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Offensive Collateral Estoppel in Kentucky: A Deadly Weapon or a Paper Tiger?

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INTRODUCTION

Collateral estoppel is a close relative of the doctrine of res judicata. Unlike res judicata which may be used to preclude entire claims that were brought or should have been brought in a prior action, collateral estoppel only applies to issues actually litigated. As courts have tried to bring finality and judicial

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1 Collateral estoppel is often used interchangeably with "issue preclusion." See Hunter v. City of Des Moines, 300 N.W.2d 121, 123 n.2 (Iowa 1981); Gregory v. Commonwealth, 610 S.W.2d 598, 600 (Ky. 1980). In the landmark case of Sedley v. City of West Buechel, 461 S.W.2d 556, 559 (Ky. 1971), Kentucky's highest court referred to collateral estoppel as the "'preclusion' doctrine."

2 "'Offensive collateral estoppel' refers to the successful assertion by a party seeking affirmative relief, that a party to a prior adjudication who was unsuccessful on a particular issue in that adjudication is barred from relitigating the issue in a subsequent litigation." Callen, Efficiency After All: A Reply to Professor Flanagan's Theory of Offensive Collateral Estoppel, 1983 ARIZ. ST. L.J. 799, 799 n.2. See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979) ("In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.").

3 See Note, Use of Juror Depositions to Bar Collateral Estoppel: A Necessary Safeguard or Dangerous Precedent?, 34 VAND. L. REV 143, 144 (1981). But see Perschbacher, Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings, 35 U. FLA. L. REV. 422, 426-27 (1983) ("Despite the current perception of collateral estoppel as a branch of res judicata, the two doctrines have independent origins in Anglo-American law. This historical distinction is important, because it serves notice that the purposes and policies underlying res judicata and collateral estoppel are not necessarily the same." (footnotes omitted)).

4 See Egbert v. Curtis, 695 S.W.2d 123, 124 (Ky. Ct. App. 1985):

Stated another way the subsidiary rule makes res judicata applicable not only to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at that time.


4 See, e.g., Kaiser v. Northern States Power Co., 353 N.W.2d 899, 907 (Minn. 1984) ("[T]he party seeking the benefit of collateral estoppel must show that during the
economy into litigation, judicial acceptance of collateral estoppel has increased greatly. In an attempt to exercise control over the application of collateral estoppel, many jurisdictions distinguish between offensive and defensive estoppel and either reject the use of offensive collateral estoppel or require stricter prerequisites for its use.

Kentucky courts have not expressly accepted the offensive use of collateral estoppel. However, the last major obstacle to its application was removed when the mutuality requirement was rejected in 1971 in Sedley v. City of West Buechel. Since the Sedley opinion, other jurisdictions have expressly adopted offensive collateral estoppel. This Note argues that the Kentucky Supreme Court should follow their lead and expressly

former action the presently contested issue was actually litigated. )

5 See United States v. Mendoza, 464 U.S. 154, 158-59 (1984); Parklane Hosiery Co., 439 U.S. at 326 ("Collateral estoppel has dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971). But see Perschbacher, supra note 2, at 451 ("The foregoing critique suggests courts' regular reliance on the policies of finality, prevention of vexatious litigation, judicial economy, and minimization of inconsistent decisions in applying collateral estoppel is often misplaced.").

6 See supra note 1.

7 See Parklane Hosiery Co., 439 U.S. at 326 n.4 ("Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.").

8 See infra notes 39-40 and accompanying text; cf. infra notes 134-35, 163-68 and accompanying text.

9 Mutuality is the common law doctrine that prohibits the use of collateral estoppel against a party unless the proponent of the doctrine would have been bound by a contrary decision. Thus, collateral estoppel cannot be applied unless both parties are bound by the prior decision. See Blonder-Tongue Laboratories, Inc., 402 U.S. at 320-21. Only a few states still require mutuality. Schroeder, Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal, 67 Iowa L. Rev. 917, 919-20 (1982) (a 1981 list included nine states).

10 461 S.W.2d 556 (Ky. 1971).

11 See infra notes 157-86 and accompanying text.
accept this doctrine. Although offensive collateral estoppel is not without its critics, the experience of other jurisdictions has shown that proper controls can insure that the doctrine is applied fairly.

The Kentucky Supreme Court must make a clear and definitive statement on offensive collateral estoppel for three reasons. First, Kentucky practitioners need to know the effect of prior litigated issues and who may take advantage of estoppel. Second, recent U.S. Supreme Court decisions require federal courts to apply state preclusion principles to prior state court judgments and state administrative adjudications. Third, as a general rule other states look to Kentucky principles of collateral estoppel to determine the effect of prior Kentucky judgments.

This Note seeks to provide a framework for the application of offensive collateral estoppel in Kentucky by comparing the

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14 See generally infra notes 129-238 and accompanying text for cases that demonstrate a successful application of the doctrine of offensive collateral estoppel. When technical compliance with estoppel requirements would cause an inequitable result, courts have refused to apply collateral estoppel on grounds of unfairness or failure to fulfill estoppel purposes. See infra notes 114-28 and accompanying text.

15 Without a clear statement of offensive collateral estoppel principles, attorneys involved in multiple litigation are less able to predict the effect of a first decision on later judgments. In addition, a clear statement on offensive collateral estoppel would allow attorneys involved in multi-state litigation to predict the effect of allowing the Kentucky litigation to proceed to judgment first.

16 See University of Tenn. v. Elliott, 106 S. Ct. 3220, 3227 (1986).

Accordingly, we hold that when a state agency "acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the same preclusive effect to which it is entitled in the State's courts. Id. (citing United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

17 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 (1969) ("What issues are determined by a valid judgment is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered.").
current treatment of collateral estoppel under Kentucky law with the development of offensive collateral estoppel in other jurisdictions. Defendants facing multiple lawsuits on identical issues may consider offensive estoppel a deadly weapon when wielded by subsequent plaintiffs. However, the protections currently existing under Kentucky law and additional protections recognized in other jurisdictions can, in many cases, turn this deadly weapon into a paper tiger.

I. APPLICATION IN KENTUCKY

A. History of Collateral Estoppel

The history of collateral estoppel in Kentucky may be divided into three stages: The mutuality requirement existing before Sedley,\(^1\) the rejection of mutuality in Sedley, and estoppel following Sedley

1. Before Sedley

Prior to Sedley collateral estoppel was viewed as a type of res judicata.\(^2\) In accord with res judicata, a prior judgment was binding only if it was between the same parties or those in privity with them.\(^3\) In the 1963 decision of State Farm Mutual Automobile Insurance Co. v Shelton,\(^4\) Kentucky's highest court stated that "[t]he doctrine under which a person not a party to a suit may be bound by a judgment therein is not strictly res judicata but 'collateral estoppel.'"\(^5\) At that time, the term "collateral estoppel" was merely a convenient way to distinguish preclusion between the same parties from preclusion based upon privity.\(^6\) By 1965, collateral estoppel was interpreted to apply

\(^{1}\) Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1971).


\(^{3}\) See Ward, 436 S.W.2d at 796-97; Shelton, 368 S.W.2d at 737.

\(^{4}\) 368 S.W.2d 734 (Ky. 1963).

\(^{5}\) Id. at 737.

\(^{6}\) See id.
to specific issues that had been determined in the prior action. Moreover, in 1968 the doctrine was said to deal "primarily" with issues of fact and law between the same parties.

2. The Sedley Decision

Considering the confusion that existed in applying collateral estoppel, it is probably no accident that the phrase "collateral estoppel" is not even mentioned in Sedley. Instead of "collateral estoppel," the court adopted what it calls the "preclusion doctrine." Mrs. Sedley, the owner of defaulted revenue bonds, attempted to obtain a limited recovery from the City of West Buechel, Kentucky. In two prior actions in federal court, Mrs. Sedley was one of three defendants in suits brought by two life insurance companies to recover the value of the bonds. Although the federal cases were settled when Mrs. Sedley agreed to reacquire a portion of the bonds from the insurance companies, an interlocutory order was appealed and became final following a Sixth Circuit Court of Appeals decision. That order contained a finding that the bonds were not issued according to law and were therefore invalid. In the subsequent case the defendant city moved to dismiss the claim on grounds of res judicata because the prior case had determined that the bonds were invalid. This motion was granted by the trial court.

Since the federal judge had stated that the finding of bond invalidity was immaterial to his decision, the Kentucky Court

24 See Whittenberg Eng'g & Constr. Co., 390 S.W.2d at 883 ("[T]he judgment in the prior action did not operate as a bar under the doctrine of res judicata or act as an estoppel on the issue of negligence under the corollary doctrine of collateral estoppel by judgment" (emphasis added)).

25 Ward, 436 S.W.2d at 796 ("Collateral estoppel applies to situations where res judicata is not applicable, primarily a different case between the same parties with either, (1) factual determinations arising out of the same situation, or (2) closely similar questions of law.").

26 Sedley, 461 S.W.2d at 559. The omission of the phrase "collateral estoppel" may have led to the failure of recent Kentucky Court of Appeals decisions to properly define the doctrine. See infra notes 51-64 and accompanying text.

27 See Sedley, 461 S.W.2d at 557.

28 Id. at 558.

29 Id.

30 Id. at 557.

31 Id. at 558.
could have ended its opinion by declaring that there was no res
judicata because the prior finding was not essential to the judg-
ment. However, the court went further and used this case as an
opportunity to make a major change in the law of collateral
estoppel and res judicata in Kentucky Although the City of
West Buechel was not a party to any of the prior cases involving
Mrs. Sedley, the “preclusion doctrine” was adopted. The mu-
tuality requirement was rejected, yet not a single prior Kentucky
case requiring identity of the parties was expressly overruled.
Instead, prior cases were rejected implicitly by a new doctrine
recognized in a single sentence: “The ‘preclusion’ doctrine seems
reasonable to us and we shall adopt it.”

After this dramatic new doctrine was adopted, however, the
court refused to apply it to the case before it because serious
factual questions remained as to whether the finding of invalidity
of the bonds was essential to the prior judgment and whether
the parties had a full and fair opportunity to litigate the issue.
The court stated that there was less basis for a full and fair
opportunity to litigate where a party was a defendant in the prior
action. Mrs. Sedley had been a defendant in the prior

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In the [prior] action the opinion of the district court indicates that a
determination of the issue of whether the bond issue was invalid was
considered to be immaterial to a determination of the plaintiff’s right of
recovery, and the court granted judgment to the plaintiff without deter-
mining whether or not the bonds were invalid.

Id.

See id. at 558-59. After discussing the need for the issue to be essential to the
prior judgment, and that the judge in the prior action did not find it essential, the court
stated that “[t]he ultimate significance of this point, as affects the disposition of the
instant appeal, will be discussed at a later point in this opinion.” Id. at 558. Thus, the
court deliberately set out to announce the abolition of the mutuality requirement and
the adoption of the “preclusion doctrine,” although it could have refused to apply
collateral estoppel on other grounds. See id.

Id. at 559.

See, e.g., Ward, 436 S.W.2d at 796 (“Collateral estoppel applies to situations
where res judicata is not applicable, primarily a different case between the same
parties.”). State Farm Mut. Auto Ins. Co., 368 S.W.2d at 737 (“[Collateral estoppel]
is based upon privity between a party to the original suit and the person who should be
bound by the judgment. This privity is in turn founded upon such an identity of interest
that the party to the judgment represented the same legal right.”).

Sedley, 461 S.W.2d at 559.

Id.

Id.
action, but the court did not give this factor controlling weight since the case was remanded to the trial court to determine the factual preclusion questions.\textsuperscript{38}

What new and dramatic doctrine was adopted in \textit{Sedley}\textsuperscript{9}? The court in \textit{Sedley} adopted non-mutual collateral estoppel or issue preclusion that applies when at least the party to be bound is the same party or in privity with a party in the prior action.\textsuperscript{39} Although the use of collateral estoppel in \textit{Sedley} was defensive,\textsuperscript{40} the court did not prohibit an offensive application. However, the court used confusing phraseology by referring to the doctrine as "'claim preclusion' or 'issue preclusion.'"\textsuperscript{41} The term "'claim preclusion'" refers to the res judicata effect given to an entire claim while "'issue preclusion'" refers to the collateral estoppel of a party from relitigating an issue that has already been determined.\textsuperscript{42}

### 3. Post-Sedley

Following the \textit{Sedley} decision, the Kentucky Supreme Court clarified the doctrine of collateral estoppel,\textsuperscript{43} while the Kentucky Court of Appeals somewhat confused the doctrine.\textsuperscript{44} In \textit{Gregory v Commonwealth},\textsuperscript{45} the Kentucky Supreme Court cited \textit{Sedley}
for the proposition that "[c]ollateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding."46 In Gregory, a criminal defendant attempted to bind the Commonwealth on the issue of sodomy commission.47 In a prior dependency proceeding, a district court found that the defendant had not subjected his children to deviate sexual intercourse. However, the district court found other reasons to commit the children to the Department of Human Resources. As a result, the issue of sodomy commission was not essential to the dependency judgment and could not serve to collaterally estop the Commonwealth from relitigating the issue in the criminal proceedings.48

The Gregory decision is important because it defines collateral estoppel as res judicata which precludes relitigation of issues necessarily decided in the prior action. This definition of collateral estoppel conforms more closely with the definition found in other jurisdictions.49 Although the application of collateral estoppel in Gregory involved the same parties which had litigated in the prior action (Gregory and the state), Sedley permits its application where only one party is the same.50

At least three Kentucky Court of Appeals decisions mention collateral estoppel without any recognition of the abandonment of mutuality. In Fayette County Education Association v Hardy,51 the appellant teacher organization asserted that the subsequent proceeding was barred by res judicata and estoppel.52 The court refused to decide this issue because it did not have a sufficient record of the prior action to determine the parties and issues involved.53 However, the court implied that the appellant would have to show that the same parties were involved in the prior suit: "Thus we do not have the means to determine the issue whether the circuit court allowed that action to be pursued

46 Id. at 600.
47 Id. at 599.
48 Id. at 600.
49 See supra note 42.
50 Sedley, 461 S.W.2d at 557-59.
51 626 S.W.2d 217 (Ky. Ct. App. 1980).
52 Id. at 218.
53 Id. at 219-20.
as a class action involving the same parties as in this case.\textsuperscript{54}

Similarly, in \textit{Penco, Inc. v Detrex Chemical Industries, Inc.},\textsuperscript{55} the court stated that "under the doctrine of collateral estoppel, a judgment on the merits in a prior action, involving the same parties or their privies, precludes the relitigation of issues actually litigated and determined in a prior suit regardless of whether it is based on the same cause of action."\textsuperscript{56} Although the court applied collateral estoppel by finding an "identity of interest"\textsuperscript{57} between the parties, the continued recognition of a mutuality requirement failed to consider the impact of \textit{Sedley}

In \textit{Waddell v Stevenson},\textsuperscript{58} the Kentucky Court of Appeals again overlooked \textit{Sedley} by stating that "a judgment becomes res judicata only when there exist identity of the parties, identity of the cause of action, and when the action is decided on its merits."\textsuperscript{59} The \textit{Waddell} statement is correct if applied to claim preclusion, but not to issue preclusion.\textsuperscript{60} The court cites the 1963 \textit{Shelton} case\textsuperscript{61} and apparently defines collateral estoppel as res judicata based upon privity.\textsuperscript{62} This is not the definition of collateral estoppel found in \textit{Sedley, Gregory}, or in other jurisdictions.\textsuperscript{63}

As these cases show, collateral estoppel or issue preclusion has not been clearly distinguished from res judicata. In addition, no attempt has been made to distinguish between offensive and defensive collateral estoppel. However, recent Kentucky cases involving res judicata provide a format for the requirements and exceptions to the application of offensive collateral estoppel, and demonstrate that adequate protections exist to prevent unfair or inequitable application of offensive collateral estoppel.\textsuperscript{64}

\textsuperscript{54} \textit{Id.} at 220 (emphasis added). The court cited six cases relating to res judicata and collateral estoppel, yet failed to cite \textit{Sedley} or even suggest that mutuality was no longer required. \textit{Id.} at 219-20.

\textsuperscript{55} 672 S.W.2d 948 (Ky. Ct. App. 1984).

\textsuperscript{56} \textit{Id.} at 950 (emphasis in original).

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} 683 S.W.2d 955 (Ky. Ct. App. 1984).

\textsuperscript{59} \textit{Id.} at 958 (emphasis added).

\textsuperscript{60} \textit{See supra} note 20 and accompanying text.

\textsuperscript{61} 368 S.W.2d 734.

\textsuperscript{62} \textit{Waddell}, 683 S.W.2d at 959.

\textsuperscript{63} \textit{See supra} notes 39-49 and accompanying text.

\textsuperscript{64} \textit{See infra} notes 65-128 and accompanying text.
B. Requirements of Collateral Estoppel

Fear of possible unfair application of offensive collateral estoppel should be put to rest quickly when all the various requirements and exceptions are considered. These protections will be examined in two parts. First, Kentucky cases involving collateral estoppel and res judicata provide a basic skeleton. Second, the experience of other jurisdictions in the application of offensive collateral estoppel adds the meat to provide a complete body of law useful for both asserting and defending against the application of the doctrine.

The six basic requirements of non-mutual collateral estoppel are set forth in Sedley: 1) a final decision on the merits; 2) identity of issues; 3) issues actually litigated and determined; 4) a necessary issue; 5) a prior losing litigant; and 6) a full and fair opportunity to litigate. First, collateral estoppel requires a final decision on the merits in the prior action. “Finality of decision is a prerequisite to the defense of res judicata and collateral estoppel.” In Sedley and Cartmell v. Urban Renewal and Community Development Agency, the use of preclusion was attacked because the prior issues allegedly were contained in interlocutory orders. Although the prior action was not a final judgment, this attack failed in Sedley because the Sixth Circuit accepted an appeal of the order as “a final adjudication of that issue.” However, the attack in Cartmell was successful because the prior action involved only an interlocutory condemnation order.

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65 Sedley, 461 S.W.2d at 558-59.
66 Id. at 558; Cartmell v. Urban Renewal and Community Dev. Agency, 419 S.W.2d 719, 721-22 (Ky. 1967).
67 Cartmell, 419 S.W.2d at 721.
68 419 S.W.2d 719 (Ky. 1967).
69 Sedley, 461 S.W.2d at 558; Cartmell, 419 S.W.2d at 721.
70 Sedley, 461 S.W.2d at 558.
71 See Cartmell, 419 S.W.2d at 721-22. As to the type of action in this case (a condemnation proceeding), Cartmell may no longer have any application. A more recent decision found that the condemnee has an immediate right to appeal even though the condemnation order is called an “interlocutory judgment.” See also Ratliff v. Fiscal Court of Caldwell Cty., Ky., 617 S.W.2d 36, 39 (Ky. 1981). If an interlocutory condemnation order may be final for purposes of appeal, it may also be final for purposes of collateral estoppel. Id.
Second, collateral estoppel requires identity of the issues in the prior and subsequent actions. Before the trial court or court of appeal can determine the identity of issues, it must have access to the complete record. In *Fayette County Education Association v Hardy*, a teachers' organization attempted to use the claim or issues decided in a prior judgment, which had allowed collective bargaining, to bind relitigation in the subsequent action. However, the complaint and judgment were the only record of the prior case furnished to the Kentucky Court of Appeals. As a result, the appellate court was unable to identify the particular issues involved and refused to rule on the preclusion question.

Identity of the issues may be shown by a complete record which includes a prior unpublished opinion. Under Kentucky Rule of Civil Procedure 76.28(c), an unpublished opinion cannot be "used as authority in any other case." In *Penco* the appellant attacked the use of a prior unpublished opinion for purposes of res judicata and collateral estoppel as an attempt to use it "as authority" in the present action. The court rejected this argument stating that "[w]e do not construe the Rule so strictly as to characterize the instant action as a separate 'other' case."

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72 See BTC Leasing, Inc. v. Martin, 685 S.W.2d 191, 197 (Ky. Ct. App. 1984); *Penco, Inc.*, 672 S.W.2d at 951-52; *Fayette County Educ. Ass'n*, 626 S.W.2d at 219-20; *Norrell v. Elec. & Water Plant Bd.*, 557 S.W.2d 900, 902-03 (Ky. Ct. App. 1977); *Sedley*, 461 S.W.2d at 559; *Whittenberg Eng'g & Constr. Co.*, 390 S.W.2d at 883.

73 See *Fayette County Educ. Ass'n*, 626 S.W.2d at 219-20.

74 626 S.W.2d 217 (Ky. Ct. App. 1980).

75 Id.

76 See id.

77 "Opinions that are not to be published shall not be cited or used as authority in any other case in any other court of this state." Ky. R. Cty P 76.28(c) [hereinafter CR 76.28(c)].

78 See *Penco, Inc.*, 672 S.W.2d at 951.

79 Id. Because *Penco* involved mutuality of the parties, the question remains whether Kentucky courts would apply this reasoning to the non-mutual use of collateral estoppel in which only one party was involved in the prior unpublished opinion. The result should be the same. Trial court opinions are not published, yet they are used as authority for purposes of res judicata and collateral estoppel when a final decision is rendered. Cf. supra notes 19-76 and accompanying text (most of the aforementioned cases involved use of a trial court decision). Unpublished Kentucky Court of Appeals decisions should have no less authority.
Third, collateral estoppel is restricted to issues that were actually litigated and determined in the prior action. The party asserting the application of the doctrine of collateral estoppel must plead and prove that the question presented in the instant action was actually litigated and determined by the judgment in the prior action.

In *Whittenberg Engineering & Construction Co. v Liberty Mutual Insurance Co.*, a general contractor attempted to use collateral estoppel to bind the insurer of a subcontractor's employees on the issue of the general contractor's negligence. However, in the prior action the general contractor was granted a summary judgment on the basis of a Workmen's Compensation statute. Because the negligence issue was not litigated in the prior action, it was not available in the subsequent action for purposes of collateral estoppel.

Fourth, the issue must have been necessary or essential to the determination of the prior decision to estop litigation in a subsequent case. The Court in *Sedley* and *Gregory* denied the use of issue preclusion mainly because the prior court failed to rely upon the particular issue in reaching its decision.

The remaining two requirements focus on the fairness of enforcing finality. Fifth, even though absolute mutuality is no longer required, at least the party to be bound must have been a party to the prior action or in privity with a party to the prior case. An attempt to use a prior litigated issue against a party

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10 See Norrell, 557 S.W.2d at 902-03; Sedley, 461 S.W.2d at 558; Whittenberg Eng'g & Constr. Co., 390 S.W.2d at 883.
11 *Whittenberg Eng’g & Constr. Co.*, 390 S.W.2d at 883.
12 390 S.W.2d 877 (Ky. 1965).
13 *Id.* at 883.
14 See *id*.
15 See *Gregory*, 610 S.W.2d at 600; *Sedley*, 461 S.W.2d at 558.
16 See supra notes 31-32, 46-49 and accompanying text.

The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment.

*Sedley*, 461 S.W.2d at 558.

17 *Waddell*, 683 S.W.2d at 958; *Sedley*, 461 S.W.2d at 559; *State Farm Mut. Auto Ins. Co.*, 368 S.W.2d at 737.
who has never had an opportunity to litigate that issue is a violation of due process.  

A typical traffic accident case illustrates the application of this requirement. A truck collides with a car and a passenger in the car sues the truck driver for injuries received. The truck driver's defense is that the driver of the car was the proximate cause of the accident. In a prior action the driver of the car, who was not injured, recovered from the truck driver for extensive damage to his car. The jury verdict included a special finding that the driver of the car was not negligent. As a result, the passenger moves for a partial summary judgment on the issue of liability. If the motion is granted, the doctrine of offensive collateral estoppel will be applied.

Taking the car accident hypothetical one step further, if the truck driver had been found to be not negligent in the prior case, the truck driver could not use this finding to collaterally estop the passenger from suing him in the subsequent case because the passenger never had his day in court. Although it has been argued that preclusion should apply in this situation, the requirement that at least the party to be bound must have been a party to the prior action or in privity with such a party allows a party to have his day in court before he can be bound. Thus, when issues are expected to be the subject of more than one action, a loss in the first action may bind the losing litigant in a subsequent action. A plaintiff's loss in one case may result in the application of defensive collateral estoppel by a different defendant in a subsequent case, while a loss by a defendant may result in the application of offensive collateral estoppel by a different plaintiff in a subsequent case.

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89 See generally, Schroeder, supra note 9.
90 Of course when there is privity between two parties, one party may be bound even though he was not a party to the first case. See Waddell, 683 S.W.2d at 958; State Farm Mut. Auto. Ins. Co., 368 S.W.2d at 737.
91 In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting
Sixth, collateral estoppel applies only if the party to be bound had a full and fair opportunity to litigate the issue in the prior action. This element requires the trial court to examine the record and circumstances surrounding the prior action for any conditions that may have prevented the party from adequately litigating an issue. In Sedley, the fact that Mrs. Sedley was a defendant in the prior action was a factor for the trial court to consider upon remand in determining whether there had been a full and fair opportunity to litigate the issue involved. However, the appellate court allowed the City of West Buechel to file an answer upon remand reasserting res judicata. Thus, the use of collateral estoppel against a defendant does not, by itself, indicate the lack of a full and fair opportunity to litigate.

C. Exceptions to the Use of Collateral Estoppel

Although Sedley did not list any specific exceptions to the application of collateral estoppel, the exceptions already available within the doctrine of res judicata provide additional protection against an unfair application of offensive collateral estoppel. The following is not an exhaustive list of exceptions to the application of res judicata available under Kentucky law. However, these exceptions may prevent the application of collateral estoppel, as well as res judicata.

First, preclusion may be denied when the court in the prior action was without subject matter jurisdiction. In Karami v

\[ a claim the plaintiff has previously litigated and lost against another defendant. Parklane Hosiery Co., 439 U.S. at 326 n.4. \]

\[ See Sedley, 461 S.W.2d at 559. \]

The rule contemplates that the court in which the plea of res judicata is asserted shall inquire whether the judgment in the former action was in fact rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case.

\[ Id. \]

\[ Id. See infra notes 208-16 and accompanying text. \]

\[ Sedley, 461 S.W.2d at 559-60. \]

\[ See id; see also supra note 38. \]

\[ See Karami v. Roberts, 706 S.W.2d 843, 845 (Ky. Ct. App. 1986); Fischer v. Jefferies, 697 S.W.2d 159, 160 (Ky. Ct. App. 1985). But see Kirchner v. Riherd, 702 S.W.2d 33, 35 (Ky. 1985). In Kirchner an injured driver proceeded first against the \]
Roberts, the appellant and his father attempted to prevent the appellant’s former wife from setting aside a love and affection conveyance by pleading the prior divorce decree as res judicata. However, the decree expressly stated that the property in question was not owned by the couple. The trial court in the divorce action had no jurisdiction over property that was not claimed by either party and its findings could not preclude the litigation of ownership in the present action. "If the court rendering a judgment pleaded in bar did not have jurisdiction of the subject matter or the parties to the action, the rule of res adjudicata has no application, for it is an ineffective adjudication."100

In Fischer v Jeffries, the appellees argued that a probate proceeding in district court was res judicata as to the validity of a will. However, since a district court has jurisdiction over only uncontested probate matters, and the will had been challenged by the appellee children of the testator, the district court did not have jurisdiction over the will, and its decision was not effective for purposes of preclusion.

Second, fraud and duress in the prior proceeding may prevent the application of collateral estoppel. In Karami, duress in the divorce proceeding was a ground for not applying res adjudicata in a subsequent proceeding. Even if jurisdiction had existed over the property in question, the husband’s physical

driver of the other car in the small claims division of district court, which had a jurisdictional limit of $1000, to recover for property damages to his car. Id. at 33. After losing on the issue of negligence in the small claims division, the injured driver filed suit in Circuit Court to recover for his personal injuries. However, the Supreme Court of Kentucky agreed with the trial court in dismissing the second suit for splitting a cause of action. Id. at 35. A vigorous dissent written by Justice Leibson and joined by two other justices challenged this decision on the basis of exceptions to the doctrine of issue preclusion. Id. at 35-37 (Leibson, J., dissenting). With the different procedures and jurisdiction in small claims court, the injured driver should not be precluded from litigating negligence in the second action. Id.

97 Karami, 706 S.W.2d at 843.
98 Id. at 845.
99 See id.
100 Id. (quoting Wolfe County v. Tolsen, 140 S.W.2d 671 (Ky. 1940)).
102 Id. at 160.
104 See id.
105 See Karami, 706 S.W.2d at 846.
violence and threats rendered the decree void for purposes of res judicata.\textsuperscript{106} Although the defense of duress in this instance was made to prevent the application of res judicata to an agreed judgment,\textsuperscript{107} claims of fraud and duress should be available as an exception under non-mutual collateral estoppel in light of the requirement of a full and \textit{fair} opportunity to litigate.\textsuperscript{108}

Third, collateral estoppel is not available when there has been a statutory or common law change in the legal climate between the prior and subsequent judgments.\textsuperscript{109} In \textit{Hall v. Noplis},\textsuperscript{110} individual taxpayers challenged salary payments to Perry County magistrates.\textsuperscript{111} The magistrates pled as res judicata a December 17, 1985 Perry Circuit Court decision permitting such salary payments. However, on December 11, 1959, Kentucky's highest court had issued an opinion denying salary payments to Harlan County magistrates. The court refused to allow the 1958 judgment to preclude the subsequent action. The court reasoned that the intervening decision had altered the legal basis of the prior judgment.\textsuperscript{112} Thus, the earlier Perry County judgment was available for purposes of res judicata only until December 11, 1959.\textsuperscript{113}

Fourth, Kentucky courts have refused to apply preclusion when principles of fairness would be violated by its application.\textsuperscript{114} When res judicata is denied on this ground, courts have referred to the application of res judicata as "fundamentally

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} at 845-46 ("A prior agreed judgment operates as res judicata in a subsequent action only if free from fraud or duress."").

\textsuperscript{108} \textit{See supra} notes 92-95 and accompanying text.

\textsuperscript{109} \textit{See Ward}, 436 S.W.2d at 797 ("[M]any courts have held that estoppel should apply unless there was an interim change in the 'legal climate' either through a change in an applicable statute or through an interim court decision." (citations omitted)); \textit{Hall v. Noplis}, 367 S.W.2d 456, 457-58 (Ky. 1963).

\textsuperscript{110} 367 S.W.2d 456 (Ky. 1963).

\textsuperscript{111} \textit{Id.} at 457.

\textsuperscript{112} \textit{See id.} at 458 ("But it would hardly be in keeping with sound policy to say that an erroneous judgment must or can fix in perpetuity the rights and liabilities of parties in such a continuing relationship as exists between the public and its officers.").

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{See Karami}, 706 S.W.2d at 846; \textit{BTC Leasing, Inc.}, 685 S.W.2d at 198; \textit{Ward}, 436 S.W.2d at 797.
unfair,""manifest injustice,"" and ""inequitable."" In *Karami*, the prior divorce proceeding was described as "unfair" in light of the husband's threats. In *Ward v Southern Bell Telephone and Telegraph Co.*, a telephone company sued the state highway commission seeking compensation for the removal of certain telephone lines along a state highway right-of-way. The telephone company asserted that the state was collaterally estopped on the issue of compensation because the state had lost in a prior action involving a different contract in another county. After considering such factors as the different contracts involved in each action, the different government attorneys involved in each action, and the perpetual relationship between utility companies and the state, the court found it "inequitable" to apply estoppel.

In *BTC Leasing, Inc. v Martin*, the court stated that "general considerations of fairness have led us to conclude that it would be entirely inappropriate to apply the doctrine of res judicata." In a Russell County action a repairman sought to enforce a statutory lien against a successor in title to a houseboat. The new owner had made every effort to ascertain any existing liens against the boat while the repairman had failed to give proper notice of his lien. Nevertheless, the repairman asserted that the new owner was bound by a prior action in Wayne County where the court had found a valid lien and the predecessor liable for repairs. After finding a lack of privity between the new owner and the parties in the prior action, the court referred to res judicata as a "rule of justice" that should not be applied to preclude an innocent purchaser, who made

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115 *Karami*, 706 S.W.2d at 846.
116 *BTC Leasing, Inc.*, 685 S.W.2d at 198.
117 *Karami*, 706 S.W.2d at 846.
118 *Ward*, 436 S.W.2d at 794 (Ky. 1968).
119 *Id.* at 795.
120 *Id.* at 796.
121 *Id.* at 197.
122 *Id.* at 192-93.
123 *Id.* at 198.
124 *Id.* at 195-97.
125 *Id.* at 192-93.
126 *Id.* at 198.
every reasonable effort to ascertain any prior interest, in favor of a repairman who has done little to protect his interest.128

A basic skeleton for the application of offensive collateral estoppel presently exists in Kentucky. The unfair application of collateral estoppel is prevented by the prerequisites and exceptions to its application. Moreover, the experience of other jurisdictions in the application of offensive collateral estoppel may supply additional protections.

II. APPLICATION IN OTHER JURISDICTIONS

A. History of Collateral Estoppel

While collateral estoppel has Germanic origins,129 the doctrine in America was not distinguished clearly from res judicata until *Cromwell v County of Sac.*130 This 1876 United States Supreme Court decision has continued importance today because of its focus on the need for actual litigation in the prior action and the unique "elements and emphasis" of each suit.131 However, expansion of collateral estoppel was hindered by such cases as *Triplett v Lowell,*132 in which the court required mutuality as a prerequisite to the application of collateral estoppel.133 Expansion began again in 1942 when the California Supreme Court rejected the mutuality requirement in *Bernhard v Bank of America.*134 Although *Bernhard* involved the defensive use of collateral estoppel, nothing in the opinion barred an offensive use of

128 Id.
129 See Pershbacher, supra note 2, at 426-27.
130 94 U.S. 351 (1876); see Pershbacher, supra note 2, at 429.
131 Pershbacher, supra note 2, at 429 (citing Cromwell, 94 U.S. at 353-56, 359-60).
133 See Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 320-21 (1971) ("Triplert v. Lowell exemplified the judge-made doctrine of mutuality of estoppel, ordaining that unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action.").
134 122 P.2d 892, 895 (Cal. 1942). In addition, *Bernhard* is important because it sets forth three questions to be answered before applying collateral estoppel: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Id.
The modern history of collateral estoppel revolves around the Supreme Court’s 1979 landmark decision in *Parklane Hosiery Co. v Shore*.¹³⁶

1. Estoppel Before Parklane

Mutuality was rejected in the federal courts in *Blonder-Tongue Laboratories, Inc. v University of Illinois Foundation*.¹³⁷ As in *Bernhard*, *Blonder-Tongue* involved only the defensive use of collateral estoppel.¹³⁸ After rejecting mutuality, some state courts limited collateral estoppel to only defensive applications.¹³⁹ The doctrine appeared less fair when applied in favor of a plaintiff in the subsequent action against a party who was a defendant in both the prior and subsequent actions.¹⁴⁰ Later cases adopting the offensive use of collateral estoppel attempted to remedy this concern by imposing additional requirements upon such use.¹⁴¹ However, cases that initially rejected mutuality such as *Blonder-Tongue*, *Bernhard*, and *Sedley* already contained some of these additional protections.

¹³⁵ See Note, supra note 2, at 148 ("Although *Bernhard* involved defensive use of collateral estoppel, Justice Traynor wrote his opinion broadly enough to encompass both offensive and defensive situations.").

¹³⁶ 439 U.S. 322 (1979); see infra notes 148-55 and accompanying text.


¹³⁸ See id. at 330.

¹³⁹ See Note, supra note 2, at 148-49.

Several courts, however, began developing a number of limitations to the *Bernhard* decision, the most significant being the limitation of the abrogation of mutuality to defensive use of collateral estoppel. This limitation prevented unsuccessful litigants from returning to the courtroom simply by switching opponents and promoted consolidation of litigation at the outset. State courts generally adhered to the defensive use limitation, whereas federal courts were more willing to allow nonparties to prior actions to assert the collateral estoppel doctrine offensively. *Id.* (footnotes omitted); see also *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 502 (Mo. Ct. App. 1985) ("The cases reflect that courts have traditionally been less inclined to allow offensive use of the doctrine than its defensive use when mutuality of estoppel is absent.")).

¹⁴⁰ *Parklane Hosiery Co.*, 439 U.S. at 329-31. *Parklane* lists a number of special problems involving offensive estoppel, including a "wait and see" attitude of potential plaintiffs and inconsistent verdicts. Most state courts that have rejected mutuality now attempt to solve these problems by requiring a case-by-case examination of factors such as a "full and fair opportunity to litigate." Note, supra note 2, at 149-50 (a list of eight factors).

¹⁴¹ See infra notes 148-238 and accompanying text.
Both Blonder-Tonque and Bernhard emphasize the need for the trial court to consider all the circumstances involved in the prior and subsequent actions before precluding any issues.\footnote{See supra note 131 and accompanying text; Blonder-Tongue Laboratories, Inc., 402 U.S. at 333-34.} "[A]s so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity."\footnote{Blonder-Tongue Laboratories, Inc., 402 U.S. at 333-34.} A fair application of collateral estoppel, both defensive and offensive, is not achieved by simply meeting certain basic requirements. The trial court may find additional factors in a particular case justifying a denial of estoppel.\footnote{See supra notes 96-128 and accompanying text.} Moreover, both Sedley and Blonder-Tonque require that the bound party have had a "full and fair opportunity" to litigate the issue in the prior action.\footnote{See supra note 36 and accompanying text; see also Blonder-Tongue Laboratories, Inc., 402 U.S. at 333-34.} According to at least one commentator, the "full and fair opportunity" rule was not applied by any state court until 1967.\footnote{See Note, supra note 2, at 149 (citing B.R. DeWitt, Inc. v. Hall, 225 N.E.2d 195 (N.Y. 1967)).} The first state court to apply this rule permitted a plaintiff to use collateral estoppel offensively in a subsequent action.\footnote{Id. (citing B.R. DeWitt, Inc., 225 N.E.2d at 199).}

2. The Parklane Decision

The Supreme Court made a definitive statement regarding offensive collateral estoppel in Parklane Hosiery Co. v Shore.\footnote{439 U.S. 322 (1979).} Two actions arose out of an alleged materially false and misleading proxy statement issued in the context of a corporate merger.\footnote{Id. at 324.} The Securities and Exchange Commission (SEC) brought an action against Parklane Hosiery for violation of federal security laws, and the stockholders brought a separate class action to recover damages. The SEC action resulted in a judgment against the defendant, and the stockholders moved for...
partial summary judgment on the issue of whether the statement was materially false and misleading. 150 The court held that Parklane Hosiery was collaterally estopped from relitigating the issue and affirmed the granting of the motion. 151 Although Parklane permits the use of offensive collateral estoppel, the court noted that two problems with its use distinguish offensive from defensive use of preclusion. First, offensive use of collateral estoppel does not necessarily promote judicial economy because potential plaintiffs may sit on the sidelines awaiting a favorable decision by another plaintiff against a common defendant. 152 Second, the doctrine may be unfair to a defendant if the prior suit was only for a small amount of damages, inconsistent verdicts were involved, or the defendant lacked adequate procedural opportunities in the prior action. 153

The Court provided a solution to the inequitable nature of offensive estoppel by listing at least seven factors that could prevent its use: 1) the broad discretion of the trial court in the application of offensive collateral estoppel; 2) lack of procedures in the prior action that were available in the subsequent action; 3) an inconvenient forum in the prior action; 4) the possibility that the plaintiff could easily have joined in the prior action; 5) the bound party's lack of incentive to litigate in the prior action; 6) lack of a full and fair opportunity to litigate in the prior action; and 7) any other reasons for unfairness to the defendant. 154 A literal application of each of these factors would seem to prevent any use of offensive issue preclusion. However, the Court found that Parklane Hosiery had every incentive and opportunity to litigate the issue in the SEC lawsuit since the later private suits were foreseeable, no inconsistent decisions were involved, and the procedural opportunities were similar in both actions. 155 Thus, the Supreme Court permitted the use of

150 Id. at 324-25.
151 Id. at 337.
152 Id. at 329-30.
153 Id. at 330-31.
154 See id. at 331-32.
155 Id. at 332. Although the defendant would have been entitled to a jury trial in the present action on the issue of the misleading statement absent the motion for summary judgment, Parklane Hosiery did not have a right to a jury trial in the prior SEC action for injunctive relief. The Court permitted the use of estoppel in the face of
offensive collateral estoppel in federal courts and laid a foundation for the application of the doctrine in states that have abolished mutuality but have not applied collateral estoppel offensively.

3. State Cases After Parklane

Offensive collateral estoppel has been expressly adopted by many states and by the Restatement (Second) of Judgments. An examination of two state decisions to adopt and one state decision to reject offensive collateral estoppel provides a basis for applying the doctrine in Kentucky. In Hunter v. City of Des Moines, the Iowa Supreme Court, after considering Parklane and a tentative draft of the Restatement (Second) of Judgments, adopted offensive issue preclusion. Unlike Kentucky, the Iowa Court had limited non-mutual preclusion to defensive uses in a prior decision that abolished mutuality. As a result, offensive

this procedural difference by calling it a "neutral" distinction. Id. at 332 n.19 ("[T]he presence or absence of a jury as factfinder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum."). Id.

See supra note 139.

See, e.g., Ali Baba Co. v. Wilco, Inc., 482 A.2d 418, 422 (D.C. 1984); Dudley v. Carroll, 467 So. 2d 706, 707 (Fla. Dist. Ct. App. 1985) (refused application in this case because of lack of opportunity to litigate, but indicated an acceptance by Florida courts in appropriate situations); Hunter v. City of Des Moines, 300 N.W.2d 121, 125 (Iowa 1981); Kaiser v. Northern States Power Co., 353 N.W.2d 899, 902 (Minn. 1984); O'Blennis, 691 S.W.2d at 503; Beall v. Doe, 315 S.E.2d 186, 190 (S.C. Ct. App. 1984); Conley v. Spillers, 301 S.E.2d 216, 224-25, 226-27 (W Va. 1983); see also Schroeder, supra note 9, at 919-20 ("The requirement of mutuality for both defensive and offensive applications of issue preclusion has been abolished both in the federal courts and in most state courts." (footnotes omitted)); Note, supra note 2, at 149-50 ("In fact, most courts that have abandoned the mutuality rule are now willing to apply collateral estoppel both defensively and offensively, depending upon the circumstances of each case."). But see Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 982-83, 987-88 (Ohio 1983); Algood v. Nashville Mach. Co., 648 S.W.2d 260, 264 (Tenn. Ct. App. 1983).

RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). No distinction is made between offensive and defensive preclusion, but the additional protections afforded offensive collateral estoppel in cases like Parklane are listed as additional considerations in the Restatement. See id., see also supra note 154 and accompanying text.

300 N.W.2d 121 (Iowa 1981).

See id. at 123-25.

Id. at 123 (citing Betran v. Glen Falls Ins. Co., 232 N.W.2d 527, 533-34 (Iowa 1975)).
use of estoppel was prohibited in Iowa until the *Hunter* decision.\(^{162}\)

The South Carolina Court of Appeals clearly accepted offensive collateral estoppel in *Beall v Doe*.\(^{163}\) However, the history of estoppel in South Carolina is similar to that in Kentucky.\(^{164}\) In previous cases the South Carolina Supreme Court had rejected mutuality and applied collateral estoppel defensively,\(^{165}\) yet no appellate court had expressly prohibited an offensive use.\(^{166}\) Although the Fourth Circuit Court of Appeals had interpreted South Carolina law as prohibiting the use of offensive collateral estoppel,\(^{167}\) the *Beall* court relied upon the reasoning of prior South Carolina cases, as well as *Parklane* and the Restatement, and decided to allow its use.\(^{168}\) Similarly, Kentucky courts are in a position to follow the reasoning in *Sedley* and other jurisdictions and adopt the use of offensive collateral estoppel.

Conversely, the Ohio Supreme Court chose not to allow the non-mutual use of offensive issue preclusion in *Goodson v McDonough Power Equipment Co*.\(^{169}\) Instead of abolishing mutuality, Ohio courts have allowed issue preclusion in the absence of identity of parties by permitting exceptions in particular cases.\(^{170}\) In one case an injured plaintiff was allowed to bind a defendant hospital on the issue of sovereign immunity even though the plaintiff did not participate in the prior action.\(^{171}\) This clearly offensive use of preclusion was limited to the particular facts involved in that case. Although it refused to reject

\(^{162}\) *Id.*


\(^{164}\) In both *Beall* and *Sedley*, the appellate court rejected mutuality and applied collateral estoppel defensively without any prohibition against offensive use. *See id.* at 189; *Sedley*, 461 S.W.2d at 559. As a result, the Kentucky Supreme Court could adopt the same reasoning as the South Carolina Supreme Court in *Beall* and find that the offensive use of collateral estoppel has been permissible in Kentucky since the date of the *Sedley* opinion.

\(^{165}\) *See id.* at 189 (citing Irby v. Richardson, 298 S.E.2d 452 (S.C. 1982); Graham v. State Farm Fire & Casualty Ins. Co., 287 S.E.2d 495, 496 (S.C. 1982)).

\(^{166}\) *Id.*

\(^{167}\) *Id.* at 189-90 (citing Watkins v. M. & M. Tank Lines, Inc., 694 F.2d 309 (4th Cir. 1982)).

\(^{168}\) *See id.* at 190.

\(^{169}\) 443 N.E.2d 978, 987 (Ohio 1983).

\(^{170}\) *See id.* at 984-87.

\(^{171}\) *Id.* at 984-85 (citing Hicks v. De La Cruz, 369 N.E.2d 776 (Ohio 1977)).
mutuality, the Goodson court implied that non-mutual estoppel would be permitted in appropriate situations. Thus, even in a jurisdiction that requires mutuality, such as Ohio, litigants may not be absolutely precluded from applying offensive estoppel.

4. Supreme Court Cases After Parklane

At least three recent United States Supreme Court cases have an impact on the doctrine of collateral estoppel. In United States v Mendoza, the Court refused to allow the non-mutual use of offensive collateral estoppel to bind the U.S. government. The Court reasoned that the government should not be placed in the same position as a private litigant "because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates." Similarly, Kentucky's highest court refused to allow preclusion against the State in Ward v Southern Bell Telephone and Telegraph Co. One of the factors the court listed in support of their decision was the involvement of different government attorneys in the prior and subsequent actions. Thus, Kentucky courts may adopt the use of offensive estoppel but they can use the protective reasoning of Mendoza and Ward to prevent its application against the State.

In Kremer v Chemical Construction Corp., the Court in a Title VII action required federal courts to give the same preclusive effect to a state judgment as given by the courts of

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172 After deciding to continue the mutuality requirement, the court stated that "[w]e therefore opt to adhere to such principle as a general proposition, while realizing that there may well be other cases in which there are presented additional exceptions which could be acceptable to this court upon the basis of serving justice within the framework of sound public policy."


174 Id. at 162.

175 Id. at 159.

176 436 S.W.2d 794 (Ky. 1968); see generally supra notes 119-22 and accompanying text.

177 Ward, 436 S.W.2d at 797.

that state.\textsuperscript{179} This decision increases the need for state courts to make a clear statement of preclusion principles.\textsuperscript{180} Moreover, in the recent decision of University of Tennessee \textit{v} Elliott\textsuperscript{181} the Court required federal courts to give the same preclusive effect to issues determined in certain unreviewed state administrative adjudications as would the courts of that state.\textsuperscript{182} However, within Elliott, preclusion is limited to state agencies "acting in a judicial capacity,"\textsuperscript{183} and disallowed where Congress has expressed an intent to foreclose such preclusion.\textsuperscript{184} Giving such broad effect to administrative decisions may lead to greater use of preclusion based on prior administrative adjudications. However, in light of the different procedures involved in administrative proceedings, application of offensive collateral estoppel, in some situations, may be unfair to the defendant.\textsuperscript{185}

The experience of other jurisdictions in the application of offensive collateral estoppel\textsuperscript{186} can provide a basis for its application in Kentucky. This experience, added to the framework of collateral estoppel presently available in Kentucky, can result in a fair system for preventing unnecessary relitigation of issues. Any lingering doubts as to the ability of courts to prevent unjust application of the doctrine should be removed by the examples given below.

\textbf{B. Requirements For Offensive Collateral Estoppel}

In general, the requirements for non-mutual collateral estoppel in Kentucky\textsuperscript{187} are the same as those in other jurisdic-

\textsuperscript{179} Id. at 481-82.

\textsuperscript{180} See supra note 17.

\textsuperscript{181} 106 S. Ct. 3220 (1986).

\textsuperscript{182} Id. at 3227.

\textsuperscript{183} Id.

\textsuperscript{184} See id. at 3225 (Congress has expressed an intent not to allow preclusion in Title VII claims.).

\textsuperscript{185} See infra notes 219-29 and accompanying text.

\textsuperscript{186} See infra note 188 and accompanying text.

\textsuperscript{187} See supra notes 65-95 and accompanying text.
The Restatement (Second) of Judgments divides its discussion of issue preclusion into three sections: the general rule between the same parties, exceptions to the general rule, and considerations for issue preclusion in subsequent litigation with others. Whether called principles, factors, or corollaries,

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188 See Polk v. Montgomery County, 782 F.2d 1196, 1201 (4th Cir. 1986) (listing five factors to consider); Ali Baba Co., 482 A.2d at 423 (four factors); Hunter, 300 N.W.2d at 123 (four prerequisites); Burtoq & Crawford, supra note 88, at 30, 31 (three elements); Catans, supra note 3, at 229 (three requirements for preclusion and two additional elements for issue preclusion); Note, supra note 2, at 145 (three corollaries).

189 § 27. Issue Preclusion—General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

190 § 28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

1. The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

2. The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

3. A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

4. The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

5. There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

191 § 29. Issue Preclusion in Subsequent Litigation With Others
these requirements provide a format for a basic claim or defense of issue preclusion. An examination of the application of three of these requirements provides a more complete body of law for the use of offensive collateral estoppel in Kentucky.

First, the party asserting collateral estoppel has the burden of proving the identity of the issues in the prior and subsequent actions. While this requirement may be easy to meet in simple cases, additional considerations are involved in more complex suits between multiple parties. For example, in *Bogenholm v*

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

1. Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
2. The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
3. The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
4. The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
5. The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
6. Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
7. The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
8. Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

*Id.* at § 29 (1982).

Before submitting any proof of estoppel, normally a party must assert it in the pleadings. See *Beall*, 315 S.E.2d at 188 ("We agree that, as a general rule, a former adjudication must be pled in order to make the doctrine of collateral estoppel operative in a particular case."); see also CR 8.03 (res judicata listed as an affirmative defense). However, the party against whom estoppel is asserted can waive the failure to plead preclusion if no objection is made when the issue is raised. *Id.*

See *Goodson*, 443 N.E.2d at 983.
House, twelve high school cheerleaders were injured when the van in which they were riding collided with another vehicle. Six cheerleaders, in separate actions, sued the drivers of both vehicles, the school district, and their faculty advisor. An agreement was made between the plaintiffs providing for one action to proceed as a "test case" and for a method of dividing the recovery of insurance proceeds between them. The "test case" resulted in a verdict for the plaintiff against each defendant on the negligence and causation issues. However, the jury did not apportion any negligence to the defendant faculty advisor.

The action by cheerleader Judith Bogenholm then proceeded to trial. Bogenholm attempted to bind all the defendants on the negligence and causation issues, while the faculty advisor attempted to bind Bogenholm on the issue of apportionment. Since Bogenholm was not a party to the prior suit and had not had her day in court, the use of estoppel against her was rejected. However, Bogenholm attempted to separate the negligence and causation issues that were favorable to her from the apportionment issue favoring the faculty advisor. Although the issues of negligence and causation were identical in both suits, the court refused to give Bogenholm the choice of selecting what issues to apply, because this "may lead to an inequitable and distorted result." Consequently, Bogenholm was given the option of invoking collateral estoppel on negligence, causation, and apportionment or of relitigating the entire liability issue. Thus, in complex cases involving multiple parties and issues the party asserting offensive estoppel may be given the choice of precluding all identical issues or relitigating all identical issues.

194 388 N.W.2d 402 (Minn. Ct. App. 1986).
195 Id. at 403.
196 Id.
197 Id. at 404.
198 Id.
199 Id. at 407. It is a violation of due process to bind a person who was not a party nor in privity with a party to the prior suit. See supra notes 87-91 and accompanying text.
200 Id. at 408.
201 Id.
OFFENSIVE COLLATERAL ESToppel

Second, the proponent of estoppel must show that the issues in the prior action were actually determined.\(^{202}\) When there exists any reasonable doubt as to whether the issue has been determined, estoppel is not applied.\(^{203}\) The proponent can satisfy this requirement easily by supplying either a copy of a special verdict, or conclusions of fact and law that specifically identify the particular issues determined. With a general verdict, the proponent may need to turn to the pleadings and the full transcript of the prior proceeding\(^{204}\) or present the testimony of persons who observed the first trial.\(^{205}\) The deposition of a juror in the prior case is an additional method of proving issues actually determined.\(^{206}\) It has been suggested, however, that courts should guard against freely allowing juror depositions when other reasons exist for denying the use of estoppel.\(^{207}\)

Third, the party to be bound must have had a full and fair opportunity to litigate the issue in the prior action. The requirement has evolved differently in federal courts, as opposed to state courts. In \textit{Kremer}, the Supreme Court, while noting that previous decisions had failed to define the phrase "full and fair opportunity to litigate," required only that state proceedings meet "the minimum procedural requirements of the Fourteenth

\(^{202}\) See, e.g., \textit{Kaiser}, 353 N.W.2d at 907 ("Moreover, the question of whether NSP should be relieved of liability to the firefighters because of contributory negligence of the firefighters was never litigated in the prior action."); Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 385 (Tex. 1985) ("Since we have already determined that the trial on the intervention claim for fees did not actually litigate the malpractice issue , it is not necessary for us to address the [collateral estoppel] question.").

\(^{203}\) See Note, supra note 2, at 154 (citing Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970) and Mulligan v. Schlichter, 389 F.2d 231 (6th Cir. 1968)).

\(^{204}\) See Note, supra note 2, at 152.

\(^{205}\) Id.

\(^{206}\) See generally \textit{Katz} v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979); Note, \textit{supra} note 2. At least two reasons existed for the use of juror depositions in \textit{Katz}. First, since the purpose of the juror deposition was to prevent the use of collateral estoppel in a second case, the court found that such a deposition would not literally violate the federal rule of preventing the impeachment of a jury verdict by testimony concerning jury deliberations. \textit{Katz}, 84 F.R.D. at 382; Note, \textit{supra} note 2, at 160-61. Second, when a plaintiff attempts to use a prior decision offensively against a common defendant, a court should afford the defendant "every reasonable opportunity to examine the verdict sought to be asserted against it." Note, \textit{supra} note 2, at 160.

\(^{207}\) See Note, \textit{supra} note 2, at 171.
Amendment's Due Process Clause.\textsuperscript{208} Although not directly mandating states to adopt the "full and fair" requirement for their own rules of preclusion, the Court did dictate that state courts, at a minimum, deny preclusive effect to prior judgments that failed to supply procedural due process to the parties.\textsuperscript{209} The limitation of "full and fair opportunity" to "minimum procedural requirements" represents a narrow application of the requirement because it focuses more upon the "opportunity" to litigate than the actual circumstances or effectiveness of the prior action.\textsuperscript{210}

Fortunately for parties challenging the application of collateral estoppel, other courts and commentators have defined "full and fair opportunity" more broadly. For many judges and scholars the focus of the requirement has been on the "fairness" of the opportunity to litigate.\textsuperscript{211} In addition to procedural requirements, courts have considered such factors as the experience of counsel, the prejudice in a particular forum, and the absence of the losing party's counsel in the subsequent action.\textsuperscript{212} However, if subjective considerations such as these are given controlling weight, the party resisting estoppel would almost always prevail. One court recently expressed the need to "apply an objective

\textsuperscript{208} We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue.

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.

\textit{Kremer}, 456 U.S. at 480-81 (citations and footnote omitted).

\textsuperscript{209} "The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." \textit{Id.} at 482 (footnote omitted).

\textsuperscript{210} Cf. Perschbacher, \textit{supra} note 2, at 456-58.

\textsuperscript{211} "In fact, many judges and legal scholars feel that fairness is the ultimate consideration, rather than reliance on any particular set of rules." Note, \textit{supra} note 2, at 156.

\textsuperscript{212} \textit{See id.} (citing Schwartz v. Public Adm't, 246 N.E.2d 725, 729-30 (N.Y. 1969); Read v. Sacco, 375 N.Y.S.2d 371, 375 (N.Y. App. Div. 1975)).
standard in assessing the 'full and fair opportunity to litigate' standard, and expressly rejected the use of subjective reasons for denying the application of collateral estoppel.

Likewise, Kremer applies an objective standard of "fairness" when dealing with procedural requirements. Logically, a middle-ground approach would give controlling weight to the objective procedural opportunities of the party to litigate the issue in the prior action, as well as due consideration to subjective "fairness" factors. Of course, Kremer does not mandate the use of a narrow approach for state courts or for federal courts as to prior federal court judgments. Therefore, should Kentucky courts adopt the offensive use of collateral estoppel they may require a full and fair opportunity to litigate determined by the objective procedural opportunities in the prior action and provide that some weight be given subjective reasons for unfairness.

C. Exceptions to the Use of Offensive Collateral Estoppel

As shown by the eight considerations for the application of non-mutual preclusion listed in the Restatement and the seven limiting factors given in Parklane, many exceptions to the application of offensive collateral estoppel are recognized. An examination of three exceptions typifies how parties can prevent the unfair application of issue preclusion.

First, parties opposing the application of offensive estoppel may claim that the procedures were different and less fair in the prior action. In City of Cleveland v Cleveland Electric Illuminating Co. the Sixth Circuit affirmed the district court's
refusal to apply collateral estoppel. The prior action involved an administrative licensing hearing before the Nuclear Regulatory Commission (NRC)\textsuperscript{221} in which findings of fact were made concerning the effect of granting a license on the creation or continuation of antitrust violations.\textsuperscript{222} In the subsequent antitrust action, the plaintiff attempted to use these findings offensively to bind the defendant. However, the different procedures and burdens of proof in the administrative action, plus the NRC's lack of expertise in antitrust matters justified the trial court's discretionary denial of preclusion.\textsuperscript{223}

However, in \textit{Ali Baba Company, Inc. v WILCO, Inc.},\textsuperscript{224} the plaintiff, Ali Baba, sued the defendant, WILCO, to recover the deficiency on a note following the foreclosure and sale of certain rental property\textsuperscript{225} WILCO raised various defenses, including the wrongful substitution of trustees, usurious loan, and unlawful lending. Ali Baba then sought to collaterally estop WILCO from asserting these defenses since they had proven unsuccessful against another party in the Landlord and Tenant Branch. WILCO resisted the use of estoppel, claiming that the procedures in the Landlord and Tenant Branch were different and less fair than the procedures in the Civil Division. In particular, WILCO complained of the "expedited calendering procedures of the Landlord and Tenant Branch"\textsuperscript{226} which allowed only one month to prepare a response to the opposing party's summary judgment motion.\textsuperscript{227}

Although the procedures in the Landlord and Tenant Branch were "substantially curtailed"\textsuperscript{228} to allow for speedy and expeditious proceedings, the court refused to deny the use of estoppel because of WILCO's failure to take advantage of other procedural opportunities. Under District of Columbia law, WILCO was entitled to have the case removed to the Civil Division because of a prior plea of title, but WILCO failed to object.

\begin{footnotes}
\item[221] See \textit{id. at} 1165-66.
\item[222] \textit{id. at} 1164.
\item[223] \textit{id. at} 1165-66.
\item[224] 482 A.2d 418 (D.C. 1984).
\item[225] \textit{id. at} 420.
\item[226] \textit{id. at} 425.
\item[227] \textit{id.}
\item[228] \textit{id. at} 424.
\end{footnotes}
when the case was not removed.\textsuperscript{229} In addition, at the hearing on the summary judgment motion, WILCO did not ask for a continuance or reconsideration and did not take the opportunity to argue the case on the merits.

A second exception to the application of offensive estoppel is applied when the proponent, usually the plaintiff, could have easily joined in the first action.\textsuperscript{230} The plaintiff in \textit{Polk v Montgomery County}\textsuperscript{231} filed suit against various government entities and employees alleging an unlawful strip search.\textsuperscript{232} Shortly thereafter, another plaintiff, Smith, filed a class action suit involving the same type of strip search. Polk admitted that she qualified as a class member in the Smith action, but refused to join the class. After the Smith case was decided, Polk moved for summary judgment on the issue of the constitutionality of the strip search, and the trial court granted the motion. On appeal, the court demed estoppel, stating that "[t]o permit a plaintiff who declines to join a class action to later apply collateral estoppel to a prior favorable judgment rendered in the class suit could burden the defendants with multiple suits and may be contrary to the notion of promoting judicial efficiency."\textsuperscript{233} Other courts have also used failure to join as a reason for denying preclusion.\textsuperscript{234} As a result, a potential plaintiff who delays action until another plaintiff has obtained a favorable decision against a common defendant must have a good reason for failing to join in the first action before the use of offensive estoppel will be permitted.

A third exception to the offensive use of preclusion was applied in \textit{Setter v A.H. Robins Co.},\textsuperscript{235} one of the many products liability actions involving the Dalkon Shield. At the time of the \textit{Setter} decision, twenty-one cases had resulted in eight decisions for plaintiffs, twelve decisions for the defendant, A.H.

\begin{itemize}
  \item \textsuperscript{229} \textit{Id.} at 421 n.4, 425.
  \item \textsuperscript{230} See \textit{Polk}, 782 F.2d at 1202; \textit{Hunter}, 300 N.W.2d at 126; \textit{Kaiser}, 353 N.W.2d at 907.
  \item \textsuperscript{231} 782 F.2d 1196 (4th Cir. 1986).
  \item \textsuperscript{232} \textit{Id.} at 1197.
  \item \textsuperscript{233} \textit{Id.} at 1202.
  \item \textsuperscript{234} See \textit{Hunter}, 300 N.W.2d at 127; \textit{Kaiser}, 353 N.W.2d at 907
  \item \textsuperscript{235} 748 F.2d 1328 (8th Cir. 1984).
\end{itemize}
Robins, and one hung jury. Setter moved for summary judgment to prevent relitigation of the negligence and design defect issues based on a recent Dalkon Shield verdict for the plaintiff in the same court. However, the court refused to allow the use of offensive collateral estoppel primarily because of the existence of prior inconsistent verdicts. If there had been only one prior case, "a different question would have been presented."

CONCLUSION

As a device for preventing the relitigation of issues decided against a prior losing litigant, offensive collateral estoppel stands as a deadly weapon that may be wielded by a later plaintiff against an unlucky defendant. A simple mistake in one case can develop into a fatal error in later cases. Because a defendant can lose a suit due to the misstatement of a witness, an appeal to the sympathy of a jury, or other reason unrelated to the facts of the case, he or she can become forever bound on major issues. Whenever a defendant faces multiple lawsuits on identical issues, the first action demands almost perfect litigation.

On the other hand, a plaintiff may discover that his deadly weapon is only a paper tiger. After all the requirements for the application of collateral estoppel are met, preclusion may be denied because of the plaintiff's failure to join in a prior action or because the prior decision was a general verdict and the issues essential to the verdict cannot be identified. Even if no specific exceptions are applicable, the trial court may exercise its discretion in applying general principles of fairness to deny preclusion.

In simple cases involving a limited number of parties and readily identifiable issues, offensive collateral estoppel can be a deadly weapon. However, in complex actions between multiple parties, offensive preclusion more closely resembles a paper tiger; the requirements are more difficult to satisfy and the exceptions are easier to find. A defendant facing multiple plaintiffs should be aware of the implications of a loss in the first case. A

\[236\) Setter, 748 F.2d at 1330.

\[237\) Id.

\[238\) Id.
potential plaintiff who waits for a defendant to lose should not presume that estoppel is automatically available.

After Sedley, the use of offensive, non-mutual collateral estoppel in Kentucky became a possibility. Kentucky courts can prevent any unjust application of the doctrine by adopting the additional protections recognized by Parklane239 and the Restatement (Second) of Judgments.240 The use of requirements and exceptions to the application of offensive preclusion can insure an equitable result. The Kentucky Supreme Court has rejected mutuality and has not limited the application of collateral estoppel to defensive situations. Thus, the door is open for the use of offensive collateral estoppel in Kentucky 241

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239 See supra note 154 and accompanying text.
240 See supra notes 189-91 and accompanying text.
241 See supra notes 163-68 and accompanying text.