme Court determined that the application of nonmutual issue preclusion in the circumstances of *Parklane* did not offend the Seventh Amendment right to a civil jury,⁸⁹ other situations

application in criminal contexts is “embodied in the double jeopardy clause of the Fifth Amendment of the United States Constitution.” *People v. Somerville*, 771 N.Y.S.2d 866, 871–72 (N.Y. Sup. Ct. 2004) (citing *Ashe v. Swenson*, 397 U.S. 436, 445 (1970)); see *Smith v. Dinwiddie*, 510 F.3d 1180, 1186–87 (10th Cir. 2007). See generally Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729 (1996) (examining different interpretations of criminal collateral estoppel doctrine and how it differs from the Double Jeopardy Clause).

⁸⁴ Findings resulting in a criminal conviction may have preclusive effect against the unsuccessful criminal defendant in any subsequent civil litigation, but a successful criminal defendant may not use findings in favor of an acquittal for collateral estoppel purposes in a subsequent civil proceeding—this is true even when the subsequent proceeding is against the state, in which case there would be mutuality. See, e.g., *Donley v. Donley*, 686 A.2d 943, 945–46 (Vt. 1996) (“Defendant’s acquittal of domestic assault charges under a beyond-a-reasonable-doubt standard did not preclude the family court, under a preponderance-of-the-evidence standard, from extending an abuse-prevention order to protect the complainant’s safety, even though the same conduct led to the order and the criminal charges.”).

⁸⁵ See Jonathan C. Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079, 1120 (1982). Criminal defendants may feel especially pressured to settle civil suits early and quickly because of the possibility that a civil plaintiff might later use the results of the criminal trial. *Id.*

⁸⁶ See *id.*

⁸⁷ See *id.* at 1119.

⁸⁸ See *id.*

⁸⁹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333–37 (1979). *Parklane* involved a situation in which there had been no jury trial, and thus no jury trial, in the prior action, which was brought by the SEC, who sought only declaratory judgment. Thus, in deciding *Parklane*, the Supreme Court also explicitly declared that allowing nonmutual collateral estoppel where the defendant was never able to have a jury hear its case did not violate the Seventh Amendment right to a jury trial. Going even farther in this direction, some commentators have proposed a regime whereby non-economic damages are not litigated but, rather, are determined by comparison to similar suits—this is essentially what appellate

in which courts might allow nonmutual collateral estoppel might violate the Seventh Amendment. For example, some courts will allow nonmutual collateral estoppel based on judicially approved arbitration, even though the arbitration procedures, especially regarding discovery, may offer less protection than those of a civil trial.⁹⁰ This may be especially troublesome where one of the contracting parties is not free to refuse waiving its right to a jury trial.⁹¹ Proceedings for minor “quasi-criminal” offenses, such as those for minor traffic violations,⁹² could also have preclusive effect in subsequent litigation.⁹³ And administrative proceedings, such as workers’ compensation hearings, that have more relaxed procedures than judicially controlled civil litigation, may also be given preclusive effect.⁹⁴

courts do when determining whether damages are “excessive.” See JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 270–97 (2003).

⁹⁰ See Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435, 448–59 (arguing that courts should adopt per se rules denying issue-preclusive effects to nontraditional litigation in order to improve predictability and thereby facilitate efficient use of nontraditional litigation settings); Lightner, *supra* note 65, at 1138 (“[I]n light of procedural inadequacies [of arbitration discovery and proceedings], preclusive doctrines must be met with extreme caution”); cf. Wayne J. Positan & Domenick Carmagnola, *Employment Torts*, in BUSINESS TORTS LITIGATION 81, 123 (David A. Soley et al. eds., 2d ed. 2005) (noting that arbitration or administrative proceedings may have preclusive effects in subsequent litigation). For example, in *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648 (Minn. 1990), the preceding arbitration proceeding was heard and decided by personal injury lawyers rather than a judge or magistrate. The Minnesota Supreme Court deemed the arbitration to have preclusive effect. *Id.* at 652, 654.

⁹¹ See *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 357 (Minn. 2003) (Anderson, J., concurring) (“[W]e need to be mindful of the potential for individuals to unknowingly and involuntarily waive their constitutional right to a trial by jury.”); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12–14 (Mont. 2002) (Nelson, J., concurring) (discussing Montana’s constitutional protection of a right to trial by jury in the context of standard-form contracts of adhesion).

⁹² See, e.g., Helen W. Gunnarsson, *Bohner Redux: Insured Property Denied Coverage for “Illegal” Act*, 74 ILL. B.J. 168, 168 (2006) (noting that “speeding and running stop signs, for example, are not considered criminal offenses, but, rather, are quasi-criminal” as opposed to DUI, which qualifies as a criminal offense (describing the holding in *Bohner v. Ace Am. Ins. Co.*, 834 N.E.2d 635 (Ill. App. Ct. 2005))); Ilya Lichtenberg, *The Bus Sweep Controversy: Agency, Authority and the Unresolved Issues of Third Party Consent*, 81 U. DET. MERCY L. REV. 145, 164 n.184 (describing pedestrian traffic on an interstate highway as “a criminal or quasi-criminal offense”); Heather M. Bell et al., *The Year in Review, The Year in Review 2001: Cases from Alaska Supreme Court, Alaska Court of Appeals, U.S. Court of Appeals for the Ninth Circuit, and U.S. District Court for the District of Alaska*, 19 ALASKA L. REV. 201, 236 (2002) (describing “traffic infractions” as “within a class of ‘quasi-criminal offenses’” and describing the “violation” of consumption of alcohol by a minor as “quasi-criminal” (citing *State v. Euteneier*, 31 P.3d 111 (Alaska Ct. App. 2001))).

⁹³ See generally Sheryl L. Musgrove & David W. Gross, *Use of a Traffic Citation in a Subsequent Related Civil Proceeding*, 33 IDAHO L. REV. 135, 145 (1996) (advocating for “a rule disallowing any and all evidence of the [traffic] citation and related pleas, convictions and payment” in subsequent civil litigation).

⁹⁴ See, e.g., *Alba v. Raytheon Co.*, 809 N.E.2d 516, 521–22 (Mass. 2004) (giving a workers’ compensation ruling preclusive effect); *Corrigan v. Gen. Elec. Co.*, 548 N.E.2d 1238,

3. *Efficiency Gains from Nonmutuality Are Illusory*

Nonmutuality may not foster the efficiency gains that its supporters envisioned. Because of the increased probability of success, “[p]laintiffs who might otherwise join together, or intervene, in a single lawsuit under modern permissive joinder rules would have incentive to sue separately and to hang back awaiting another plaintiff’s favorable result.”⁹⁵ In this way, “[u]nlimited use of offensive, non-mutual issue preclusion can generate, rather than deter, multiple lawsuits.”⁹⁶ Compounding this effect, a loss in any suit can lead to liability to all remaining plaintiffs, inducing a defendant to expend more effort defending each case than it would otherwise.⁹⁷

Many a prudent litigant might be willing to [default or pursue a moderate litigation strategy] because of the comparative insignificance of [one] claim and costliness of full and thorough litigation . . . if the consequences of the judgment are limited to the parties before the court. On the other hand, such a litigant would be forced to take a more aggressive position—often to the detriment of both his adversary and himself—and litigate the suit to the utmost, if deprived of the protection that the mutuality requirement affords⁹⁸

Thus, “[t]he abandonment of mutuality . . . instead of reducing the amount of judicial effort required to resolve disputes turning on common issues . . . might have the opposite effect.”⁹⁹

B. Alternatives to Mutuality

Although most jurisdictions now allow nonmutual collateral estoppel, the law in this area continues to change, and perhaps some jurisdictions will reconsider their abandonment of the mutuality requirement.¹⁰⁰ Some courts allow nonmutual defensive use of collat-

1240 (Mass. 1990) (giving preclusive effect to a workers’ compensation ruling in a subsequent suit brought by the employee’s wife for loss of consortium).

⁹⁵ CASAD & CLERMONT, *supra* note 14, at 176; *see also* DAVID A. DITTFURTH, *THE CONCEPTS AND METHODS OF FEDERAL CIVIL PROCEDURE* 270–71 (1999); Semmel, *supra* note 30, at 1473.

⁹⁶ DITTFURTH, *supra* note 95, at 271; *see also* Semmel, *supra* note 30, at 1473 (citing, as an example, *B.R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195 (N.Y. 1967)).

⁹⁷ *See* CASAD & CLERMONT, *supra* note 14, at 176.

⁹⁸ James Wm. Moore & Thomas S. Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 309 (1961). Ultimately, this may place increased strain on the courts’ time as well as drain the litigants’ resources.

⁹⁹ CASAD & CLERMONT, *supra* note 14, at 176.

¹⁰⁰ *See id.* at 185. For example, Alaska appears to have revived its requirement of mutuality of collateral estoppel. *Compare* *Cook Inlet Keeper v. State*, 46 P.3d 957, 966 (Alaska 2002) (“There are three necessary elements to a claim of collateral estoppel: ‘(1) the issue decided in a prior adjudication was precisely the same as that presented in the action in question; (2) the prior litigation must have resulted in a final judgment on the merits; and (3) there must be “mutuality” of parties, i.e., collateral estoppel may be invoked only by

eral estoppel but refuse to allow offensive use of nonmutual collateral estoppel.¹⁰¹ Commentators have proposed several additional alternatives to requiring mutuality for collateral estoppel to apply, including mandatory joinder of all interested parties,¹⁰² allowing the use of the results of adjudication against those who were not parties to the prior litigation,¹⁰³ and allowing the use of former adjudication as evidence.¹⁰⁴

1. *Allowing Only Defensive Use*

Although not technically an alternative to nonmutuality, limiting the application of nonmutual collateral estoppel to defensive uses is the most common alternative to full abandonment of the mutuality requirement. Several states currently allow defensive use of nonmutual collateral estoppel but refuse to permit offensive use of nonmutual collateral estoppel.¹⁰⁵

It has been further proposed that even defensive use of collateral estoppel should be permissible only in situations in which the party to

those who were parties or privies to the action in which the judgment was rendered.” (quoting *Briggs v. State*, 732 P.2d 1078, 1081–82 (Alaska 1987)), with *Pennington v. Snow*, 471 P.2d 370, 377 (Alaska 1970) (“[M]utuality of estoppel will not as a rule be necessary for the invocation of res judicata or collateral estoppel against a party.”). Michigan recently rejected a mutuality requirement for defensive use of collateral estoppel, see *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 852 (Mich. 2004) (adopting defensive nonmutual collateral estoppel), while restating its rejection of offensive nonmutual collateral estoppel. *Id.* at 848 n.5 (stating that its holding is consistent with *Howell v. Vito’s Trucking & Excavating Co.*, 191 N.W.2d 313, 317 (Mich. 1971) (rejecting offensive nonmutual collateral estoppel)). Kansas, in dicta in *Goetz v. Board of Trustees, Policemen’s & Firemen’s Retirement System*, 454 P.2d 481, 489 (Kan. 1969), seemed to abandon a requirement of mutuality, commenting that “collateral estoppel does not require mutuality of parties,” but appears to maintain a requirement of mutuality for collateral estoppel. See *Jetcraft Corp. v. FlightSafety Int’l, Inc.*, 781 F. Supp. 687, 692–93 (D. Kan. 1991) (noting numerous Kansas Supreme Court cases that disagree with *Goetz*); see, e.g., *Jones v. Bordman*, 759 P.2d 953, 965 (Kan. 1988) (refusing to allow offensive collateral estoppel); *McDermott v. Kan. Pub. Serv. Co.*, 712 P.2d 1199, 1209 (Kan. 1986) (stating, in a case involving offensive use of nonmutual collateral estoppel, that “we did not then and we do not now abandon the mutuality rule”); *Keith v. Schiefen-Stockham Ins. Agency, Inc.*, 498 P.2d 265, 273 (Kan. 1972) (disallowing defensive use of nonmutual collateral estoppel); *Adamson v. Hill*, 449 P.2d 536, 539 (Kan. 1969) (refusing to allow offensive use of nonmutual collateral estoppel).

¹⁰¹ See CASAD & CLERMONT, *supra* note 14, at 177; cases cited *supra* note 61.

¹⁰² See CASAD & CLERMONT, *supra* note 14, at 185–87 (citing Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917 (1982)).

¹⁰³ See *id.* at 187 (citing Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511).

¹⁰⁴ See *id.* at 187–88 (citing Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979 (1986)).

¹⁰⁵ For example, Hawaii allows only defensive use of nonmutual collateral estoppel. See *Doe v. Doe*, 52 P.3d 255, 264–65 (Haw. 2002); *Morneau v. Stark Enters., Ltd.*, 539 P.2d 472, 474–76 (Haw. 1975); *Ellis v. Crockett*, 451 P.2d 814, 822 (Haw. 1969). Similarly, Michigan, when adopting defensive use of nonmutual collateral estoppel, restated its opposition to a rule permitting offensive applications. See *Monat*, 677 N.W.2d at 848 n.5.

be precluded was the plaintiff in the prior action.¹⁰⁶ The reasoning behind this proposal is that, as plaintiff, the common party chose the forum and timing of the first suit.

2. *Mandatory Joinder*

Mandatory joinder requires plaintiffs to join their claims together in a single suit—under mandatory joinder, plaintiffs who could have participated, but did not, will find their claims barred. The result is that common matters will be tried all at once.¹⁰⁷ Making all determinations in a single action maximizes efficiency and minimizes the danger of inconsistent results.¹⁰⁸ At the same time, the unfairness that results from nonmutuality—that plaintiffs may benefit from a favorable determination in an action by a prior plaintiff without danger of being bound by an adverse determination—is eliminated (or at least reduced). Under a regime of mandatory joinder, all plaintiffs may benefit from the result, but, simultaneously, all will be bound by the result. Mandatory joinder “restores procedural neutrality by equating the parties’ litigating risk, [and] nicely demonstrates by contrast the most serious defect of nonmutuality, the destruction of procedural neutrality.”¹⁰⁹

A closely related proposal would encourage joinder by making the issue-preclusive effects of a judgment dependent upon whether a party seeking to assert preclusion could have been a party to the prior proceeding.¹¹⁰ Under this proposal, issue preclusion is available against a party to the prior action if that party could have caused its opponent in the subsequent action to be joined in the first action but failed to do so, or if the party to be precluded could have requested consolidation of the actions but failed to do so.¹¹¹ Similarly, one who was not a party to the first action but could have been, or could have requested consolidation of the actions, cannot assert issue preclusion against an opponent who was a party to the first action.¹¹² Under this proposal, issue preclusion is not available to those who could not have

¹⁰⁶ See CASAD & CLERMONT, *supra* note 14, at 177–78.

¹⁰⁷ See *id.* at 185.

¹⁰⁸ See generally John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 724–28 (1976) (advocating mandatory joinder as an alternative means to nonmutuality for achieving efficiency and consistency in resolving multiparty disputes while affording all plaintiffs an opportunity to be heard).

¹⁰⁹ CASAD & CLERMONT, *supra* note 14, at 185 (citing Schroeder, *supra* note 102).

¹¹⁰ See Semmel, *supra* note 30, at 1475 (proposing rules to govern the availability of issue preclusion in the absence of mutuality so as to encourage joinder and consolidation whenever possible).

¹¹¹ See *id.* at 1475 R. 1.

¹¹² See *id.* at R. 2. Where either party could have caused joinder or consolidation, preclusion would be available against the party to the first action. See *id.*

participated in the prior proceeding (for instance, because of jurisdictional limitations).¹¹³

Bringing all parties into one suit may, however, lead to procedural complexity and conflation of noncommon issues.¹¹⁴ Furthermore, "not all the nonparties who ought to be joined may be subject to the jurisdiction of the court, and therefore, repetitive litigation may be unavoidable."¹¹⁵ And, assuming that not all the plaintiffs desire to pursue their claims in the same court, at least some will not get their chosen forum.¹¹⁶ Thus, despite some benefits, mandatory joinder does not appear to be a panacea for the problems raised by nonmutuality.

3. *Collateral Class Actions*

Under collateral-class-action proposals, plaintiffs would be bound by determinations made in an earlier suit to which they were not parties.¹¹⁷ Class treatment for similarly situated plaintiffs is based on the premise that "if a person's point of view on a common issue has been asserted adequately in an earlier action, even by a totally unrelated litigant, . . . there is no reason to permit that issue to be contested again in another suit by that person or someone else similarly situated."¹¹⁸ Under a collateral-class-action regime, "[t]he cure [to unfairness created by nonmutuality] would be to reintroduce mutuality, but to do so by binding as well as benefiting strangers."¹¹⁹ Treating plaintiffs as a class would greatly improve efficiency in deciding common matters and prevent inconsistent determinations.¹²⁰ Ultimately, however, "[t]here are too many unfathomable variations in the course of discovery, pretrial, and trial to allow the assertion that confidence in the result is always warranted" under a regime of collateral class actions.¹²¹ "The collateral-class-action proposal would create in effect a compulsory class action without the careful limitations and protections" that surround class actions as they presently exist.¹²²

¹¹³ *Id.* at 1478.

¹¹⁴ *See* Schroeder, *supra* note 102, at 918.

¹¹⁵ *Id.* at 918-19; *see also* McCoid, *supra* note 108, at 726-27.

¹¹⁶ This could lead to a race to file, in which only the first plaintiff to file will see his or her choice of forum honored.

¹¹⁷ *See generally* Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980) (analyzing the effects of treating similarly situated plaintiffs as a class).

¹¹⁸ Schroeder, *supra* note 102, at 921-22 (evaluating the potential effects of broad nonparty preclusion (citing George, *supra* note 117, at 659-64, 670-74)).

¹¹⁹ CASAD & CLERMONT, *supra* note 14, at 187.

¹²⁰ *See* Schroeder, *supra* note 102, at 922.

¹²¹ *Id.* at 980.

¹²² CASAD & CLERMONT, *supra* note 14, at 187. For example, Federal Rule of Civil Procedure 23 limits the situations in which litigants may employ a class action. *See id.*

4. *Use of Former Adjudication as Evidence*

Another proposal is to allow the use of the results of prior adjudication as evidence.¹²³ This approach would permit fact finders to evaluate the probative value of the prior judgment.¹²⁴ However, the degree to which a jury will feel constrained to follow this is uncertain, and it is likely to be highly influenced by the instructions of the presiding judge.¹²⁵ Furthermore, this proposal would often create conflict where a judgment rendered by a court that permits prior judgments as evidence is then introduced as nonpreclusive evidence in a court under whose procedures this evidence is impermissible hearsay.¹²⁶

5. *Other Flexible Approaches to Nonmutual Collateral Estoppel*

The appropriateness of allowing nonmutual collateral estoppel in any case depends, *inter alia*, on the nature of the former adjudication—particularly whether procedural infirmities should nullify its authority in subsequent proceedings. For example, just fifteen years after *Bernhard*, in *Taylor v. Hawkinson*,¹²⁷ the California Supreme Court upheld a trial court's refusal to allow a plaintiff's offensive use of nonmutual collateral estoppel where the verdict on which the plaintiff sought to rely appeared to be a compromise verdict. The plaintiff and her husband had been successful coplaintiffs in a negligence action.¹²⁸ Ms. Taylor, however, sought a new trial because of insufficient damages.¹²⁹ The court awarded her a new trial, and she sought to limit the retrial to the issue of damages by contending that her husband's successful litigation on the issue of liability could be the basis for nonmutual collateral estoppel and, therefore, the defendant could be estopped from contesting liability. But the trial court submitted the issue of liability to the jury, which returned a verdict in favor of the defendant.¹³⁰ The California Supreme Court first determined that the trial court, in granting a new trial, correctly believed that "the verdicts following the first trial were compromise verdicts

¹²³ *See id.*

¹²⁴ It might also open the door to a common defendant offering prior judgments in its favor.

¹²⁵ *See CASAD & CLERMONT, supra note 14, at 188.* This would, in essence, change the criterion from whether the prior judgment is preclusive or nonpreclusive, as decided by the rendering court, to the weight that the fact finder in the subsequent litigation should give the prior conclusions. By changing this determination, the subsequent court would be able to substitute its own preclusion doctrine for that of the rendering court, effectively circumventing the Full Faith and Credit Clause.

¹²⁶ The *res judicata* law of the rendering court determines the preclusive effects of a judgment. *See supra* note 71.

¹²⁷ 306 P.2d 797 (Cal. 1957).

¹²⁸ *Id.* at 798.

¹²⁹ *Id.*

¹³⁰ *Id.*

and that the jury did not determine the issue of liability.”¹³¹ Because the first jury’s verdict was a compromise verdict, the California Supreme Court believed “it [did] not constitute such a determination of the issues involved as to render them *res judicata* where distinct rights are sought to be litigated in a separate cause of action.”¹³² In his dissenting opinion, Justice Carter¹³³ contended that the judgment in the first suit must be *res judicata* because it was binding on the parties still subject to it¹³⁴—Ms. Taylor’s husband and the defendant—or else “[i]f the jury did not decide [the issue of liability], it decided nothing, and the judgment entered on its verdict would not be binding on the parties thereto.”¹³⁵

The refusal to give preclusive effect to compromise verdicts is also enunciated in the *Restatement (Second) of Judgments*:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also 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 considerations should be given include those enumerated in § 28 and also whether:

...

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding¹³⁶

Taylor v. Hawkinson and the Second Restatement reflect a holistic approach to evaluating the fairness of the procedure and, importantly, the result of the prior adjudication.

6. *Requiring Consistent Judgments*

Another proposed reform would be to deny nonmutual issue-preclusive effect to a judgment when inconsistent judgments exist.¹³⁷

¹³¹ *Id.* at 799.

¹³² *Id.*

¹³³ Interestingly, it was Justice Traynor, author of the *Bernhard* opinion, who wrote the majority opinion in *Taylor v. Hawkinson* and exhibited great reluctance to allow nonmutual collateral estoppel.

¹³⁴ *Taylor*, 306 P.2d at 803 (Carter, J., dissenting).

¹³⁵ *Id.*

¹³⁶ RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

¹³⁷ See FIELD ET AL., *supra* note 26, at 754–55; see also DITTFURTH, *supra* note 95, at 270; Semmel, *supra* note 30, at 1466–67 (“In situations of multiple claimants whose suits cannot be consolidated, the common defendant should never be bound if he wins the first and then loses a later trial; . . . Both judgments should be ignored in the subsequent actions, not because of lack of mutuality or offensive-defensive distinctions, but because of common sense.”). In *Shire LLC v. Sandoz, Inc.*, No. 07-CV-00197-EWN-CBS, 2008 WL 4402251,

This would minimize the unfairness of allowing a plaintiff to rely on a single determination when the defendant has successfully defended. But the first determination would be all-important, leading the defendant to face great pressure to overlitigate the first suit.¹³⁸ Additionally, because of the primary importance of the first determination, early plaintiffs would still enjoy a distinct settlement advantage compared to the balance under a regime without nonmutuality.

A similar proposal would deny issue-preclusive effect to a single judgment—only when multiple, consistent judgments are available would nonmutual collateral estoppel be permissible.¹³⁹ This would temper the criticality of the first suit, reducing the degree to which the defendant would overlitigate the first several suits. Some incentive, albeit a lesser one, would still exist. And, early plaintiffs, as a group, would still enjoy a settlement advantage.

Although each of these proposals acts to address the criticisms of nonmutuality, they lack the predictability of a per se rule, and it is this lack of predictability that leads to the principal drawbacks of nonmutual collateral estoppel.

IV

THREE POTENTIAL SOLUTIONS: LIMITS ON DAMAGES

This Note proposes three different methods of reducing the problems associated with the offensive use of nonmutual collateral estoppel; each is some sort of limit on the damages that can be recov-

at *7 (D. Colo. Sept. 24, 2008), the district court declined to apply nonmutual issue preclusion, in part because in two prior cases courts had come to different conclusions about the correct interpretation of patent claims. The Federal Circuit granted permission to make an interlocutory appeal on “the issue of whether a patentee who settles an earlier infringement case after a *Markman* ruling [on patent claim interpretation] is precluded under the doctrine of collateral estoppel from relitigating claim-construction issues determined in the prior case.” *Shire LLC v. Sandoz, Inc.*, No. 893, 2009 WL 330235 (Fed. Cir. Feb. 6, 2009). Although the Federal Circuit generally determines the issue-preclusive effects of a judgment by applying the law of the regional circuit where the case is first heard, *see RF Del., Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1261 (Fed. Cir. 2003), the Federal Circuit will make its own law in areas where most of the cases will be appealed to the Federal Circuit, such as patent-related issues. *Cf., e.g., Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998) (“Because most cases involving these issues will therefore be appealed to this court, we conclude that we should decide these issues as a matter of Federal Circuit law, rather than rely on various regional precedents.”).

¹³⁸ To be sure, this is better than the prevailing nonmutuality doctrine, whereby a plaintiff feels this pressure to overlitigate all early cases.

¹³⁹ *See* Aaron Gershonowitz, *Issue Preclusion: The Return of the Multiple Claimant Anomaly*, 14 U. BALT. L. REV. 227 (1985). *But see* *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1190 (Or. 1976) (dismissing the view that multiple consistent judgments are necessary for issue preclusion to apply because it is “based on the apprehension that the first judgment might well be an aberration, but this view fail[s] to recognize that the very notion of collateral estoppel demands and assumes a certain confidence in the integrity of the end result of our adjudicative process”).

ered by a plaintiff who relies on nonmutual collateral estoppel to establish an element of the cause of action: a fixed cap on the amount of damages; a system whereby the present plaintiff cannot recover more in damages than the prior plaintiff in the case upon which the present plaintiff relies to estop the defendant; a system whereby damages are limited to a fraction of the damages awarded in the case upon which the present plaintiff relies for collateral estoppel or the most recent preceding case which also relied upon the original case as a basis for collateral estoppel.

A. A Set Statutory Cap

The first and simplest proposal is a statutory cap on damages that can be recovered by a plaintiff who relies upon nonmutual collateral estoppel to establish an element of the cause of action. This cap would be similar to limits on damages that have been proposed as part of tort-reform legislation.¹⁴⁰ This type of limit would reduce, but not eliminate, incentives for plaintiffs with large claims to “wait and see” what happens in suits brought by plaintiffs with smaller claims.¹⁴¹ It would also limit, but not eliminate, the possibility that a defendant could face large suits brought by previously unforeseen plaintiffs following a small judgment in favor of a plaintiff with a small claim.¹⁴²

¹⁴⁰ See, e.g., Press Release, White House Office of the Press Secretary, Fact Sheet: President Calls for Medical Liability Reform (Jan. 16, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030116.html>; cf. Alexee Deep Conroy, Note, *Lessons Learned from the “Laboratories of Democracy”: A Critique of Federal Medical Liability Reform*, 91 CORNELL L. REV. 1159, 1180–81 (2006) (noting that, as of 2006, eighteen states had such caps in place). California was an early leader in tort reform; in 1975 it implemented a cap on non-economic damages recoverable in a medical malpractice action. See CALIFORNIANS ALLIED FOR PATIENT PROTECTION, THE MEDICAL INJURY COMPENSATION REFORM ACT: CALIFORNIA’S LANDMARK HEALTHCARE LIABILITY LAW: A NATIONAL MODEL FOR ASSURING ACCESS TO AFFORDABLE HEALTHCARE 4 (2005), available at http://www.micra.org/about-micra/docs/micra_handbook.pdf. In 2003, Texans voted to amend their constitution to allow their legislature to implement caps on the amount of non-economic tort damages. Donald J. Palmisano, *A Rallying Cry from Texas: Remember Proposition 12!*, AM. MED. NEWS, Oct. 20, 2003, available at <http://www.ama-assn.org/amednews/2003/10/20/edca1020.htm>; cf. TEX. CONST. art. III, § 66 (amended 2003). Other states have adopted similar measures. See John W. Martin, Jr., *State Civil Justice Reform*, in CIVIL JUSTICE REFORM: WHAT NOW? 5, 5–6 (Roger Clegg ed., 1996) (outlining the status of various state tort-reform measures).

¹⁴¹ Plaintiffs with large claims may still prefer to observe litigation over smaller claims before pursuing their own claims for tactical advantage, such as previewing the defendant’s evidence, allowing plaintiffs with small claims to test possible theories of liability, or to take advantage of the increased settlement leverage that would result should earlier plaintiffs be successful.

¹⁴² Because plaintiffs claiming damages above the statutory limit could not rely on nonmutual issue preclusion (unless they wished to limit themselves to damages below the statutory limit), they would have less incentive to “hide” in hopes that an unsuspecting defendant would under-litigate and lose an early case against a plaintiff with a small claim. Additionally, this type of limit would have little effect on the behavior of prospective plaintiffs whose claims did not rise above the statutory limit—and it could have little effect on

The primary virtue of this type of limit is its simplicity—it need not require assertion by the defendant or any proof of damages awarded in the prior action that the present plaintiff seeks to use to estop the defendant.¹⁴³ However, this approach would apply only to suits that are sufficiently large to exceed this cap, reducing its effectiveness in correcting the shortcomings of nonmutuality. Furthermore, if the cap were lower—to more often provide defendants the protection of this type of cap—then plaintiffs would be much more likely to forgo reliance on collateral estoppel, increasing successive litigation of the same issues and reducing the efficiency benefits that nonmutuality is supposed to provide.

B. Limiting a Plaintiff's Damages to the Original Plaintiff's Damages

The second proposal is a limit whereby a plaintiff who relies on nonmutual collateral estoppel could not recover more in damages than the plaintiff in the action on which the present plaintiff relies. This type of limit would provide defendants a great deal more foreseeability of the magnitude of future liability arising from a suit, even when other plaintiffs are unforeseen. This foreseeability would better enable defendants to determine the proper level of resources to devote to defending a claim. This in turn would reduce the tendency to overlitigate and, therefore, the costs of litigation to both parties. It would also relieve courts of the burden of presiding over needlessly protracted litigation over points that may seem unimportant in the present suit, but, with the availability of unlimited nonmutual collateral estoppel, might provide future plaintiffs with a windfall. Further, it would reduce the unfair settlement leverage that plaintiffs, especially those with relatively small claims, enjoy when nonmutual collateral estoppel is available.¹⁴⁴ Similarly, this approach would reduce the

plaintiffs whose claims were only slightly above the statutory limit. In this way, it would create a novel conundrum not raised by the typical tort-reform damages limit: plaintiffs with damages above the statutory limit might have to choose between relying on nonmutual issue preclusion (increasing their likelihood of recovery, but reducing the amount of recovery) or forgoing nonmutual issue preclusion (decreasing their likelihood of recovery, but increasing the potential amount of recovery). Of course, this type of evaluation is common—litigants always must decide whether the likelihood and amount of a potential recovery is worth the costs and risks of litigation. Furthermore, even when nonmutual issue preclusion is available, a party may forego precluding its opponent in order to have more opportunity to present evidence that will paint the opponent in an unfavorable light; such evidence could be irrelevant if the issue is not in dispute because of issue preclusion.

¹⁴³ This could be especially important if the prior action is appealed and the damages reduced. While *res judicata* law is amply equipped to determine whether the damages awarded in the prior action are a final judgment, serious fairness concerns would be implicated if a plaintiff could rely upon a prior judgment to set the level of damages in the present action and thereafter the defendant had the damages in the prior action reduced.

¹⁴⁴ When nonmutual collateral estoppel is available, a defendant may feel pressure to

incentive for plaintiffs to "wait and see" what happens in prior litigation.¹⁴⁵ If so, plaintiffs may feel that they would benefit from combining their resources for litigation, thus reducing the burden of repetitive litigation on the courts.¹⁴⁶

Because judges are supposed to ensure that nonmutuality will not give rise to unfairness,¹⁴⁷ this scheme could be adopted by judicial decision. Of course, a legislature would be free to make such a rule, but unlike the more traditional cap on damages described above,¹⁴⁸ this type of limit could be adopted without legislative action. It would amount to a per se rule that a suit seeking damages greater than those awarded in the prior action that the non-common party wishes to use to estop the common party would be "compelling circumstances [that] make it appropriate that the [common] party be permitted to relitigate the issue."¹⁴⁹

C. Progressively Limiting a Plaintiff's Damages to a Percentage of the Immediately Preceding Plaintiff's Damages

The third proposed limit on damages that could be recovered by a plaintiff who relies upon nonmutual collateral estoppel would limit the damages available to a percentage—less than 100 percent—of the damages recovered in the original action or in the most recent action in which a plaintiff employed nonmutual collateral estoppel to establish an element of the cause of action. The amount of damages possible in each subsequent action in which a plaintiff employs nonmutual collateral estoppel would diminish. Assuming that in each case the damages are the maximum possible under this type of limit, the total amount of damages in a sequence of cases is a geometric series.¹⁵⁰ It is of the form

settle a claim by a plaintiff with small damages simply to avoid the danger of an adverse finding. Even an aberrational finding in a suit involving meager damages could prove disastrous to the defendant if there is a plaintiff with a significantly larger claim who is pursuing a "wait and see" tactic. *See generally Economic Analysis, supra* note 67.

¹⁴⁵ *But see* sources cited *supra* note 140.

¹⁴⁶ This would likely benefit plaintiffs with small claims the most, even though their leverage in settlements would be reduced. Plaintiffs with small claims, if larger claims are looming and nonmutual collateral estoppel is available, may face a more vigorous defense than would otherwise be warranted if nonmutual collateral estoppel was not available; the plaintiff has a relatively meager amount at stake in the litigation, but the defendant, faced with the prospect of losses not only in the present suit but also in any future suits, would have a much greater incentive to litigate against even a claim seeking meager damages.

¹⁴⁷ *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. b (1982) ("What combination of circumstances justifies withholding preclusion is a matter of sound discretion [sic], guided by the general principle that a party should not be precluded unless his previous opportunity was at least the equivalent of that otherwise awaiting him in the present litigation.").

¹⁴⁸ *See supra* Part IV.A.

¹⁴⁹ RESTATEMENT (SECOND) OF JUDGMENTS § 29(8) (1982).

¹⁵⁰ *See* WILLIAM E. BOYCE & RICHARD C. DIPRIMA, *CALCULUS* 592 (1988).

$$\sum_{k=0}^{\infty} r^k$$

Expanded, this series appears as

$$\sum_{k=0}^{\infty} r^k = 1 + r + r^2 + r^3 + \dots + r^k + \dots^{151}$$

For positive values of r that are less than 1, this series will converge to Equation Three

$$\frac{1}{(1-r)}^{152}$$

In this instance, r is the percentage limit on the damages recovered in the original action, and this limit, by definition, sets that percentage to less than 100 percent (i.e., r is less than 1.00).

The total amount of damages for which a defendant might possibly become liable as a result of any one suit can therefore be predicted. Of course, the damages awarded in the first suit are still difficult to predict, but they are far more susceptible to accurate estimation than the total amount of potential damages in any future litigation brought by other plaintiffs.¹⁵³ Facilitating prediction of possible damages, some jurisdictions limit a plaintiff's recovery to the damages demanded in the complaint.¹⁵⁴

To illustrate, the following table describes the cumulative total amount of damages that a defendant might face as a result of an adverse finding:

TABLE ONE

Percentage	Possible Cumulative Total Amount of Damages
50%	2 Times Original
75%	4 Times Original
90%	10 Times Original
95%	20 Times Original

¹⁵¹ *Id.* at 592 eq.13.

¹⁵² *Id.* at 592 eq.17.

¹⁵³ This is especially true when future plaintiffs are unforeseen.

¹⁵⁴ See, e.g., *Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 365 (Va. 1995). *But see*, e.g., FED. R. CIV. P. 54(c) ("Every other final judgment [except a default judgment] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."); *Breland v. Ford*, 693 So. 2d 393, 397 (Ala. 1997) ("[A] litigant seeking general damages for personal injuries, . . . may recover an amount in excess of the amount contained in the *ad damnum* clause of the complaint."); *cf.*, e.g., *Savago v. Payne*, 566 N.Y.S.2d 677, 679 (N.Y. App. Div. 1991) (allowing amendment of the complaint after trial because "the bill of particulars sought 'remuneration for such other damages as the plaintiffs shall prove upon the trial of the action herein.'").

The values in the above table are the result of simply applying the percentage limits in the convergence equation¹⁵⁵ to determine the values to which the geometric series converges.¹⁵⁶

This scheme, depending on where the percentage limit is set, may provide a severe disincentive to plaintiffs who might otherwise rely on nonmutual collateral estoppel. Of course, plaintiffs facing such a limit may opt to not employ nonmutual issue preclusion¹⁵⁷; forgoing preclusion would allow plaintiffs to receive more in damages than would be available as a result of this type of limit. Because a significant number of plaintiffs may forgo asserting estoppel, this type of system may sharply reduce or eliminate the efficiency gains that nonmutuality of issue preclusion is supposed to provide.

The principal drawback of this system is its complexity. Although the arithmetic is fairly simple, questions about which action is most recent may prove problematic. Would filing date be controlling? Date of judgment? Would defendants have to assert the cap as a defense? Who would bear the burden of proof? Each of these questions can be answered, but even once these issues are resolved, tracking multiple litigations and proving that the issue to be precluded was decided or precluded in each of them might be administratively burdensome and give rise to additional litigation.

D. Comparisons of These Methods

The following chart describes the defendant's potential liability to an individual plaintiff as these damages would be limited under the

¹⁵⁵ See *supra* note 152 and accompanying text.

¹⁵⁶ For example, for a percentage limit of 75%, r is 0.75. Incorporating this value in the convergence equation yields

$$\frac{1}{(1-0.75)} = \frac{1}{(0.25)} = 4$$

The geometric series appears as

$$\sum_{k=0}^{\infty} 0.75^k = 1 + 0.75 + 0.75^2 + 0.75^3 + \dots + 0.75^k + \dots$$

The first element in this series, the value of 1, represents the award in the first suit, on which later plaintiffs asserting nonmutual collateral estoppel will attempt to rely. The second value in the series, the value of 0.75 (or 75%), represents the damages sought by (and presumably awarded to) the first plaintiff to rely on nonmutual collateral estoppel. The third value in the series, 0.75 to the second power (equal to 0.5625, or 56.25%), represents the damages sought by (and presumably awarded to) the second plaintiff to rely on nonmutual collateral estoppel. This sequence of diminishing potential awards will continue for all successive plaintiffs who rely on nonmutual collateral estoppel.

¹⁵⁷ Even when nonmutual issue preclusion is available, a plaintiff may instead choose to prove the element of the cause of action. For example, plaintiffs might choose to offer proof of an element rather than assert estoppel when the proof is prejudicial to the defendant; this will be especially true when an issue is the amount of damages resulting from egregious conduct by the defendant. *Cf. supra* note 141.

second proposed regime¹⁵⁸ (i.e., where damages available to a plaintiff relying on nonmutual collateral estoppel are limited to the damages awarded in the original action) and under two variations of the third proposed regime¹⁵⁹ (i.e., where damages available to a plaintiff relying on nonmutual collateral estoppel are limited to a percentage of the damages awarded in the original action or the most recent suit in which a plaintiff relied on nonmutual collateral estoppel). Plaintiff number one is the first successful plaintiff, and plaintiffs two through fifty are successive plaintiffs who rely on nonmutual collateral estoppel. Damages are expressed as a percentage of the damages recovered in the original action.

CHART ONE

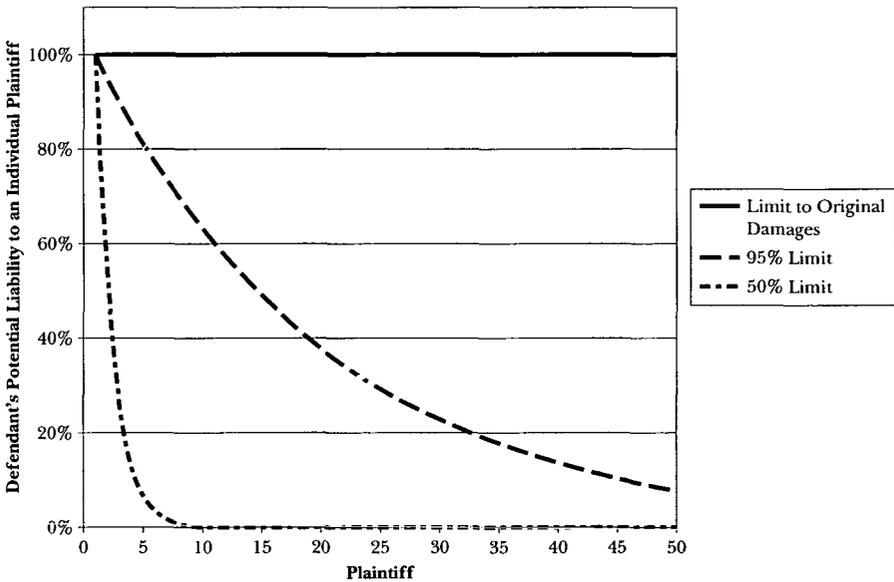


Chart: Defendant's Potential Liability to Individual Plaintiffs
(expressed as a percentage of the damages recovered by the original plaintiff)

Under the regime in which the damages are limited to those in the original action, the common defendant would face liability to each subsequent plaintiff of up to the amount of the damages in the original action, but no more. Under the regime in which damages sought by a plaintiff relying on nonmutual collateral estoppel are limited to a percentage of the damages recovered in the original action on which the plaintiff relies or the most recent action in which a plaintiff employed nonmutual collateral estoppel, and that limit is set to 50 percent, then the common defendant's potential liability to successive

158 See *supra* Part IV.B.

159 See *supra* Part IV.C.

plaintiffs rapidly declines. For example, the defendant's potential liability to the first plaintiff to rely on nonmutual collateral estoppel would be limited to 50 percent of the damages in the original action; potential liability to the second plaintiff to rely on nonmutual collateral estoppel would be limited to 25 percent of those in the original action; potential liability to the seventh subsequent plaintiff would be less than 1 percent. Under the same type of scheme, but with the damages limited to 95 percent of those in the most recent action, the defendant's potential liability to the first plaintiff to rely on nonmutual collateral estoppel would be limited to 95 percent of the damages in the original action; potential liability to the second plaintiff to rely on nonmutual collateral estoppel would be limited to approximately 90 percent of those in the original action; potential liability to the seventh subsequent plaintiff would be about 70 percent; potential liability to the fiftieth plaintiff would be limited to about 8 percent of the damages recovered by the first victorious plaintiff.

Perhaps more telling is the following chart, which shows the total potential liability of a common defendant faced with multiple potential plaintiffs under the second and third schemes. The defendant's total potential liability is a function of the number of potential plaintiffs (who would follow the first successful plaintiff). This potential liability is described as a multiple of the award in the first suit in which the defendant loses:

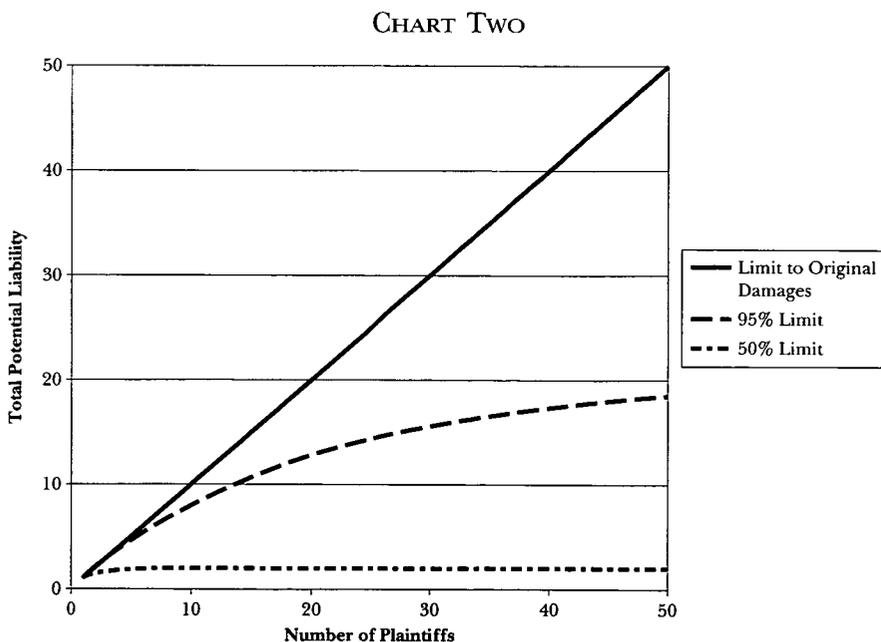


Chart: Extent of Defendant's Potential Liability Resulting from an Adverse Finding as a Function of the Number of Potential Plaintiffs (expressed as a multiple of defendant's obligation to the original plaintiff)

As one can see from this chart, for a defendant facing plaintiffs who would rely on nonmutual collateral estoppel, total potential liability resulting from an adverse finding would be limited, under the second scheme, to the original damages multiplied by the number of plaintiffs who rely on nonmutual collateral estoppel (plus the damages awarded to the first successful plaintiff). Where the subsequent plaintiffs who rely on nonmutual collateral estoppel have damages limited to a percentage (less than 100 percent), the defendant's potential liability resulting from an adverse finding is lower, and it is limited, no matter how many potential plaintiffs there are.

Even when one of these limits is in place, a defendant's total potential liability could vary widely based on the type of limit in place and the number of potential plaintiffs. Consider a hypothetical situation in which fifty plaintiffs are injured in the same accident, and they sue one at a time. If the defendant loses the first suit, under a scheme that limits damages possible for a plaintiff who relies on nonmutual collateral estoppel to the damages won by the plaintiff on whose suit the subsequent plaintiff relies to estop the common defendant, the defendant would face a cumulative total potential damages of fifty times the damages in the first suit. Under the same scheme, if the defendant won the first twenty-five suits but lost the twenty-sixth, the defendant would face a potential liability of twenty-five times the damages won by the twenty-sixth plaintiff. Under a 50-percent limit, the defendant who lost the twenty-sixth suit would face a total potential liability of approximately two times the damages awarded to that successful plaintiff. Under the 95-percent limit, the defendant who lost the twenty-sixth suit would face a total potential liability of approximately fourteen times the damages awarded to that successful plaintiff.

CONCLUSION

Any of the proposed limits on damages would, in appropriate cases, continue to provide the efficiency advantages that result from nonmutual collateral estoppel. However, they would, to varying degrees, reduce or eliminate the fairness problems that arise with offensive nonmutual collateral estoppel. This would be especially true when a court implements one of the proposed damage limitations in conjunction with any of the other reforms described in Part III.B. None of these schemes would limit the discretion of the trial judge to ensure that offensive nonmutual collateral estoppel does not give rise to fairness problems; instead, they each would supplement the trial judge's decision making and leave the judge free to disallow nonmutual collateral estoppel should the circumstances warrant. By providing greater predictability of the future effects of litigation, these

limits would increase a defendant's ability to correctly discern the level of vigor with which to litigate a suit. They would also reduce the effects of unfair results when a series of suits by different plaintiffs results in inconsistent findings; a plaintiff might still rely on a sole finding against the defendant, but only to a more limited extent. Further, they would limit or eliminate surprise damages in suits by unforeseen plaintiffs. Moreover, these limits may even increase judicial efficiency; by reducing or eliminating the incentive for plaintiffs to "wait and see" what happens in suits brought by other plaintiffs, they might make plaintiffs more likely to combine their separate claims in a single suit.

The preferred method would likely be to limit damages recoverable in a suit in which the plaintiff relies on offensive nonmutual issue preclusion to establish an element of the cause of action to the damages in the original suit. Such a *per se* rule would enable a defendant facing multiple plaintiffs to foresee the scope of its potential liability—thereby limiting the worst of the unfair effects of nonmutual issue preclusion. Although the "converging geometric series" method provides the greatest amount of certainty for a defendant about the potential liability that might arise from given litigation, that method is likely too complex to be workable. A flat statutory cap on damages would, because of its simplicity, be preferable, but it lacks flexibility, and there are potential problems with setting the limit too high to be effective or too low to permit efficiency gains to result.