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Offensive Collateral Estoppel and Products Liability: Reasoning the Unreasonable.

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OFFENSIVE COLLATERAL ESTOPPEL AND PRODUCTS LIABILITY: REASONING WITH THE UNREASONABLE

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I. INTRODUCTION

A *sine qua non* of recovery in every products liability suit is the factual finding that the product is defective.[1] In products liability actions, defective design or failure to adequately warn of a prod-

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

uct's dangerous characteristics[2] can be very difficult to prove; expensive and complex expert testimony is often required for both parties.[3]

Within the last few years, plaintiffs alleging design defects have been given a potent new weapon seemingly capable of wiping out whole industries with a single judgment; that weapon is the offensive use of collateral estoppel. Once a product is found defective, if certain criteria are met,[4] plaintiffs in subsequent suits can obtain a summary judgment on the issue of defect by establishing that the defendant is collaterally estopped to deny the defectiveness of the product.[5] The theory is that the defendant had the opportunity to litigate the defectiveness of the product and, in the interest of preserving judicial resources, should not be allowed to do so again. The potential for injustice, however, is great; finders of fact are not infallible, new evidence can arise bearing on the issue of defectiveness, and a host of other factors could make it unfair to collaterally estop the defendant. Conversely, the plaintiff can save a great deal of time, effort, and money if the defendant is estopped to deny the defectiveness of his product.

The asbestos cases are the only line of products liability cases in which collateral estoppel has been used extensively.[6] There are,

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2. This article deals solely with design defects and failure to warn cases; manufacturing defects cannot be used as a basis for an estoppel except in rare cases (e.g., simultaneous mass torts, such as an airplane crash). Throughout this paper, the term "design defect" will include failure to warn.

3. *See* Tinnerholm v. Parke, Davis & Co., 411 F.2d 48, 51-53 (2d Cir. 1969). *Tinnerholm* is a classic example of this problem. In a defective drug case, plaintiff put on expert after expert to prove his theory of pertussis endotoxin "leakage" that allegedly caused the plaintiff's injury. This case has been described as a "classic battle of the litigant's hired guns." Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 45 (1979).

4. *See infra* notes 32-40 and accompanying text.

5. *See* Flatt v. Johns Manville Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 248 (E.D. Tex. 1980). Not only can collateral estoppel shake defendant industries, but the *ad timorum* effect of the concept can be used to bludgeon defendants. In Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730 (7th Cir. 1976), Vladimir "Spider" Sabich sued Outboard Motor Corp. (OMC) in a product liability action alleging that an amphibious vehicle produced by OMC was unsafe and the cause of his injuries. Sabich won $600,000 in actual damages and $1,250,000 in punitive damages. Sabich's attorney approached OMC and offered to vacate the judgment to prevent its future use as a basis for an estoppel if OMC would pay the judgment and not appeal. OMC refused the offer and appealed; Sabich's attorney then filed a class action suit on behalf of the owners of OMC vehicles. *See id.* at 733.

6. The reported asbestos cases are Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155

however, other types of cases where collateral estoppel would no doubt be appropriate.[7] Cases involving the drug DES are ripe for the use of collateral estoppel, as are other cases involving mass torts that necessarily require complicated and difficult proof of defect.

The asbestos cases provide a fascinating journey through the doctrine of collateral estoppel as it relates to products liability cases. In a period of two years, seven reported federal district court cases dealt with its scope and application.[8] The Eastern District of Texas, with its high concentration of shipyards and oil refineries, led the way with several pioneering decisions applying collateral estoppel in an attempt to alleviate the burden on its docket of literally thousands of asbestos-related claims.[9] The Fifth Circuit, however, has severely restricted the application of collateral estop-

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(8th Cir. 1975); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335 (S.D. Miss. 1980); Migues v. Nicolet Indus., 493 F. Supp. 61 (E.D. Tex. 1980), *rev'd in part and remanded sub nom.*, Migues v. Fibreboard Corp., 662 F.2d 1182 (5th Cir. 1981); Tretter v. Johns-Manville Corp., 88 F.R.D. 329 (E.D. Mo. 1980); Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980).

7. An earlier line of cases involving the drug Quadrigen has had a relatively minor effect on the development of collateral estoppel law. *See* Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979); Grant v. Parke, Davis & Co., 544 F.2d 521 (7th Cir. 1976), reported in full, [1978 Transfer Binder] PRODS. LIAB. REP. (CCH) § 7848, at 15,598 (7th Cir. October 27, 1976); Parke-Davis and Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969); Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969); Vincent v. Thompson, 377 N.Y.S.2d 118 (App. Div. 1975). Two other miscellaneous product liability cases involved the offensive use of collateral estoppel. *See* Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975) (involving defectiveness of gas tank in Ford Maverick); Williams v. Laurence-David, Inc., 534 P.2d 173, 174-75 (Or. 1975) (involving defectiveness of gloves worn by workers in plywood mill).

8. *See* Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 543-45 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1361 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 338-40 (S.D. Miss. 1980); Tretter v. Johns-Manville Sales Corp., 88 F.R.D. 329, 333 (E.D. Mo. 1980); Migues v. Nicolet Indus., 493 F. Supp. 61, 63 (E.D. Tex. 1980), *rev'd in part and remanded sub nom.*, Migues v. Fibreboard Corp., 662 F.2d 1182 (5th Cir. 1981); Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 839-41 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 248-49 (E.D. Tex. 1980).

9. In Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982), the court cites a recent estimate that "there are over 3000 asbestos plaintiffs in the Eastern District of Texas alone and between 7500 and 10,000 asbestos cases pending . . . around the country." *Id.* at 347.

pel in asbestos cases in two recent decisions,[10] laying down strict rules that will stem the tide of summary judgments based on collateral estoppel on the issue of defect in asbestos cases.[11]

The Fifth Circuit's treatment of collateral estoppel essentially has been salutary. The basic problem with the use of collateral estoppel is that few coherent rules have developed for its application and, as a result, the doctrine has been applied haphazardly and seemingly at the whim of the trial judge. Products liability suits, unlike most tort actions, affect interests far beyond those of the litigants; the defendant's stockholders, employees, creditors, insurers, customers, and occasionally the entire industry, can be seriously shaken by a finding of defect, and the liberal application of collateral estoppel on the issue of defect greatly magnifies the effect. While the noble policy of tort law—that the innocent victim should be compensated for the loss caused by another—should not be threatened by unduly inhibiting the ability of a plaintiff to prove his case, it is equally unjust to prove the plaintiff's case for him by taking from the factfinder the opportunity to pass on the defectiveness of the product when that question is still a matter of reasonable dispute.[12]

Products liability cases provide an excellent stage for the development of collateral estoppel rules. The complexity and subtlety of products liability issues provide fertile ground for the growth of collateral estoppel rules in a wide variety of settings. But to grow into a viable doctrine in products liability law, firm guidance is needed.[13] Evaluating existing guidelines and proposing new guidelines for what is "fair" in the products liability collateral estoppel case is the purpose of this article.

II. RES JUDICATA: MERGER, BAR, AND COLLATERAL ESTOPPEL

Res judicata is a generic term encompassing a family of related

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10. *See id.* at 345; Migues v. Fibreboard Corp., 662 F.2d 1182, 1185-87 (5th Cir. 1981).

11. *See infra* notes 127-133, 158-165 and accompanying text.

12. *See* Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 52-54 (1979).

13. The United States Supreme Court's only substantial guidance in the use of offensive collateral estoppel came in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), a non-products liability suit, in which the Court stated that an estoppel should not be applied if its use would be "unfair" to the defendant. *See id.* at 330-31.

judicial doctrines.[14] The concept is almost exclusively a product of the common law;[15] legislation in the field is rare and of relatively recent origin.[16] Several reasons have been advanced for its development: encouraging the final settlement of disputes,[17] preventing the harassment of litigants,[18] promoting the efficient use of the court system,[19] and recognizing the prestige of other courts.[20]

To further these ends, the res judicata concept has evolved into three distinct but related parts: merger, bar, and collateral estoppel. The doctrine of merger states that, upon rendering a judgment for the plaintiff, the cause of action[21] upon which the suit was based merges with the judgment, thereby extinguishing the plaintiff's original cause of action and creating an action on the judgment.[22] Related to merger is bar, whereby the judgment acts to bar

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14. *See* Towle v. Boeing Airplane Co., 364 F.2d 590, 592 (8th Cir. 1966).

15. *See* Vestal, *Rationale of Preclusion,* 9 ST. LOUIS L.J. 29, 30 (1964).

16. *See id.* at 30; *see also* Cherokee Nation v. United States, 270 U.S. 476, 486 (1926) (involving statutory waiver of prosecution).

17. A. VESTAL, RES JUDICATA/PRECLUSION at V-8 (Freeman and Friedman, eds. 1969). According to Vestal:

> People who have engaged in a formal adjudication in the socially established manner expect that the end of the process will be reached. Although in unusual circumstances a decision may be reversed, we normally expect that once a decision is made that that terminates the controversy. Life simply must move forward; we cannot spend our energies refighting old battles.

Id. at V-8.

18. *See id.* at V-9.

19. *See id.* at V-10.

20. *See id.* at V-12.

21. The term "cause of action" is used herein to describe the *specific* set of facts upon which the plaintiff's case is based. *See* Rhodes v. Jones, 351 F.2d 884, 886 (8th Cir. 1965), *cert. denied,* 383 U.S. 919 (1966); Duke v. Housen, 589 P.2d 334, 341 (Wyo.), *cert. denied,* 444 U.S. 863 (1979). It is distinct from the "legal theory of recovery," which provides the plaintiff with a vehicle for getting redress for an alleged violation of his rights. An "issue" is a disputed question of law or fact (in this context, disputed facts are of greater interest) that the parties wish to have resolved by the court or jury. *See* Muller v. Muller, 45 Cal. Rptr. 182, 184 (Ct. App. 1965). It is independent of and distinct from the theory of recovery used to present it. *See* Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1049-50 (9th Cir. 1974). A cause of action, of course, can be composed of any number of issues. Likewise, the same issues presented in a single cause of action can provide a basis for a variety of theories of recovery.

22. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 comment a (1982). Comment a to section 18 states:

> When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment. It is immaterial whether the defendant had a defense to the original action if he did not rely on it, or if he did rely on it

an unsuccessful plaintiff from forcing a prevailing defendant to defend on the same cause of action a second time.[23] Merger and bar are complements of each other; merger protects unsuccessful defendants, while bar protects victorious ones. Together, merger and bar have been given the name of "claim preclusion."[24]

Six elements must be established to sustain a defense of claim preclusion: (1) identity of the thing sued for,[25] (2) identity of the cause of action,[26] (3) identity of persons or parties to the cause of action,[27] (4) identity of the quality or character in the person against whom the claim is made,[28] (5) the rendering of a judgment by a court of competent jurisdiction,[29] and (6) a final judgment on the merits of the case.[30] A judgment meeting these requirements is conclusive on all matters, issues, and defenses that were or could have been raised.[31]

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and judgment was nevertheless given against him. It is immaterial whether the judgment was rendered upon a verdict or upon a motion to dismiss or other objection to the pleadings or upon consent, confession, or default.

See Kotsopoulos v. Asturia Shipping Co., 467 F.2d 91, 95 (2d Cir. 1972); Pepper v. Banker's Life & Casualty Co., 414 F.2d 356, 357-58 (8th Cir. 1969); Kirksey v. Morris, 206 S.E.2d 706, 707 (Ga. Ct. App. 1974).

23. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982). Section 19 provides that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." *Id.* § 19.

24. A. VESTAL, RES JUDICATA/PRECLUSION at V-14 (Freeman and Friedman, eds. 1969).

25. *See* United States v. Harrison County, Miss., 399 F.2d 485, 491 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970); Schubach v. Silver, 336 A.2d 328, 332 (Pa. 1975).

26. *See, e.g.*, Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 361 (6th Cir. 1967); Sims v. Mack Trucks, Inc., 407 F. Supp. 742, 743 (E.D. Pa. 1976); Omernick v. LaRocque, 406 F. Supp. 1156, 1159 (W.D. Wis.), *aff'd sub nom.*, Omernick v. State, 539 F.2d 715 (7th Cir. 1976).

27. *See, e.g.*, Sims v. Mack Trucks, Inc., 407 F. Supp. 742, 743 (E.D. Pa. 1976); State v. Stauffer, 536 P.2d 1044, 1047 (Ariz. 1975); State v. Redinger, 312 A.2d 129, 132 (N.J. 1973).

28. *See* Perrin v. Brunswick Corp., 333 F. Supp. 221, 224 (W.D. Va. 1971). This element relates to the problem of a subsequent suit against the defendant acting in a different capacity. A suit against a person acting in his or her official capacity does not preclude a subsequent suit against that same person as an individual. *See id.* at 224.

29. *See* Moran v. Paine, Webber, Jackson & Curtis, 279 F. Supp. 573, 582 (W.D. Pa. 1967), *aff'd*, 389 F.2d 242 (3d Cir. 1968); De Maio v. Lumbermans Mut. Casualty Co., 230 A.2d 279, 281 (Md. 1967); Swilley v. McCain, 374 S.W.2d 871, 874 (Tex. 1964).

30. *See* Omernick v. LaRocque, 406 F. Supp. 1156, 1159 (W.D. Wis.), *aff'd sub nom.*, Omernick v. State, 539 F.2d 715 (7th Cir. 1976); Hagopian v. Consolidated Equities Corp., 397 F. Supp. 934, 935 (N.D. Ga. 1975); United States v. General Elec. Co., 358 F. Supp. 731, 738 (S.D.N.Y. 1973); Bugg v. Fairview Farms, Inc., 189 N.W.2d 291, 297 (Mich. 1971).

31. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 579 (1974); Stevenson v. International Paper Co., 516 F.2d 103, 108-09 (5th Cir. 1975); Harrison v. Bloomfield Bldg. Indus., 435 F.2d 1192, 1195 (6th Cir. 1970); Flynn v. State Bd. of Chiropractic Examiners, 418 F.2d

While merger and bar prevent the relitigation of claims, collateral estoppel, or estoppel by judgment,[32] prevents the relitigation of issues and has been given the name "issue preclusion."[33] Collateral estoppel prevents relitigation of a fact[34] or issue[35] when a court of competent jurisdiction[36] has rendered a final adjudication of the issue on the merits. Both parties in the subsequent suit are bound by the original decision[37] if the party claimed to be estopped had a full and fair opportunity to litigate the issue in the earlier action.[38]

The critical distinction, then, is that merger and bar relate to causes of action, while collateral estoppel relates to issues.[39] Thus: *A* sues *B* to enjoin *B's* use of his or her land in a manner that violates the local zoning ordinance. The injunction is issued. If *B*

668, 668 (9th Cir. 1969); Brotherhood of R.R. Trainmen v. Atlantic Coastline R.R., 383 F.2d 225, 227-28 (D.C. Cir. 1967); May v. Edwards, 505 S.W.2d 13, 14 (Ark. 1974); Fladung v. City of Boulder, 438 P.2d 688, 690 (Colo. 1968); Fireman's Fund Ins. Co. v. Bybee, 322 S.W.2d 657, 658-59 (Tex. Civ. App.—Eastland 1959, writ dism'd w.o.j.). See also Carbonaro v. Johns-Manville Corp., 526 F. Supp. 260, 262 (E.D. Pa. 1981), for an example of the effect of this rule in an asbestos case.

32. Canaan Prods., Inc. v. Edward Don & Co., 388 F.2d 540, 543 (7th Cir. 1968).

33. A. VESTAL, RES JUDICATA/PRECLUSION at V-14 (Freeman and Friedman, eds. 1969).

34. *See* Washington v. United States, 366 A.2d 457, 460 (D.C. 1976); Colaneri v. McNab, 395 N.Y.S.2d 980, 982 (App. Div. 1975); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 7 (1979).

35. *See* Eason v. Weaver, 557 F.2d 1202, 1204-05 (5th Cir. 1977); United States v. Holder, 399 F. Supp. 220, 227 (D.S.D. 1975); Williams v. Evans, 552 P.2d 876, 878 (Kan. 1976); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 7 (1979).

36. *See* Weaver v. Prince George's County, 366 A.2d 1048, 1052 (Md. Ct. Spec. App. 1976); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 7 (1979).

37. *See* Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975); Miller v. Meinhard-Commercial Corp., 462 F.2d 358, 360 (5th Cir. 1972); Performance Plus Fund, Ltd. v. Winfield & Co., 443 F. Supp. 1188, 1191 (N.D. Cal. 1977); United States v. McNair, 439 F. Supp. 103, 107 (E.D. Pa. 1977); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 7 (1979). The much litigated mutuality requirement is rapidly being discarded. *See infra* notes 55-81 and accompanying text.

38. *See* Wolfson v. Baker, 444 F. Supp. 1124, 1127-30 (M.D. Fla. 1978); Gilbey v. Chesapeake & Potomac Tel. Co., 419 F. Supp. 623, 625 (S.D.W. Va. 1976); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal,* 15 NEW ENG. L. REV. 1, 8 (1979). Stated another way, "a right, question, or fact distinctly put in issue and directly determined as a ground of recovery by a court of competetent jurisdiction collaterally estops a party or his privy from relitigating the issue in a subsequent action." Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982).

39. *See* Hone v. Climatrol Indus., 130 Cal. Rptr. 770, 778-79 (Ct. App. 1976); Seaboard Coastline R.R. Co. v. Industrial Contracting Co., 260 So. 2d 860, 862-63 (Fla. Dist. Ct. App. 1972).

later resumes the same activity, *A* may get summary judgment against *B* on the issue whether the use violates the ordinance and *B* will be collaterally estopped to deny the violation. Although the cause of action is different, the issue is the same.[40]

III. Collateral Estoppel In Products Liability Suits

A. *Overview*

Whenever collateral estoppel is injected into a products liability suit, two issues are particularly significant. The first and most troublesome is whether the issue decided in the first suit is identical to the issue in the second suit for which collateral estoppel is being invoked. The second issue is whether the party invoking collateral estoppel is one allowed to do so under the collateral estoppel rules.

1. Identity of Issue

In products liability actions three aspects of the identity of issue requirement are important. First, there must be identity of the product involved. In *Williams v. Laurence-David, Inc.*,[41] the plaintiff claimed that the rubber gloves he wore at work in a plywood mill caused him to contract dermatitis either because the gloves were easily punctured by splinters or because the gloves themselves caused the irritation. He alleged that the defendant was col-

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40. *See* Bentrup v. Hoke, 433 S.W.2d 139, 139-40 (Ark. 1968). *Bentrup* is an example of the offensive use of collateral estoppel by a *party* to the original action. *See also* McKee v. Johns Manville Corp., 404 N.Y.S.2d 814, 816 (App. Div. 1978) (offensive use of collateral estoppel by asbestos defendant). In Carbonaro v. Johns-Manville Corp., 526 F. Supp. 260 (E.D. Pa. 1981), plaintiffs sued defendants in state court alleging asbestos-related injuries and defendants moved for summary judgment based on the applicable statute of limitations. Instead of defending, plaintiffs filed in federal court alleging the same injuries plus additional ones that arose since the filing in state court. The state judge granted defendants' motion. Defendants in federal court then moved for summary judgment on the grounds of res judicata. In granting that motion, the federal judge stated, "[i]f the question before me were one of *issue* preclusion, plaintiffs might prevail. Res judicata, however, is a doctrine of *claim* preclusion." *Id.* at 262. Plaintiffs apparently forgot, or never knew, that once a claim is decided, all of the issues involved in that claim between the two parties likewise are decided. The state court judgment barring plaintiffs from suing on the same claim was decisive of all matters and issues that were or could have been raised. *See id.* at 263; *see also supra* note 31 and accompanying text.

41. 534 P.2d 173 (Or. 1975).

laterally estopped to deny its liability because of an earlier case that resulted in a finding of liability.[42] He presented evidence that the gloves worn by plaintiffs in both suits bore the same brand insignia, but no evidence that the gloves came from the same carton or case lot.[43] Though refusing to find that the products were not identical, the trial court rejected a plea of estoppel because of potential unfairness to the defendant.[44] That ruling was upheld on appeal.[45]

How identical the products involved in the two suits must be is not settled. The trial judge in *Williams* noted, "[o]bviously these two people weren't wearing the same pair of gloves at the same time and maybe not under the same conditions."[46] The *Williams* court seemed unwilling to find that the gloves were identical unless they came from the same "carton or case lot."[47] Such a rule is unnecessarily restrictive; essentially identical gloves could be manufactured years apart. By definition, design defects recur with each new product, and requiring very strict identity of product would void the doctrine on unnecessarily technical grounds.[48]

The second important element is that an identity of defect must be established before an identity of issue is established. If the original action involved the issue of the defectiveness of a forklift with no overhead guard, collateral estoppel cannot be invoked in a subsequent case involving the same type forklift with allegedly defective transmission and brakes.[49] Far less obvious examples can be

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42. *See id.* at 177-78.

43. *See id.* at 178.

44. *See id.* at 177-78.

45. *See id.* at 177-78.

46. *Id.* at 179 n.1.

47. *Id.* at 178.

48. *Compare* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973) (product at issue was asbestos insulation), *cert. denied*, 419 U.S. 869 (1974) *with* Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980) (product at issue was cement pipes containing asbestos). In applying the estoppel effect of *Borel*, the *Flatt* court closely tailored the issues in the motion for summary judgment to relate solely to the pathogenic qualities of asbestos exposure, not to the level or mode of exposure or other causal variables related to a finding of liability. Had the *Flatt* court focused strictly on the product itself, it would have been unable to apply collateral estoppel. Thus, though the products containing the asbestos differed, identity of product was maintained by focusing on the asbestos itself, not on the vehicle causing the exposure. *See* Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980). This point was overruled in Hardy v. Johns-Manville Sales Corp., 681 F.2d. 334, 340-41 (5th Cir. 1982).

49. *See* Christopherson v. Hyster Co., 374 N.E.2d 858, 866 (Ill. App. Ct. 1978) (evidence

imagined. A case finding a pressurized air tank to have a defective valve is not dispositive of a subsequent case involving the same tank with an allegedly defective seal; a case finding a truck's steering device to be defective due to weak rods is not dispositive of a case involving the same steering device with too much "play" in the wheel.

Finally, using collateral estoppel in products liability suits poses the problem of reconciling varying standards of defectiveness used in different jurisdictions.[50] A product adjudicated defective, for example, in Oregon[51] or California[52] is judged under a different standard than a product found defective in a jurisdiction that uses the definition of defect found in section 402A Restatement (Second) of Torts.[53] Thus, the "issue" determined in one trial, whether a product is defective under the Oregon or California definitions, may not be the same as the issue at a subsequent trial in a different jurisdiction, whether the same product is defective under section 402A, Restatement (Second) of Torts.

Finding an identity of issue is probably the most vexatious requirement of collateral estoppel in products liability suits. It requires reading between the lines of judicial opinions or extrapolating from a general jury verdict.[54] A problem with many of the

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sufficient on allegation of defective design based on lack of overhead guard); Anderson v. Hyster Co., 385 N.E.2d 690, 692 (Ill. 1979) (allegation of defective steering device on forklift).

50. For a discussion of the different tests used throughout the United States, see Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 72-79 (1982).

51. The test in Oregon asks whether a reasonable person in the manufacturer's position would have placed the article in commerce had he or she known of the allegedly dangerous qualities of the article. *See* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1038-39 (Or. 1974).

52. California's test provides that a product can be found defective if, when used for its intended purpose, the plaintiff either demonstrates that the product did not perform as safely as an ordinary consumer would expect, or, alternatively, shows that the product caused his injury and the defendant fails to show that the benefits of the design outweigh the dangers inherent in it. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 454, 143 Cal Rptr. 225, 236 (1978).

53. Section 402A imposes liability on manufacturers who produce a "product in a defective condition unreasonably dangerous to the user or consumer or to his property . . . ." RESTATEMENT (SECOND) OF TORTS § 402A (1965). A "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.* comment g.

54. An excellent example of difficulty of this task is found in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 341-44 (5th Cir. 1982).

asbestos cases discussed below is that the judges did not properly read and interpret the case or cases pleaded as an estoppel, and thereby established an improper estoppel.

2. Privity and Mutuality of Estoppel

Before a plaintiff can be bound by a judgment in favor of a particular defendant, the plaintiff must either have been the plaintiff or be in privity with the plaintiff in the original case.[55] This rule rests on due process concerns; a plaintiff who was not a party in the prior suit cannot be bound by an adverse judgment.[56]

The requirement of privity, effective in every jurisdiction,[57] prevents the *defensive* use of collateral estoppel by a party to the original action against a non-party plaintiff. Thus, if *A* sues Manufacturer *X* on a products liability claim and loses, and *B* later sues *X* based on the same alleged defect, due process considerations will require that *B* be given his day in court. *X* cannot use collateral estoppel defensively to prevent the relitigation of the same issue litigated in *A's* suit.

The privity requirement will not, however, bar the *offensive* use of collateral estoppel. There is no requirement that the plaintiff in the second suit be in privity with the plaintiff in the first suit if the second plaintiff seeks to invoke the estoppel *offensively* against the losing defendant. However, traditional collateral estoppel rules required mutuality of estoppel between plaintiffs; a litigant may not use collateral estoppel offensively unless the doctrine could have been used defensively had the original decision gone the other way.[58] This rule effectively prevented subsequent plaintiffs from using a judgment rendered in favor of a prior plaintiff against the identical defendant on identical issues, and has been the primary stumbling block for plaintiffs seeking to use collateral estoppel

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55. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinios Found., 402 U.S. 313, 320-21 (1971).

56. *See id.* at 329.

57. *See* Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 9 (1979).

58. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 117-18 (1912); Foltz v. Pullman, Inc., 319 A.2d 38, 41 (Del. Super. Ct. 1974); Mayhew v. Deister, 244 N.E.2d 448, 454 (Ind. App. 1969); City of Mason v. Mason State Bank, 234 N.W.2d 489, 493 (Mich. Ct. App. 1975); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 15 (1979).

offensively.[59]

Because the plaintiff in a subsequent suit was not the plaintiff in the original suit, or was not in privity with the original plaintiff, there was no mutuality of estoppel and the doctrine of collateral estoppel was unavailable. The policies underlying the mutuality requirement are entirely different from and not nearly so persuasive as those underlying the privity requirement.[60] Recognizing this, the United States Supreme Court discarded the mutuality requirement for federal courts in *Parklane Hosiery Co. v. Shore*.[61] The Court adopted the standard that "in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[62]

The types of unfairness with which the Court was most concerned were those situations in which (1) the defendant had little incentive to litigate the original action vigorously because of the small amount of money involved or the lack of foreseeability of other suits involving the same issue,[63] (2) inconsistent judgments in past cases would make it unfair to estop the defendant based on one or two defeats out of several subsequent cases,[64] and (3) proce-

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59. *See* Pennington v. Snow, 471 P.2d 370, 377-78 (Alaska 1970); Yeates v. Dailey, 150 N.E.2d 159, 162 (Ill. 1958); Keith v. Schiefen-Stockham Ins. Agency, Inc., 498 P.2d 265, 273 (Kan. 1972); Feinstein v. Edward Livingston & Sons, Inc., 457 S.W.2d 789, 793-94 (Mo. 1970); Owens v. Kuro, 354 P.2d 696, 698-701 (Wash. 1960).

60. It is difficult to find a solid doctrinal or policy basis for the mutuality requirement. In Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), Judge Friendly described the doctrine as "destitute of any semblance of reason, . . . [and is] . . . a maxim which one would suppose to have found its way from the gaming table to the bench." *Id.* at 954. Similarly, in Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892 (Cal. 1942), Justice Traynor stated, "[n]o satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend." *Id.* at 895.

61. 439 U.S. 322, 326-28 (1979). *Parklane Hosiery* was a securities fraud case involving a suit by the SEC followed by a stockholder's suit. *See id.* at 324-25.

62. *See id.* at 331.

63. *See id.* at 330.

64. *See id.* at 330. In the products liability situation, the "defects" referred to by the court are defects on the issue of product defectiveness, regardless of the outcome of the case. Thus, it is essential to determine, in a case won by a defendant manufacturer, whether the judgment turned on a finding of no defect. If it did, there would be obvious problems of "fairness" if the defendant lost a second or subsequent case on a similar defect issue and in a third case plaintiff attempted to apply the collateral estoppel effect of the second case and ignored the finding of the first case in the defendant's favor. *See id.* at 330.

dural differences between the two suits could readily cause a different result.[65]

The Supreme Court in *Parklane Hosiery* followed the trend set by other jurisdictions that had previously abandoned the mutuality requirement in part[66] or in whole.[67] A classic *Erie* question is then presented. A federal court hearing a products liability case normally will be sitting in diversity. The federal rule allows the offensive use of collateral estoppel, but many states do not.[68] In deciding which rule applies, some courts and commentators have followed the federal rule,[69] some have followed the state rule,[70] and some have avoided the issue altogether.[71]

3. Texas Law on the Meaning of Defect and Collateral Estoppel

The Texas test for defect in products liability actions is the "ordinary consumer test." The supplier of the product becomes liabile

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65. *See id.* at 330-31.

66. *See, e.g.*, Ellis v. Crockett, 451 P.2d 814, 822 (Hawaii 1969) (legal consequences in subsequent suit different than in first litigation); McAndrew v. Mularchuk, 183 A.2d 74, 75-76 (N.J. 1962) (court recognized exception to mutuality requirement that defendant's liability is dependent on culpability of another party); Posternack v. American Casualty Co., 218 A.2d 350, 352 (Pa. 1966) (mutuality requirement not rigid and has several exceptions).

67. *See, e.g.*, Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942) (party not precluded by lack of mutuality from asserting plea of res judicata); B.R. DeWitt, Inc. v. Hall, 225 N.E.2d 195, 198-99, 278 N.Y.S.2d 596, 601 (1967) (doctrine of mutuality is "dead letter"); Bahler v. Fletcher, 474 P.2d 329, 338 (Or. 1970) ("mutuality is not a relevant basis on which to determine the finality of litigation").

68. No state supreme court, however, has unequivocally affirmed the mutuality requirement in a recent offensive collateral estoppel case, though some form of the rule remains in many jurisdictions. *See* Spartacus Youth League v. Board of Trustees of Illinois Indus. Univ., 502 F. Supp. 789, 795-96 (N.D. Ill. 1980); *see also* Annot., 31 A.L.R.3d 1044, 1076-77 (1970).

69. *See, e.g.*, Johnson v. United States, 576 F.2d 606, 612-13 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1980); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715-16 (5th Cir.), *reh'g denied*, 423 U.S. 1026 (1976); Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 839 (E.D. Tex. 1980); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982); Vestal, *Res Judicata/Preclusion By Judgment: The Law Applied In Federal Courts*, 66 MICH. L. REV. 1723, 1746-48 (1968).

70. *See* McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 338-39 (S.D. Miss. 1980); Skrzat v. Ford Motor Co., 389 F. Supp. 753, 754-57 (D.R.I. 1975); Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 15 (1979); *see also* Comment, *Texas Asbestos Claims and Market Share Liability: New Remedy for An Old Tort*, 13 ST. MARY'S L.J. 957, 971 (1982).

71. *See* Gerrard v. Larsen, 517 F.2d 1127, 1131-32 (8th Cir. 1975); Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 543-44 (D. Minn. 1982).

if he placed into the stream of commerce a product that is demonstrated to have been unreasonably dangerous.[72] The Texas Supreme Court, in *Turner v. General Motors Corp.*,[73] approved a jury instruction to be used in design defect strict liability cases, which provides that " '[u]nreasonably dangerous' means dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[74] In considering whether a product was defectively designed, a jury may balance the utility and usefulness of the product against the likelihood and seriousness of the injury resulting from its use.[75]

Invoking collateral estoppel in Texas to prevent relitigation of a previously decided issue requires, among other things,[76] that the party against whom the plea of collateral estoppel is made in the second suit be the same party as in the original suit or in privity with the party in the original suit.[77] It is no longer required that

72. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977). The test does not require the court to determine whether the supplier knew or should have known of the product's dangerousness when manufactured or sold. *See id.* at 351; *see also* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1272 (5th Cir.) (defective condition and unreasonably dangerous are synonymous), *cert. denied,* 419 U.S. 1096 (1974).

73. 584 S.W.2d 844 (Tex. 1979).

74. *Id.* at 849. In approving this test, the *Turner* court determined that the bifurcated test used in Henderson v. Ford Motor Co., 519 S.W.2d 87, 92 (Tex. 1974), and General Motors Corp. v. Hopkins, 548 S.W.2d 344, 347-48 n.1 (Tex. 1977), would no longer be approved. *See* Turner v. General Motors Corp., 584 S.W.2d 844, 851 (Tex. 1979).

75. *See* Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980). In utilizing this balancing test, the jury may consider evidence that a safer design would have prevented the injury. *See id.* at 746; Turner v. General Motors Corp., 584 S.W.2d 844, 849 (Tex. 1979); Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 38 (1973).

76. Invoking collateral estoppel also requires that the issue in the prior suit be identical to the one in the present litigation and essential to the judgment, and that the prior judgment be final and one on the merits. *See* Windmill Dinner Theatre of Dallas, Inc. v. Hagler, 582 S.W.2d 585, 586 (Tex. Civ. App.—Dallas 1979, writ dism'd); Hardy v. Fleming, 553 S.W.2d 790, 792 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.); *see also* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942).

77. *See* Olivarez v. Broadway Hardware, Inc., 564 S.W.2d 195, 198 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). In attempting to define privity, the *Olivarez* court noted that privity "connotes those so connected in law with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." *Id.* at 199. The court concluded, however, that the determination of privity must be made after examining each case because no single definition of privity can be mechanically applied to all cases. *See id.* at 199.

the litigants satisfy the doctrine of mutuality.[78] In *Hardy v. Fleming*,[79] the plaintiff brought suit for medical malpractice based on an apparent heart attack. Prior to the summary judgment hearing, however, a jury in the trial of a worker's compensation claim found that the plaintiff had not suffered a heart attack at the time in question.[80] The lower court sustained the defendant doctor's plea of collateral estoppel. The court of civil appeals affirmed the trial court's decision, stating that Dr. Fleming "was not a party or in privity with a party to the prior litigation. There is no compelling reason that such be required and . . . no satisfactory reason for any requirement of mutuality."[81]

B. *Quadrigen: Early Application of Collateral Estoppel*

1. The Quadrigen Cases

A series of cases involving the drug Quadrigen displays an uneven application of collateral estoppel principles. Quadrigen was a "four-in-one" vaccine manufactured and marketed by Parke-Davis & Co. in the late 1950's and early 1960's.[82] Before the introduction of the Salk vaccine, Parke-Davis manufacturered a "three-in-one" vaccine called "Triogen" that contained merthiolate as a preservative. Because merthiolate adversely affected the Salk vaccine, benzethonium chloride was substituted as the preservative in

78. *See id.* at 198; Baker v. Story, 564 S.W.2d 166, 167 (Tex. Civ. App.—San Antonio 1978, no writ); Hardy v. Fleming, 553 S.W.2d 790, 792 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). In Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan, 410 F.2d 718 (5th Cir.), *cert. denied*, 396 U.S. 905 (1969), the court recognized that the Erie doctrine mandated the application of Texas substantive law, and as of the date of suit Texas had not explicitly abandoned mutuality. The court concluded, however, that because the trend to disregard mutuality was clear, Texas courts would hold collateral estoppel applicable even though mutuality could not be demonstrated. *See id.* at 727.

79. 553 S.W.2d 790 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

80. *See id.* at 791. Based on the finding in the worker's compensation suit that Hardy did not suffer a heart attack, final judgment was subsequently rendered that Hardy take nothing from the insurance company. *See id.* at 791.

81. *Id.* at 792-93; *see* Olivarez v. Broadway Hardware, Inc., 564 S.W.2d 195, 198-99 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Baker v. Story, 564 S.W.2d 166, 167-68 (Tex. Civ. App.—San Antonio 1978, no writ).

82. *See* Ezagui v. Dow Chemical Corp., 598 F.2d 727, 731 (2d Cir. 1979). The drug combined diptheria toxoids, tetanus toxoids, Salk polio vaccine, and pertussis (whooping cough) vaccine. *Id.* at 731. The Quadrigen story is recounted in all of the cases cited below involving the drug.

Quadrigen.[83]

The plaintiff in *Tinnerholm v. Parke, Davis & Co.*[84] was three months old in 1959 when he was administered Quadrigen. He suffered a reaction consisting of a high fever and recurrent convulsions resulting in partial paralysis and severe retardation.[85] Plaintiff's theory was that the benzethonium chloride preservative caused pertussis endotoxins to "leak" from the pertussis cells contained in the Quadrigen vaccine, thus causing the reaction. The trial court found a breach of warranty, and that finding was upheld on appeal.[86]

Decided almost simultaneously with *Tinnerholm* was *Parke-Davis and Co. v. Stromsodt.*[87] The facts of the two cases are almost identical, but the *Stromsodt* court, in addition to finding a breach of warranty, also held that Quadrigen was defective because Parke-Davis inadequately warned physicians about the known dangers of the drug.[88]

The first and most important case applying the collateral estoppel effect of these cases was *Vincent v. Thompson.*[89] Plaintiff was thirteen years old when she stepped on a nail.[90] The defendant doctor administered a tetanus toxoid, duracillin, and a polio vaccine, but denied injecting her with Quadrigen. The next morning plaintiff was "weak, could not sit up, and had trouble moving her right leg."[91] She never suffered a fever and her illness eventually was diagnosed as transverse myelitus.

The trial judge held, on the basis of *Tinnerholm,* that Parke-Davis was estopped to deny the defectiveness of Quadrigen, which the jury found to have been administered.[92] The estoppel order, however, was reversed on appeal:[93]

> [W]hat the trial court overlooked, and what is not identical, is

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83. *Id.* at 731.
84. 411 F.2d 48 (2d Cir. 1969).
85. *Id.* at 50.
86. *Id.* at 53.
87. 411 F.2d 1390 (8th Cir. 1969). See Stromsodt v. Parke-Davis and Co., 257 F. Supp. 991 (D.N.D. 1966), for the trial court opinion.
88. *See* Parke-Davis and Co. v. Stromsodt, 411 F.2d 1390, 1399-1402 (8th Cir. 1969).
89. 377 N.Y.S.2d 118 (App. Div. 1975).
90. *See id.* at 121.
91. *Id.* at 121.
92. *See* Vincent v. Thompson, 361 N.Y.S.2d 282, 285 (Sup. Ct. 1974).
93. *See* Vincent v. Thompson, 377 N.Y.S.2d 118, 126 (App. Div. 1975).

> whether the *unstable, improperly tested* component of the drug caused [plaintiff's] injuries. That that is so is amply established by a comparison of the facts in each case, the illness suffered by each and the injury resulting therefrom, all of which serve to make clear the complete lack of identity of the ultimate issue of whether there was a causal connection between the defect in Quadrigen and the illnesses and consequent injuries suffered by the infant in *Tinnerholm* and the infant plaintiff in this case.[94]

It was a reaction to the Salk polio vaccine that caused plaintiff's injuries in *Vincent*, not a reaction to the pertussis vaccine. The appeals court also held that the trial court erred in refusing to admit scientific evidence tending to show that there was no pertussis endotoxin "leakage" in Quadrigen.[95]

After the trial in *Vincent* but before it was reversed on appeal, the United States District Court of Wisconsin in *Grant v. Parke, Davis & Co.*[96] used *Vincent* as authority for finding an estoppel based on *Tinnerholm*. Plaintiff allegedly was innoculated three times with Quadrigen in late 1961 when he was less than one year old, causing a reaction that resulted in severe brain damage.[97] The trial judge found that defendants were collaterally estopped to deny the defectiveness of Quadrigen, leaving the issues whether Quadrigen was administered to the plaintiff and, if so, whether it caused his illness. The jury returned a general verdict for defendants, probably because Quadrigen had been withdrawn from the market before plaintiff received his shots. The appeals court upheld the trial court's application of the estoppel order.[98]

The final case in this series is *Ezagui v. Dow Chemical Corp.*[99] Plaintiff's decedent was innoculated with either Quadrigen or Compligen, Dow Chemical's "four-in-one" vaccine, at age five months. Five days after the innoculation, the infant suffered a very high fever resulting in severe brain damage. The boy died at age nine.

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94. *Id.* at 125.

95. *Id.* at 125.

96. 544 F.2d 521 (7th Cir. 1976), reported in full, [1978 Transfer Binder] PRODS. LIAB. REP. (CCH) ¶ 7848, at 15,598 (7th Cir. October 27, 1976).

97. *Id.* ¶ 7848, at 15,598.

98. *Id.* ¶ 7848, at 15,602. Plaintiff-appellant claimed on appeal that the trial court's application of the estoppel order resulted in the improper exclusion of evidence which prevented plaintiff from properly trying the case. *Id.* ¶ 7848, at 15,602.

99. 598 F.2d 727 (2d Cir. 1979).

The trial court refused to find an estoppel based on *Tinnerholm* because the "leakage" theory upon which *Tinnerholm* was based was repudiated by the new evidence advanced in *Vincent*.[100] The appeals court affirmed the ruling,[101] but held that the *Stromsodt* ruling that the drug was defective because of inadequate warnings was sufficient to allow a ruling of estoppel on that issue.[102]

2. An Analysis of the Cases

These cases, with the exception of *Ezagui*, all were decided before *Parklane Hosiery* and should be read with that in mind. Their value for the development of collateral estoppel rules may therefore be impaired, and since no more Quadrigen cases can be expected to arise, these cases should be viewed as a stepping stone to the more important asbestos cases.

In discussing collateral estoppel, it is important to note that *Vincent*, the most widely cited Quadrigen case, was reversed for the wrong reason. The court of appeals overturned the trial court's estoppel because there was no proof that the defect caused the injury. The court confused defect with causation; in the context used in this article, collateral estoppel can *never* fulfill the plaintiff's obligation of proving causation. Causation is an element peculiar to each plaintiff; one case cannot discharge the obligation of proving causation in a subsequent case except in rare circumstances, such as a simultaneous mass tort. The trial court's order in *Vincent* cor-

100. *See id.* at 732.

101. *See id.* at 732.

102. *See id.* at 733. One other case should be mentioned briefly. In Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975), Skrzat and Turcotte were riding in a Ford Maverick when it was struck in the rear and exploded, killing Turcotte and burning Skrzat. Turcotte's estate sued and defendant Ford was held liable for his death based on a defective design of the car's gas tank. On appeal the case was remanded on the damages issue and affirmed on the liability issue. Turcotte v. Ford Motor Co., 494 F.2d 173, 187 (1st Cir. 1974). Skrzat then sued and moved for summary judgment on the liability issue. The court entered judgment accordingly. The trial court held that Ford had "had its day in court" with a full and fair opportunity to litigate the liability issue. *See* Skrzat v. Ford Motor Co., 389 F. Supp. 753, 758 (D.R.I. 1975). *Skrzat*, a pre-*Parklane Hosiery* case, is hard to justify beyond its own peculiar circumstances and should be limited to its facts. Had the *Parklane Hosiery* rules been in effect, collateral estoppel probably should have been denied because Skrzat easily could have joined in Turcotte's suit. Further, the application of collateral estoppel becomes defensible as an attempt to save judicial time, even though it is not doctrinally sound. *See id.* at 758.

rectly tailored the estoppel to the facts proved in *Tinnerholm*,[103] but the court of appeals interpreted that order as estopping the need to prove causation. The jury may have been confused by the estoppel, believing only that proof that plaintiff was given Quadrigen was needed to complete the defendant's liability. The *Grant* court, unlike the *Vincent* appeals court, correctly separated the defect and causation issues.

Ezagui announced a salutary rule for collateral estoppel cases, and one that should be incorporated into the collateral estoppel doctrine; *mutata legis ratione mutatur et lex*: "the reason for the law being changed, the law must also change."

C. *Asbestos: Current Status of Collateral Estoppel*

1. The Asbestos Cases

The only wide ranging line of cases yet decided in which the plaintiff's affidavit claims no defect to collateral estoppel defense is the asbestos cases. Inhaled asbestos particles have been found to cause asbestosis,[104] lung cancer,[105] and mesothelioma.[106]

The seminal asbestos case is *Borel v. Fibreboard Paper Products*

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103. *See* Vincent v. Thompson, 377 N.Y.S.2d 118, 121 (App. Div. 1975). The trial court instructed the jury that "[t]he vaccine 'Quadrigen,' was defective as a product in view of the leakage of toxins from within the pertussis component of the vaccine, which leakage was caused by [the] preservative 'phemerol.' " *Id.* at 121.

104. The *Borel* court gave a succinct description of the effects of inhaling asbestos dust. Inhaling even small amounts of asbestos can cause asbestosis. Depending on "individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used," the latency period of the disease is from ten to twenty-five or more years. Once asbestos fibers are inhaled, slowly progressive and irreversible damage starts. Each additional exposure compounds the effect, thus it is impossible to tell which exposure caused the disease. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *see also* 4A H. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶¶ 205C.50, 205C.60 (3d ed. 1981).

105. Lung cancer begins to appear about fifteen years after exposure. One-fifth of all deaths occurring among insulation workers results from lung cancer. Cigarette smoking coupled with asbestos exposure will increase the risk of lung cancer 70 to 80 times over that of a non-smoking, non-asbestos exposed worker. Several weeks of heavy industrial exposure is sufficient to cause an increased cancer risk. *See* 4A H. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 205C.71 (3d ed. 1981).

106. Mesothelioma is a rare form of cancer that attacks the chest lining. The latency period for mesothelioma is up to 35 years. Asbestos exposure is a factor in 85% of all mesothelioma cases. The disease is almost always fatal within one year of diagnosis. *See id.* ¶ 205C.72.

Corp.[107] Clarence Borel was an industrial asbestos worker from 1936 until he was disabled with asbestosis in 1969.[108] In his deposition he testified that at the end of a work day his clothes would be covered with asbestos dust and he would blow "dust out of [his] nostrils by handfuls . . . ."[109] Respirators were available for the workers but they were uncomfortable and difficult to use. In 1969, after first learning he had asbestosis, Borel sued eleven manufacturers who produced the asbestos products to which he had been exposed during his career. Five defendants settled leaving Fibreboard, Johns-Manville Products Corp., Pittsburgh Corning Corp., Phillip Carey Corp., Armstrong Cork Corp., and Ruberoid Corp. to defend.[110] The jury found the defendants negligent and Borel contributorily negligent, but also found the defendants strictly liable because of their failure to warn of the foreseeable dangers associated with asbestos products.[111]

A manufacturer is liable for a failure to adequately warn if the product is "unavoidably unsafe," i.e., "incapable of being made safe for [its] intended and ordinary use,"[112] and the manufacturer failed to adequately convey what it knew or should have known of the dangers inherent in its product.[113] Thus, the issues decided against the manufacturers in *Borel* were (1) whether asbestos dust causes disease, (2) whether asbestos insulation is "incapable of being made safe," (3) whether the risk of harm was reasonably foreseeable to the manufacturer, and (4) whether the manufacturer inadequately conveyed its superior knowledge to the plaintiff.

The first reported decision in which the plaintiff attempted to use the estoppel of *Borel* was *Mooney v. Fibreboard Corp.*,[114] a case arising seven years after the *Borel* decision and tried in the same court. Mooney worked as an insulator from 1940 to 1970 and

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107. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

108. *See id.* at 1081.

109. *Id.* at 1082.

110. *See id.* at 1086.

111. *See id.* at 1086; *see also* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 341-47 (5th Cir. 1982) (in-depth analysis of *Borel* findings).

112. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

113. *Id.* § 402A comment k.

114. 485 F. Supp. 242, 244-45 (E.D. Tex. 1980). Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) also involved the issue of the defectiveness of asbestos-based products, but the plaintiffs did not attempt to use the collateral estoppel effect of *Borel*. *See id.* at 156-57.

claimed that this long-term exposure to asbestos dust caused him to contract asbestosis. The court viewed the issue, on a motion for partial summary judgment on the question of defect, to be whether "the asbestos products as manufactured, marketed, sold, or distributed were defective and unreasonably dangerous."[115] The court held that the defendants, based on *Borel*, were collaterally estopped to deny the defectiveness of asbestos-based products.[116]

Defendants claimed that "there had been several asbestosis cases which had gone to judgment in the defendants' favor," and that to estop litigation on the defectiveness issue would be unfair under the *Parklane Hosiery* rules.[117] The court brushed aside this argument stating:

> All that the defendants have shown this court is that of the two thousand filed asbestosis cases in this country perhaps a dozen or so have gone to judgment in favor of the defendant and that in these cases the plaintiff evidently failed to prove one or more elements essential to his cause of action. To follow the defendant's reasoning, one frivolous lawsuit would preclude courts from using modern principles of collateral estoppel in cases where an issue has clearly been determined adversely to a defendant in other actions.[118]

The decision on this point was correct.[119] Defendants must be able to point to cases in which the product was found not defective to make use of the *Parklane Hosiery* rule regarding inconsistent judgments. Finally, the *Mooney* court held that products containing as-

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115. *See* Mooney v. Fibreboard Corp. 485 F. Supp. 242, 244 (E.D. Tex. 1980).

116. *See id.* at 248. One defendant, Nicolet Industries, was not a defendant in *Borel;* thus the court, on due process grounds, declined to enter summary judgment against Nicolet on the issue of whether Nicolet manufactured, sold, marketed, or distributed asbestos products. The court did, however, hold that Nicolet was estopped to deny that its asbestos products were defective and unreasonably dangerous. *See id.* at 249.

117. *See* Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247 (E.D. Tex. 1980).

118. *Id.* at 247-48.

119. The Fifth Circuit, however, reconsidered this point in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982), stating:

> On appeal, the parties inform us that there have been approximately 70 similar asbestos cases thus far tried around the country. Approximately half of these seem to have been decided in favor of the defendants. A court able to say that the approximately 35 suits decided in favor of asbestos manufacturers were all decided on the basis of insufficient exposure on the part of the plaintiff or failure to demonstrate an asbestos-related disease would be clairvoyant.

See id. at 346.

bestos were unreasonably dangerous as a matter of law.[120]

Following *Mooney* was *Flatt v. Johns Manville Sales Corp.*[121] In *Flatt*, plaintiff's decedent, who died of mesothelioma, was exposed to cement pipes containing asbestos manufactured by Johns Manville and Certain-Teed Corp. and sold to Flatt's employer, the East Texas Water Disposal Co. The pipes were accompanied by warnings of the asbestos contained within them. The court viewed the issues on the motion for partial summary judgment to be (1) whether "[d]efendants manufactured . . . products containing asbestos," (2) whether "products containing asbestos are unreasonably dangerous," and (3) whether "asbestos dust is a competent producing cause of mesothelioma."[122]

The court refused to accept Johns Manville's claim that the pipes containing asbestos at issue here were different products than the asbestos insulation at issue in *Borel*. The *Flatt* court said that "[b]oth products contain asbestos and produce asbestos dust upon use."[123] Given the court's view of the issues, this analysis is correct. The issue in the motion for partial summary judgment was not whether exposure to the pipes caused the plaintiff's disease, but whether products containing asbestos were defective and capable of producing mesothelioma. The "identity of product" requirement was met by defining the products as asbestos, not asbestos insulation or asbestos pipes.

The court held that products containing asbestos were defective as a matter of law,[124] and that the defendants were collaterally estopped by *Borel* from relitigating the issue.[125] The court noted that the defendants had won several asbestos suits, but that these wins were attributable to a finding that exposure to asbestos was insufficient to cause the plaintiffs' diseases, not a finding that the asbestos products were free of defect.[126]

One month later the Eastern District of Texas issued its opinion

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120. *See* Mooney v. Fibreboard Corp., 485 F. Supp. 242, 250 (E.D. Tex. 1980).

121. 488 F. Supp. 836 (E.D. Tex. 1980). While *Flatt* was in the same district as *Mooney*, it was from a different division.

122. *Id.* at 838-39.

123. *Id.* at 840. *But see* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 344-45 (5th Cir. 1982).

124. *See* Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980).

125. *See id.* at 841.

126. *See id.* at 842. *But see* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982).

in *Migues v. Nicolet Industries.*[127] Plaintiff's decedent was an insulation worker who contracted mesothelioma from prolonged exposure to asbestos dust. "Minutes before" opening statements at trial, thirteen of the original fourteen defendants settled with the plaintiff leaving only Nicolet to defend.[128] Nicolet had not been a party to *Borel,* but the trial court saw fit to preclude it from litigating the defectiveness issue based on the stare decisis effect of *Borel.*[129] The preclusion order construed *Borel* as establishing "as a matter of law" that products containing asbestos were unreasonably dangerous and that this holding in *Borel* controlled all products liability cases involving asbestos through stare decisis principles.[130] Thus, no defendant, whether a party to *Borel* or not, could claim that asbestos products were not defective.

This preclusion order was struck down on appeal.[131] The Fifth Circuit stated:

> In *Borel,* this Court said: "the jury was *entitled* to find that the danger to Borel and other insulation workers from inhaling asbestos dust was foreseeable to the defendants at the time the products causing Borel's injuries were sold . . . ." We did not say that the jury was compelled, as a matter of law to reach this result, or that it could not have reached another result.[132]

The case was remanded for trial to determine the defectiveness of the asbestos insulation involved.[133]

In November of 1980 the Eastern District of Missouri issued its decision in *Tretter v. Johns-Manville Corp.*[134] The court held that because the defendant had received some judgments in its favor on the defectiveness issue, it would be unfair under the *Parklane Hosiery* rules to collaterally estop the relitigation of the defectiveness issue.[135]

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127. 493 F. Supp. 61 (E.D. Tex. 1980), *rev'd in part and remanded,* 662 F.2d 1182 (5th Cir. 1981).

128. *Id.* at 61.

129. Migues v. Fibreboard Corp., 662 F.2d 1182, 1185 (5th Cir. 1981).

130. *Id.* at 1186.

131. *See id.* at 1187-90.

132. *Id.* at 1188.

133. *See id.* at 1189.

134. 88 F.R.D. 329 (E.D. Mo. 1980).

135. *See id.* at 333.

McCarty v. Johns-Manville Sales Corp.[136] followed *Tretter* by four days. In a consolidation of four cases, the court held that Mississippi law controlled the application of collateral estoppel principles and that Mississippi had not abolished the mutuality requirement, thus making the offensive use of collateral estoppel by a non-party unavailable.[137] Alternatively, the court concluded that, even if federal law applied, collateral estoppel should not be applied for three reasons. First, since some of the defendants had not been defendants in *Borel*, the court felt it unjust to give summary judgment against the *Borel* defendants but not the others. This, the court stated, would confuse the jury and be "patently unfair to both the *Borel* and non-*Borel* defendants."[138] Second, the *McCarty* court read *Borel* as turning on a breach of warranty question while the cases at bar alleged negligence, strict liability, and conspiracy, in addition to breach of warranty; the court concluded, therefore, that there was no identity of issue present.[139] Finally, since the *Borel* defendants could not have foreseen the flood of asbestos suits filed in the wake of *Borel*, the court determined that they should not be collaterally estopped by the *Borel* decision.[140]

Next in line came *Hardy v. Johns-Manville Sales Corp.*,[141] decided by the same court that tried *Borel*, *Mooney*, and *Migues*.

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136. 502 F. Supp. 335 (S.D. Miss. 1980).

137. *See id.* at 338-39.

138. *Id.* at 339.

139. *See id.* at 339. The court did not cite either *Mooney* or *Flatt* in its discussion of identity of issue. The *McCarty* plaintiffs asked for summary judgment on the following issues: (1) whether defendants' products were unreasonably dangerous, (2) whether defendants manufactured and sold products containing asbestos, (3) whether products containing asbestos are unreasonably dangerous to the user or to anyone exposed to the product, (4) whether products containing asbestos cause or contribute to asbestosis and mesothelioma, (5) whether defendants can present "state of the art" evidence, (6) whether defendants knew or should have known of the dangerous propensities of asbestos, and (7) whether defendants failed to warn plaintiffs about the known dangers of asbestos. *See id.* at 337. The court held that there was no identity of issue because the theory of recovery used in *Borel* differed from those used in the cases at bar. But when one looks beyond the pleadings to the issues that were the subject of the summary judgment motion, it becomes apparent that many of those same issues were decided in *Borel*. The court was confused about the doctrinal basis of collateral estoppel. Collateral estoppel is concerned solely with the *issues* decided in the earlier case, not with the theories of recovery used to present them. *See* Muller v. Muller, 45 Cal. Rptr. 182, 184 (Ct. App. 1965).

140. *See* McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 339 (S.D. Miss. 1980). Again, the court did not cite *Mooney*, *Flatt*, or *Migues* during this discussion.

141. 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982).

The *Hardy* court was considering motions in fifty-seven cases consolidated for pre-trial. The court earlier had entered an estoppel order against the twenty defendants and those defendants were asking for a reconsideration of that order.[142] The plaintiffs were insulation workers, pipefitters, carpenters, and factory workers, all of whom experienced different levels of exposure under different circumstances. The trial court read *Borel* solely as a duty to warn case; asbestos is an "unavoidably unsafe product" whose manufacturers can escape strict liability for harm caused by it solely by including adequate warnings.[143] Thus, the duty to warn varies with the type of finished product to which the plaintiff was exposed. The court, therefore, tailored its estoppel order to prevent relitigation of the disease-causing propensities of asbestos.[144]

Because *Borel* concerned warnings on insulation products, the *Hardy* court held that there was sufficient identity of issue to estop defendants in the insulation cases from relitigating the adequacy of their warnings.[145] The court concluded, however, "for non-insulation products, evidence with respect to warnings should not be estopped. The question of adequacy of a warning, if any was given, is a jury question in the non-insulation cases."[146] Thus, the lower court estopped defendants from denying that exposure to asbestos causes disease and estopped the insulation workers from denying that they received adequate warnings.

The *Hardy* court backed away from its previous holdings that federal law governs collateral estoppel in diversity cases and, while not conceding this point, justified an entry of summary judgment for the plaintiffs based on Texas law. While recognizing the defendant's argument that the Texas mutuality requirement mandated that the defendants against whom summary judgment is requested be parties or privies in the original suit,[147] thus impeding the entry of summary judgment against the non-*Borel* defendants, the court held that a sufficient identity of interests existed between the *Bo-*

142. *See id.* at 1354.

143. *See id.* at 1360-62; RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

144. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1362 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982).

145. *See id.* at 1362-63.

146. *Id.* at 1362.

147. *See id.* at 1361.

rel and non-*Borel* defendants[148] to justify the application of collateral estoppel based on the privity exception.[149] As a final buttress for its entry of summary judgment, the court took judicial notice of the fact that asbestos is related to disease.[150]

After the district court's decision in *Hardy,* but before the decision on appeal, the district court for Minnesota decided *Bertrand v. Johns-Manville Sales Corp.*[151] *The Bertrand* court considered motions for summary judgment[152] on the issues of (1) whether asbestos is a competent producing cause of asbestosis and mesothelioma, (2) whether *Borel* and *Karjala v. Johns-Manville Products Corp.*[153] precluded defendants from presenting evidence on the "state of the art" defense, and (3) whether asbestos insulation products are defective.[154] The court granted the motion on the issue whether asbestos dust can cause asbestosis and mesothelioma, stating that, "[t]his proposition is so firmly entrenched in the medical and legal literature that it is not subject to serious dispute,"[155] but specifically stated that asbestos dust was only *a* producing cause, not *the* only producing cause of those diseases. The court

148. The court was unclear about precisely what interests the asbestos manufacturers share. This seems to indicate that the manufacturers share the same interests solely because they produce products containing asbestos. *Id.* at 1361.

149. *See id.* at 1361. The court held that "the non-*Borel* defendants share sufficient identity of interest such that the application of collateral estoppel would not conflict with the state standard," *Id.* at 1361, and cited RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982) as authority. The court created a "novel, startling, or even revolutionary" concept in asbestos products liability. Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981). The *Migues* appeals court termed this an "enterprise liability theory of collateral estoppel." *Id.* at 1189. The *Hardy* court imposed "enterprise liability" on those manufacturers whose asbestos products the plaintiff came in contact with in an effort to apportion the liability among the producers who played a part in causing his illness. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355-56 (E.D. Tex. 1981), *rev'd,* 681 F.2d 334 (5th Cir. 1982); *see* Sindell v. Abbott Laboratories, 607 P.2d 924, 936-37, 163 Cal. Rptr. 132, 144-45, *cert. denied,* 449 U.S. 912 (1980); Comment, *DES and A Proposed Theory of Enterprise Liability,* 46 FORDHAM L. REV. 963, 995-1006 (1978); Comment, *Texas Asbestos Claims And Market Share Liability: New Remedy For An Old Tort,* 13 ST. MARY'S L.J. 957, 962-63 (1982).

150. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1362-64 (E.D. Tex. 1981), *rev'd,* 681 F.2d 334 (5th Cir. 1982).

151. 529 F. Supp. 539 (D. Minn. 1982).

152. The defendants included both *Borel* and non-*Borel* type defendants. *See id.* at 541.

153. 523 F.2d 155 (8th Cir. 1975).

154. *See* Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 542 (D. Minn. 1982).

155. *Id.* at 544. The court cited the district court opinion in *Hardy* in support of this proposition.

denied the motions regarding the other two issues. It held that estopping the non-*Borel* defendants would be a violation of due process, and bifurcating the trial between the *Borel* and non-*Borel* defendants "would require more time and effort than applying collateral estoppel would save . . . ."[156]

The district court's decision in *Hardy* is the highwater mark in the use of collateral estoppel in asbestos cases. The lower court, determined to prevent "reinventing the asbestos liability wheel"[157] in every trial, had developed three independent grounds for the application of collateral estoppel: stare decisis and a strained interpretation of privity of interests used to estop non-*Borel* defendants; an extraordinarily liberal use of collateral estoppel to prevent relitigation of the defect issue by the *Borel* defendants; and judicial notice.

The stare decisis rationale, however, fell on appeal in *Migues*. The Fifth Circuit then completed the dismantling of the district court's collateral estoppel structure with its decision in *Hardy* and effectively destroyed the use of collateral estoppel and related doctrines in future asbestos cases in the Fifth Circuit.

The *Hardy* appellate court considered the privity issue first. It stated:

> The trial court's action stretches "privity" beyond meaningful limits. While we acknowledge the manipulability of the notion of "privity," . . . this has not prevented courts from establishing guidelines on the permissibility of binding nonparties through res judicata or collateral estoppel. Without such guidelines, the due process guarantee of a full and fair opportunity to litigate disappears.[158]

The court analyzed each of the relevant grounds for finding sufficient privity to justify collateral estoppel and found each lacking. It concluded, "[t]he fact that all non-*Borel* defendants, like the *Borel* defendants, are engaged in the manufacture of asbestos-containing products does not evince privity among the parties."[159]

The *Hardy* court next attacked the stickier problem of collaterally estopping the *Borel* defendants. It began by affirming, after an extensive review of the *Borel* jury instructions, that *Borel* imposed

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156. *See id.* at 545.
157. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 348 (5th Cir. 1982).
158. *See id.* at 339.
159. *Id.* at 339.

a duty on asbestos manufacturers to warn of the products' danger,[160] but concluded that this holding could not be used to estop the defendants in later cases for three reasons. First, because the existence of a duty to warn turns in large part on the facts and circumstances surrounding the parties, it is impossible to tell when, if ever, the duty attaches.[161] Thus, a finding that a duty was owed a particular plaintiff in one case cannot apply to another plaintiff in a later case.

Second, the court overturned factual findings in *Mooney* and *Flatt* and found that inconsistent verdicts on the defect issue did exist; thus, estoppel on the defect issue was improper under the *Parklane Hosiery* rules.[162] Finally, the court held that the defendants' $68,000 liability to Mr. Borel gave them insufficient incentive to litigate the defect issue vigorously and, since this relatively insubstantial judgment could not in the eyes of the court allow the defendants to forsee future multi-million dollar liability, the court felt it unfair to estop the *Borel* defendants.[163]

The final and apparently safest ground for estopping asbestos defendants, judicial notice of the pathogenic qualities of asbestos, also fell. The court held that judicial notice "applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities,"[164] and that since a reasonable claim could be made that (1) a particular defendant's product contains asbestos in a safe form or (2) that some diseases linked to asbestos, *e.g.* mesothelioma, can arise without exposure to asbestos, judicial notice of the pathogenic qualities of asbestos is inappropriate.[165]

2. An Analysis of the Cases

The Fifth Circuit's *Hardy* decision has effectively made collateral estoppel in asbestos cases a dead letter. The cases provide, however, important rules for the use of collateral estoppel in failure to warn cases.

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160. *See id.* at 342-43.
161. *See id.* at 343.
162. *See id.* at 346.
163. *See id.* at 346-47.
164. *Id.* at 347.
165. *See id.* at 347-48.

The plaintiff's theories of recovery in *Borel* were strict products liability in tort and breach of warranty.[166] Borel alleged that the defendants' products were unreasonably dangerous thereby rendering them strictly liable because of their failure to warn of the foreseeable dangers associated with the products.[167] A manufacturer is strictly liable for a failure to warn if the product is "unavoidably unsafe"[168] and the manufacturer failed to warn adequately of the foreseeable dangers inherent in the product.[169]

A duty to warn does not arise if the user has special knowledge enabling him or her to perceive the danger.[170] Knowledge is an important element with respect to both the plaintiff and defendant; the defendant/manufacturer must warn only of dangers of which he knew or reasonably should have known given his expertise in handling the material. The manufacturer will be relieved of a duty to warn if the plaintiff subjectively knew of the dangers inherent in the product. The *Borel* court held that defendants had a duty to warn Borel and that the duty was breached.[171]

Failure to warn cases are a subset of a broader class of products liability cases. Under section 402A, Restatement (Second) of Torts, a manufacturer is strictly liable for an unreasonably dangerous product if, when balanced, the utility of the product does not outweigh the magnitude of the danger.[172] If the jury decides that the utility of the product outweighs the known or foreseeable risk, a manufacturer will still be liable if the warning accompanying the

166. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1086 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

167. *See id.* at 1086.

168. A product is "unavoidably unsafe" if it is "incapable of being made safe for [its] intended or ordinary use." RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

169. *Id.* § 402A comment k; *see* Dalke v. Upjohn Co., 555 F.2d 245, 247-48 (9th Cir. 1977); Mink v. University of Chicago, 460 F. Supp. 713, 720 (N.D. Ill. 1978); Day v. Volkswagenwerk Aktiengesellschaft, 451 F. Supp. 4, 5-6 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1373 (3d Cir. 1978); Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977).

170. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

171. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1103 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

172. RESTATEMENT (SECOND) OF TORTS § 402A comments i, k (1965); *see* Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 745-46 (Tex. 1980).

product did not adequately convey the gravity of the risk.[173] The *Borel* jury thus found that the utility of asbestos insulation outweighed its known or foreseeable risk, but that the risk inherent in the product was not adequately conveyed.[174]

It is clear, therefore, that *Borel* does not support the position that asbestos insulation is unreasonably dangerous because its danger outweighs its utility; in fact, the finding in *Borel* is directly opposite that position. *Borel* is authority only for the position that, given a plaintiff with Mr. Borel's knowledge and defendant with the actual or constructive knowledge of the manufacturers, adequate warnings were due the plaintiff.

These were the issues involving strict products liability in *Borel*. The jury did not find that all asbestos products were defective, nor could it, because that issue was never presented.[175] In fact, because failure to warn cases depend so much on the plaintiff's lack of knowledge and the defendant's actual or constructive knowledge, the collateral estoppel effect of a failure to warn case should be very narrow; few issues relating to defect in a failure to warn case will be relevant to a later case with a different plaintiff, especially the issue of whether a duty to warn any particular plaintiff existed.

It can be argued, however, that in the asbestos cases knowledge by the plaintiff concerning the danger of asbestos is a slim reed upon which to base a denial of collateral estoppel. The *Borel* court took great pains to point out the state of medical knowledge—and therefore actual or constructive knowledge by the industry—concerning the effects of inhaled asbestos dust during the time Mr. Borel was handling the material,[176] and indicated that Borel never received any warnings despite mounting medical evidence concern-

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173. *See* Ezagui v. Dow Chemical Corp., 598 F.2d 727, 732-33 (2d Cir. 1979) (package insert which stated reactions were "no greater than normally experienced" is inconsistent with medical facts on danger of product).

174. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1091 (5th Cir. 1973), *cert. denied*, 419 U.S. 864 (1974).

175. The main issues presented, and decided against the manufacturers, were (1) whether asbestos dust causes diseases, (2) whether asbestos is capable of being made safe for its intended use, (3) whether the risk of harm was reasonably foreseeable to the manufacturer, and (4) whether the manufacturer inadequately communicated its superior knowledge to the plaintiff. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1092-94 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *see also* Migues v. Fibreboard Corp., 662 F.2d 1182, 1187-89 (5th Cir. 1981).

176. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

ing the dangers of asbestos.[177] Few, if any, of the thousands of workers who came into contact with asbestos on a daily basis during this period would have had knowledge of its dangerous characteristics, and it seems improper to deny the benefits of collateral estoppel to the whole class merely because a few plaintiffs may have known of the danger, thereby discharging the defendants' duty to warn. It is equally unjust, however, to prevent the defendants from presenting evidence going to that issue.

On this issue the Fifth Circuit in *Hardy* stated:

> [C]ollateral estoppel applies only to issues of fact or law necessarily decided by a prior court. Since we cannot say that *Borel* necessarily decided, as a matter of fact, that all manufacturers of asbestos-containing insulation products knew or should have known of the dangers of their particular products at all relevant times, we cannot justify the trial court's collaterally estopping the defendant from presenting [evidence] as to the state of the art.[178]

This holding will effectively eliminate collateral estoppel in failure to warn cases. The *Hardy* court may be guilty of overkill here; a more salutary rule would be to allow a plaintiff to collaterally estop a defendant if the defendant fails to show satisfactorily that at any relevant time it had knowledge sufficient to give rise to a duty to warn the particular plaintiff. This could be done relatively mechanically, by comparing the state of the art at the relevant times with the warnings, if any, given the plaintiff. If the defendant's conduct is found lacking, the defendant could be estopped from presenting further evidence.

IV. PROPOSALS

A. *Weinberger's Rules*

In an attempt to form coherent rules for the use of collateral estoppel in products liability cases, Richard Weinberger, writing after *Parklane Hosiery* but before the asbestos cases, has drawn a distinction between products with an "intrinsic" as opposed to "extrinsic" defect.[179] An intrinsic defect, he states, is one whose

177. *Id.* at 1082.

178. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345 (5th Cir. 1982).

179. *See* Weinberger, *Collateral Estoppel And The Mass Produced Product: A Propo-*

existence can be determined through the use of "empirical and precise evidence."[180] He cites as an example of an intrinsic defect one in which, due to a misplaced decimal, a line of furniture with metal tubing frames is produced with tubing only one-tenth of its desired thickness.[181] Because "there is no need to look to concepts and factual findings outside the product in order to determine that the defect exists,"[182] the furniture has an intrinsic defect. Weinberger considers that such a defect is the only type that should be allowed to form the basis of an estoppel.[183]

Extrinsic defects, those in which the "finding of a defect turns on the extrinsic concept of the design's reasonableness,"[184] should not be allowed to be used as the basis of an estoppel:

> While one jury may conclude that the utility of [a particular product] outweighed its danger, so as to render it *reasonably* dangerous, and hence not defective, another jury might opine to the contrary. It would be improper to hold, by operation of an estoppel, that this product is definitely defective as to all users in all circumstances merely because one jury, responding to a single plaintiff's claim relating to a single set of circumstances, thought that the design was "unreasonable."[185]

Thus, by attempting to limit collateral estoppel in products liability cases to products with "intrinsic" defects, Weinberger would prevent the application of collateral estoppel when the case turns on concepts of "reasonableness."[186] He therefore suggests that the *Ezagui* decision[187] was wrong because an estoppel was upheld based on the *Stromsodt* decision[188] that the warnings contained in the Quadrigen packages were inadequate; therefore, it must be implied that, had the asbestos cases been decided when Weinberger wrote, he also would have disagreed with those cases because they all turned on a failure to warn theory. The estoppel in *Ezagui* was

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sal, 15 NEW ENG. L. REV. 1, 35-36 (1979).

180. *See id.* at 36.
181. *See id.* at 41.
182. *See id.* at 41.
183. *See id.* at 36.
184. *See id.* at 40.
185. *See id.* at 40-41.
186. *See id.* at 52-54.
187. Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979).
188. Parke-Davis and Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969).

wrong, he suggests, because the jury decided the product was "unreasonably" dangerous.[189]

Weinberger's proposal is specious. It rests on a mistaken interpretation of "defectiveness" and what establishes a finding of defect.

Several definitions of "defect" currently are in use in American jurisdictions,[190] and, to an extent, every one of them requires resort to "concepts of reasonableness." The most popular definition is in section 402A, Restatement (Second) of Torts, which imposes liability on one who sells a product "in a defective condition unreasonably dangerous to the user." Comment g defines a defective condition as a condition not contemplated by the ultimate consumer that will be unreasonably dangerous to that consumer.[191] The concept of reasonableness includes a determination of whether the design chosen is reasonable under all of the circumstances. [192] It is apparent, therefore, that *any* determination of defect under this formulation requires a resort to concepts of reasonableness, the "intrinsic" or "extrinsic" nature of a defect notwithstanding.

Whether furniture with tubing frames one-tenth of the intended thickness is defective turns on a finding of whether that furniture is "unreasonably dangerous." While it seems likely that the furniture would be found defective, it is easy to imagine a scenario in which it would not. If the tubing were intended to be quite thick and capable of supporting several hundred pounds, the fact that it turns out only one-tenth as thick, thereby weaker but certainly not totally incapable of supporting the weight of a human, will be the basis for a determination of the reasonableness of the design. While the condition of the furniture may not be contemplated by the buyer, that condition conceivably may not be found unreasonably dangerous to the consumer. There exists no design defect case decided under the Restatement formulation where the defective-

189. *See* Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 51-52 (1979).

190. *See* Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 72-79 (1982).

191. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965); *see also* P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 208 (1981).

192. *See id.* at 209; Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 72-73 (1982); Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293, 296-97 (1975).

ness of the design can be determined solely by empirical and precise measurements of the article itself; in each case the reasonableness of the design must be considered before liability can be imposed on the manufacturer.[193]

Other jurisdictions use a "risk-benefit" test to determine defectiveness. Under this definition, "[a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceiveable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed."[194] Again, the concept of "reasonableness" pervades this definition. Weinberger uses a "risk-benefit" definition of defect as an example of when not to use a products liability judgment to form an estoppel.[195]

California uses a two-pronged test for finding defect:

> First, a product may be found defective in design if the plaintiff established that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably perceivable manner. Second, a product alternatively may be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that on balance, the benefits of the challenged design outweigh the risk of danger inherent in the design.[196]

The first part of the test employs reasonableness concepts in two places: in determining what the "ordinary consumer would expect" and in determining whether the use of the product was reasonably foreseeable. The second test is the risk-benefit test redefined, with the same "reasonableness" elements remaining.

Oregon's test for defect asks whether a reasonable person in the defendant's position would have placed the article in commerce

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193. *See* Wiseman v. Goodyear Tire & Rubber Co., 631 P.2d 976, 979-80 (Wash. Ct. App. 1981). *But see* 49 WASH. L. REV. 231, 248-49 (1973) (eliminate term "unreasonably dangerous" from jury instructions as element of plaintiff's proof).

194. Keeton, *Product Liability And The Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973).

195. *See* Weinberger, *Collateral Estoppel And The Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 40-41 (1979).

196. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978).

had he known of the article's harmful character.[197] This standard differs from traditional negligence only in that knowledge of the harmful character is imputed to the manufacturer; in many cases the standard is precisely a negligence standard.

Viewed from the perspective of the definition of defect, it becomes apparent that Weinberger's rule is of little use. Concepts of reasonableness run throughout the definitions of defect; no product can be found defective without resort to them. If applied rigorously, Weinberger's rule would preclude the use of collateral estoppel in any products liability suit, thereby destroying a doctrine that, if carefully proscribed, can reap great benefits.

B. *The Proper Scope and Effect of Collateral Estoppel in Products Liability Cases*

While Weinberger's resolution of the problem falls considerably short of the mark, his analysis of its cause is substantially correct. Whenever an estoppel is attempted based on a verdict where a plaintiff proved by a preponderance of the evidence that the defendant's conduct was unreasonable, a *Parklane Hosiery* "fairness" problem arises. A lone jury's decision that a defendant's conduct was unreasonable should not resolve the issue in all subsequent cases; something more is needed.

A distinction must be drawn, therefore, between issues in a products liability case that require a finding of the defendant's "reasonableness" and those that involve other issues. Collateral estoppel law has been built on the former issues, not the latter. *Borel* and its progeny reaffirm the standards set for this type of issue: if the fact or issue is *directly* put in issue and *directly* determined as ground for recovery by a court of competent jurisdiction, the defendant will be collaterally estopped to deny the fact in a subsequent trial.[198] Thus, despite *Hardy*, a *Borel* defendant will be collaterally estopped to deny that asbestos dust is *a* competent producing cause of asbestos, mesothelioma, and lung cancer, but perhaps not *the* only producing cause.

Problems arise when issues involving reasonableness standards, such as whether a product is defective, are considered. To address

197. *See* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1037-38 (Or. 1974).

198. *See* Carruth v. Allen, 368 S.W.2d 672, 679 (Tex. Civ. App.—Austin 1963, no writ); *see generally* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345 (5th Cir. 1982).

these problems, the following standard is proposed: a products liability defendant should not be estopped to deny the alleged defect in his product *unless the judge is convinced that there is no reasonable dispute on the matter.* While similar to a judicial notice standard, this standard gives judges a clearer baseline against which to measure the claims of plaintiffs.

In applying this standard, one could easily become entangled in a semantic morass when attempting to decide whether it is beyond reasonable dispute that one acted unreasonably. To avoid this problem, the following aspects should be considered when a collateral estoppel summary judgment motion is made:

1. Using any standard, has the jury found the product not defective? If so, the judge must carefully determine (a) whether the issues truly are identical and, if they are, (b) whether the number of juries so finding is more than a slight percentage of those considering the matter. If more than five to ten percent of the juries considering the matter found no defect, the existence of a defect should be called into doubt.[199]

2. Has any new evidence arisen that, by any reasonable construction, could have caused a different result if presented at trial?

3. To prove defectiveness beyond reasonable dispute, was some rule of procedure or evidence involved that reasonably could change the result in the case at bar?

4. Are the legal arguments presented by the defendant those not used, not available, or different from, those available in the proceeding cases?

The crux of this rule remains true to its collateral estoppel underpinnings; it prevents the relitigation of issues when they have been finally decided and are now beyond reasonable dispute, and when preventing their relitigation is not unfair to the defendant. This rule, however, is a substantial refinement of the use of collateral estoppel in products liability cases. While in other cases one verdict may create an estoppel because the issue has been directly put in issue and directly decided, under this rule one verdict could not create an estoppel on the issue of defect except in extraordi-

199. In *Hardy*, the court of appeals noted that of the trials which litigated the issue of defect, approximately one-half resulted in a finding of no defect. *Id.* at 346. If true, this fact clearly indicates that collateral estoppel on the issue of defect is inappropriate.

nary cases.[200] It takes full account of state procedural and substantive law differences that could, by any reasonable construction, cause a different outcome. The rule defines what is "fair" in far greater detail than either the United States Supreme Court or lower courts considering the matter have done.

V. CONCLUSION

The reasons why collateral estoppel must be applied differently in a products liability suit than in a "run of the mill" collateral estoppel case were noted at the beginning of this article.[201] The use of collateral estoppel as a weapon must be confined within reasonable bounds if it is to have a place in our legal system. Experience with the doctrine in products liability cases has been slight to date; its use seems to be guided more by the sense of the judge making the findings than by reasonable principles of law.[202] This is understandable; the United States Supreme Court has given little guidance for the use of collateral estoppel in general, and no guidance for its use in products liability cases. A doctrine that strikes so closely to the right of trial and due process concerns must be developed slowly and with great circumspection. The proposal contained herein is intended to guide the use of this infant concept so that those most threatened by it, the manufacturers of mass-produced products, will not be destroyed by a lone judgment, while at the same time allow a plaintiff to make use of the doctrine under proper circumstances.

200. For example, if a product is condemned as unsafe in administrative proceedings and the defect is practically universally noted, an estoppel based on one or very few judgments may be allowed.

201. *See supra* note 11 and accompanying text.

202. As noted earlier, the only judges who regularly granted motions of summary judgment based on collateral estoppel were from the Eastern District of Texas. These judges had wide experience with asbestos cases, and allowing the collateral estoppel motions to succeed would have the substantial effect of clearing out the numerous asbestos cases on their dockets. Conversely, the judges who regularly denied motions based on collateral estoppel were those without wide experience in asbestos litigation.