OFFENSIVE COLLATERAL ESTOPPEL IN CIVIL ANTITRUST CASES: *PARKLANE HOISERY* AND THE SEVENTH AMENDMENT

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I. INTRODUCTION

A plaintiff in private civil litigation can benefit substantially from a judgment in prior government litigation against the same defendant, if that judgment arises from the same conduct the plaintiff challenges. The most powerful tool at a private plaintiff's disposal in follow-on litigation is offensive non-mutual collateral estoppel, in which the plaintiff may foreclose a defense challenge to an unfavorable factual finding in the previous litigation. The Supreme Court first endorsed offensive non-mutual collateral estoppel in *Parklane Hosiery Co. v. Shore*,[1] and today, this practice can heavily influence the course of litigation in major antitrust actions. In the most favorable scenario for a plaintiff, a private civil action that follows a government antitrust case can become an exercise in damages calculation, because collateral estoppel bars a defendant from contesting either its own liability or plaintiff's injury.

Parklane Hosiery is now more than 30 years old. Decisions from the Supreme Court and federal courts of appeal since *Parklane Hosiery* suggest, however, that offensive non-mutual collateral estoppel in antitrust cases may conflict with the Seventh Amendment's right to jury trial, which has evolved to take on new precedence in the case law. The tension arises because offensive non-mutual collateral estoppel allows a decision from an earlier *non-jury* proceeding—the government litigation—to control the outcome on issues that a jury would otherwise decide in the later trial—a private civil antitrust case. Even if offensive non-mutual collateral estoppel applies despite courts' recent invigoration of the Seventh Amendment, arguments for avoiding it or limiting its scope based on judicial-efficiency grounds remain available to a defendant.

II. OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

A plaintiff may "estop a defendant from re-litigating the issues which the defendant previously litigated and lost against another plaintiff."[2] To prevail in applying offensive non-mutual collateral estoppel, a new (*i.e.*, "non-mutual") plaintiff must show that: (1) the issues in both proceedings are identical; (2) the relevant issues were actually litigated and decided in the prior proceeding; (3) there was a full and fair opportunity to litigate issues in the proceeding; and (4) the issues were necessary to the final judgment on the merits in the prior action.[3] Moreover, under *Parklane Hosiery*, a decision by a judge in a government antitrust action can have collateral estoppel effect in a later private civil antitrust case—a case

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1 439 U.S. 322, 329 (1979).

2 *Parklane Hosiery*, 439 U.S. at 329.

3 *See, e.g., Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d. Cir. 1995); *Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1211 (S.D.N.Y. 1981).

otherwise triable to a jury—without violating the Seventh Amendment.[4]

Thus, a plaintiff who brings an antitrust case that follows a government action may foreclose a defendant from challenging any determinations made in the government action. These determinations may include a finding that the defendant's conduct violated the antitrust laws. Courts in recent years have applied offensive collateral estoppel following civil antitrust actions brought by the government.[5] In both *Microsoft* and *Discover*, the district court applied collateral estoppel to preclude the defendants from challenging Sherman Act violations that earlier Department of Justice actions against the defendants had established.[6] In civil cases, the judgment in a government action may have also included determinations that the civil plaintiff was injured by the defendant's conduct.[7]

Thus, offensive non-mutual collateral estoppel provides a significant tactical advantage and strong leverage to a civil plaintiff in a damages case. A plaintiff may obtain either summary judgment or a directed verdict on liability and injury.[8] This would leave the jury the job only of deciding the amount of damages, after receiving an instruction that the defendant violated the antitrust laws. The potential exposure in this scenario—including treble damages—tends to lead to settlement of the case.[9]

III. IS *PARKLANE HOISERY* STILL VIABLE IN LIGHT OF MORE RECENT PRECEDENT FROM THE SUPREME COURT AND APPELLATE COURTS?

In *Parklane Hosiery*, the Supreme Court held that an equitable determination could have preclusive effect in a subsequent legal action without violating the defendant's Seventh Amendment right to a jury trial. However, two separate lines of authority since *Parklane Hosiery* call its holding into question. First, the Supreme Court itself has departed from the reasoning underlying *Parklane Hosiery*. Second, recent appellate and district court decisions favor trying jury issues first, prior to any equitable issues that may dispose of the case.

Regarding the first line of authority, Supreme Court precedent before *Parklane Hoisery* required mutuality in collateral estoppel, meaning that the plaintiff could not rely on preclusive effect from a judgment against the defendant in an action to which

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4 *Parklane Hoisery*, 439. U.S. at 329.

5 *See, e.g.*, *In re: Microsoft Corp. Antitrust Litig.*, 232 F.Supp.2d 534, 536-37 (D. Md. 2002), *rev'd and remanded on other grounds*, 355 F.3d 322, 327 (4th Cir. 2004); *Discover Financial Services, Inc. v. Visa U.S.A., Inc.*, 598 F.Supp.2d 394, 401 (S.D.N.Y. 2008).

6 *Id*.

7 *Id*.

8 *Id*.

9 Section 5(a) of the Clayton Act, [15 U.S.C. § 16(a)] provided, even prior to *Parklane Hoisery*, that a finding against a defendant in a government action would establish a *prime facie* claim of violation in a subsequent civil action. However, the defendant retained the ability to rebut the *prime facie* claim under Section 5(a). Thus, following the Supreme Court's decision in *Parklane Hoisery*, a plaintiff has little incentive to rely on Section 5(a), when the preclusive effect of offensive non-mutual collateral estoppel provides much greater leverage to the plaintiff.

the plaintiff was not a party.[10] In *Parklane Hoisery*, the Supreme Court abrogated the mutuality requirement where a plaintiff seeks to apply collateral estoppel "offensively" to preclude the defendant from challenging a finding made against it in prior litigation with a different party. The Supreme Court justified its departure from earlier precedent requiring mutuality for offensive collateral estoppel by citing *Katchen v. Landy*,[11] for the proposition that "an equitable decision can have collateral estoppel effect in subsequent legal action."[12] Although *Katchen*'s reasoning focused on a creditor's claim against a bankruptcy estate, a particular kind of claim that arises in bankruptcy cases, the Supreme Court relied on in *Parklane Hoisery* for the broad proposition that an equitable determination by a court in a prior action can preclude re-litigating the same issue in a later jury trial involving a different plaintiff.

Ten years after *Parklane Hosiery*, though, the Supreme Court significantly narrowed the holding of *Katchen* in *Granfinanciera, S.A. v. Nordberg*.[13] The Court in *Nordberg* read *Katchen* to address only the unique posture of creditor claims against a bankruptcy estate.[14] For cases that are not within that unique posture, *Nordberg* holds that bankruptcy courts do not have the intrinsic ability to adjudicate equitable claims that would otherwise be legal claims, and therefore its equitable determinations will have no preclusive effect on subsequent legal claims.[15] In characterizing *Katchen* as a case about bankruptcy procedure, the Supreme Court may have knocked out one of the conceptual pillars supporting the *Parklane Hoisery* decision by noting that the right to a jury trial in bankruptcy depended on whether the claim was against the estate and was thus a creature of bankruptcy law, as opposed to legal claim under non-bankruptcy law. As a result, the assumption upon which the Court relied in *Parklane Hosiery*—that a prior equitable determination can govern a legal claim brought by a different plaintiff—collapses. This fact did not go unnoticed by the dissent in *Nordberg*, which stated that the majority departed from from precedent by "potentially conclud[ing] for the first time that the Seventh Amendment guarantees litigants in a specialized non-Article III forum the right to a jury trial" and "calling into question several of our prior decisions [relating to the right to jury trial for bankruptcy claims]."[16] Nonetheless, more

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10 The Supreme Court first abandoned the requirement of mutuality in *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328-29 (1971). However, *Blonder-Tongue* was limited to whether a patentee, having once litigated unsuccessfully the validity of a patent, could re-litigate that issue with another party. *Id.* at 349-50. It left open the broader question of whether to abandon mutuality altogether. *Parklane Hoisery*, 439 U.S. at 328-29.

11 382 U.S. 323 (1966).

12 *Parklane Hosiery*, 439 U.S. at 435. *Katchen* itself did not discuss mutuality; rather, it only discussed whether an equitable determination of a bankruptcy court could provide for issue preclusion on a legal claim otherwise triable to a jury. *Katchen*, 382 U.S. at 336-38. Nonetheless, *Parklane Hoisery* relies on *Katchen*, even though the issue in *Parklane Hoisery* was not whether an equitable determination could *ever* preclude re-litigation of the same issue, but rather whether a plaintiff who was not a party to the original case could use collateral estoppel offensively in a later case to preclude the defendant from re-litigating an issue that would be triable to a jury in the later case under the Seventh Amendment.

13 492 U.S. 33 (1989).

14 *Nordberg,* 492 U.S. at 58.

15 *Id.*

16 *Id.* at 71 (White, J., dissenting).

than 20 years after Nordberg, courts continue to treat *Parklane Hoisery* as settled law.[17]

The second line of decisions casting further doubt on *Parklane Hosiery* have upheld the jury trial right when a court has to decide an underlying issue that is an element of both an equitable cause of action where the court decides disputed facts and a legal cause of action where the jury decides disputed facts**.** In *Shum v. Intel*,[18] the Federal Circuit concluded that where legal and equitable claims are joined in the same action, the district court has very limited discretion to sequence the trial in a way that would put the equitable issues first and thus potentially preclude need for a jury trial on the legal issues. Similarly, the Federal Circuit decided in *Cabinet Vision v. Cabinetware*,[19] that a court's equitable determination is constrained by the Seventh Amendment when there are factual questions in common between an inequitable conduct claim and a *Walker Process* antitrust counterclaim. Both *Shum* and *Cabinet Vision* hew much more closely to the Supreme Court's holding in *Beacon Theatres v. Westover*[20] than to *Parklane Hosiery*. In *Beacon Theatres*, the Supreme Court decided that where legal and equitable antitrust claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and that discretion must be exercised to preserve jury trial.[21]

Nordberg and the recent circuit court cases provide a defendant with a potential avenue for challenging the 30-year-old *Parklane Hosiery* decision. But at present, *Parklane Hoisery* continues to allow for applying offensive non-mutual collateral estoppel to a defendant who is unsuccessful in a government action. Thus, a defendant must also look for avenues to challenge offensive non-mutual collateral estoppel within *Parklane Hosiery*'s framework.

IV. CHALLENGING THE ELEMENTS OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

Even if *Parklane Hoisery* controls, offensive non-mutual estoppel is not a *fait accompli* for a defendant who loses in a government antitrust action. A defendant may challenge application of non-mutual offensive collateral estoppel on the grounds that one of the four elements has not been satisfied, or that the doctrine fails to foster judicial efficiency. Even if liability issues overlap with those in the earlier government action, the defendant can nonetheless seek to avoid collateral estoppel by arguing that the government's burden on certain issues—injury in fact, antitrust injury, and causation—differed significantly in both degree and kind from burden the Clayton Act imposes on private plaintiffs.[22] In at least one case, though, a court ruling in a follow-on private civil action concluded that the government discharged its burden in a way that sufficiently established injury to

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17 *See Microsoft*, 232 F.Supp. 2d at 535 (describing offensive non-mutual collateral estoppel under *Parklane* as "firmly embedded in the law"); *see also Murray v. Alaska Airlines, Inc.*, __ Cal. 4th __, No. S162570, slip op., at 6 (Aug. 23, 2010) (confirming that a determination against a plaintiff in an administrative proceeding may have preclusive effect on judicial claims made by the plaintiff arising out of the same matter).

18 499 F. 3d 1272 (2007).

19 129 F.3d 595, 600 (Fed. Cir. 1997).

20 359 U.S. 500, 510 (1962).

21 *Id*.

22 *See, e.g.*, *Microsoft*, 232 F. Supp. 2d at 539.

competitors, an element critical and necessary to the judgment.[23]

A defendant may also challenge non-mutual offensive collateral estoppel on grounds that it would not foster judicial efficiency. A court may decline to apply non-mutual offensive collateral estoppel for the sole reason that doing so would not promote judicial efficiency.[24] In particular, a defendant may show that the proof required on claims where the defendant is not estopped is identical to, or overlaps substantially with, the proof required on the issues where collateral estoppel would foreclose litigation. Numerous courts have decided to deny applying collateral estoppel when doing so would not provide any judicial efficiency benefit.[25]

V. CONCLUSION

The offensive non-mutual collateral estoppel doctrine, as set out in *Parklane Hoisery* and followed in subsequent decisions, remains an established principle that may be applied in a civil antitrust case that follows a government action. However, subsequent Supreme Court decisions and recent cases affirming the importance of preserving the Seventh Amendment right to jury trial raise potential arguments for challenging *Parklane Hosiery's* ongoing viability.

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23 *See Kloth v. Microsoft*, 355 F.3d 322, 327 (4th Cir. 2004) (a finding in prior litigation must be "critical and necessary" or "essential" to the prior judgment, rather than just "supportive of" the prior judgment, to have preclusive effect).

24 *See, e.g., United States v. U.S. Currency in Amount of $119,984.00, More or Less*, 304 F.3d 165, 172 (2d. Cir. 2002); *Swineford v. Snyder Co.*, 15 F.3d 1258, 1269 (3d Cir. 1994); *Davis v. West Community Hospital*, 786 F.2d 677, 682 (5th Cir. 1986).

25 *See, e.g., Schwab v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 992, 1079 (E.D.N.Y. 2006); *Setter v. A. H. Robbins Co.*, 748 F.2d 1328, 1331 (8th Cir. 1984); *Coburn v. SmithKline Beecham Corp.*, 147 F. Supp. 2d 1235, 1239 (D. Utah 2001).