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Collateral Estoppel: Its Application and Misapplication

interests test, it appears that respect for both the tenure system's operation and the fundamental fairness afforded the individual by due process requires that a statement of reasons be given, and that a hearing be denied. This is the result reached by the First Circuit in *Drown*.[73] Of the circuit court decisions, only *Drown* appears to have understood the tenure system in its proper role as a device for maintaining a qualified faculty, while at the same time realizing that the system is alterable when the interest it represents is outweighed by a conflicting individual interest. In view of its mixed effect upon the tenure system, *Drown* is the most reasoned balancing of the governmental-private interests involved in this unresolved controversy.

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COLLATERAL ESTOPPEL: ITS APPLICATION AND MISAPPLICATION

The often-stated purpose of the doctrine of collateral estoppel is to conserve judicial time by preventing the relitigation of material issues of fact already adjudicated in a prior suit.[1] It has commonly been held that an issue which is "essential to the judgment" should be collaterally estopped from being relitigated,[2] and issues which come "collaterally in question" or issues only "incidentally cognizable" should not be estopped.[3] The purpose of this distinction is to protect parties from being prejudiced in future litigation by estoppel of issues that had not been worth the cost or trouble of a vigorous defense in the first action, but happen to be critical in the second.[4] However, if the issue was vitally necessary to a particular judgment in the first action, it is assumed that each party will have "put out his best efforts" in the defense,[5] and estoppel of this issue in a future action would surprise no one.

But while the purpose of the doctrine of collateral estoppel may be clear, courts have been unable to develop a rule or standard that is either

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[73]See text accompanying notes 45-49 *supra*.

[1]Hoag v. New Jersey, 356 U.S. 464, 470 (1958). *See also* Partmar Corp. v. Paramount Pictures Theatre Corp., 347 U.S. 89 (1954).

[2]*See* RESTATEMENT OF JUDGMENTS § 68 (1942). *See also* Tait v. Western Md. Ry., 289 U.S. 620 (1933).

[3]The Evergreens v. Nunan, 414 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

[4]*Id.*

[5]*Id.* at 928-29.

clear or universally applicable. Three factors appear to be primarily responsible for this problem: (1) policies in some areas of law distort or require exceptionally restrictive applications of estoppel; (2) there exist conflicting standards or "theories" governing the application of the doctrine; and (3) the theories themselves are difficult to apply by virtue of their complexity or ambiguity.

RESTRICTION OF THE DOCTRINE IN VARIOUS FIELDS OF SUBSTANTIVE LAW

In many instances, the substantive law to which estoppel has been applied has caused restrictive application of the doctrine by virtue of policy considerations or the peculiar nature of the legal structure in that area of the law.[6] With the exception of some sensitive areas of federal pre-emption such as antitrust law, where conclusive effect is not given to state court adjudications,[7] most restrictions on the application of collateral estoppel can be traced to the anomalies of administrative law[8] or to areas which have administrative characteristics or functions, such as patent or tax law.

In tax law, for example, the particular concern of the courts is to insure that equal treatment is given to all taxpayers of the particular class taxed.[9] The fear that members of the same class may be treated unequally

[6]*E.g.*, United States v. Stone & Downer Co., 274 U.S. 225 (1927) (estoppel inapplicable to customs cases); *cf.* J. E. Bernard & Co. v. United States, 324 F. Supp. 496 (Cust. Ct. 1971).

[7]Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). For the pre-emption effects on securities law see Vernitron Corp. v. Benjamin, 440 F.2d 105 (2d Cir. 1971) and Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970).

[8]Until recently, many courts held that res judicata and collateral estoppel did not apply to administrative agencies. *E.g.*, Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947). That view is no longer generally held, particularly since the Supreme Court's ruling in United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966). There, the Court rejected the absolute inapplicability of estoppel to administrative law, stating that "such language is certainly too broad." 384 U.S. at 421-22. Most agencies and courts will attempt to apply the doctrine unless there appears to be a good reason why they should not. *See* Old Dutch Farms, Inc. v. Milk Drivers Local 584, 281 F. Supp. 971 (E.D.N.Y. 1968). Sometimes the language is couched in terms of "sound discretion" or "flexibility." *E.g.*, Matias Rivera v. Gardner, 286 F. Supp. 305 (D.P.R. 1968). Often courts will attempt to consider a variety of factors militating for or against the use of estoppel. For example, they may try to ascertain the type of administrative hearing held, the intentions of the administrative body involved and the expectations of the parties before it, to determine whether estoppel should apply to a particular agency decision. Taylor v. New York City Transit Auth., 309 F. Supp. 785 (E.D.N.Y.) *aff'd*, 433 F.2d 665 (2d Cir. 1970). *See also* Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Rush v. Gardner, 273 F. Supp. 753 (N.D. Ga. 1967).

[9]Commissioner v. Sunnen, 333 U.S. 591, 599 (1948).

arises from the possibility that circumstances of fact or law may be dissimilar or changed, even if only slightly, between actions. In such a situation a taxpayer who is estopped to relitigate a particular fact may then be accorded a tax treatment dissimilar to that given others.[10] In addition, a particular tax matter may recur in later years with barely perceptible variations. The combined effect of the policies of equal tax treatment and the often invariant nature of tax litigation seems to restrict the application of collateral estoppel to obviously identical cases. This limitation virtually eliminates the possibility that there may be changes or dissimilarities of law or fact between actions and satisfies the requirement for the narrow application of estoppel demanded in tax law.

An example of a more pronounced restriction on the doctrine of collateral estoppel can be found in patent law. There, a distinct limitation of the doctrine seems to result from strong public policies of both encouraging and protecting invention while, at the same time, eliminating obviously invalid patents which may act as "scarecrows" to future inventors who may be sued or threatened with suit.[11] Collateral estoppel is disregarded in certain instances where it is felt that the public interst in thoroughly and completely ascertaining validity, even if it takes several litigations, is paramount to the interests of judicial economy. Thus, excepting the case of obvious invalidity, any adjudication of patent validity must be accompanied by a judgment of infringement for collateral estoppel to apply.[12] In such cases it is felt that if validity is superfluous to a judgment of infringement, courts will be less likely to undertake a thorough analysis of the complex issue of validity;[13] hence estoppel should rightly apply only where validity is solely determinative of infringement.

Even though the Supreme Court in *Electrical Fittings Corp. v. Thomas & Betts Co.*[14] realized that estoppel effect would not be given to incidental or moot findings of validity, it nevertheless held that such findings should not be included in the decree of infringement. The purpose of this holding was to prevent courts from casually giving plaintiffs a highly persuasive precedent for use in future litigations against new defendants or for threatening possible future defendants with suit.[15] As a result of this policy, courts will hesitate to rule on validity at all, unless the patent is obviously invalid, where validity is not essential to a judgment of infringement.[16]

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[10]*Id.*

[11]Wabash Corp. v. Ross Elec. Corp., 187 F.2d 577, 589-91 (2d Cir. 1951).

[12]Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317 (8th Cir. 1966; Addressograph-Multigraph Corp. v. Cooper, 156 F.2d 483 (2d Cir. 1946).

[13]Note 11 *supra.*

[14]307 U.S. 241 (1939).

[15]*See* note 11 *supra.*

[16]*See* Harries v. Air King Prod. Co., 183 F.2d 158 (2d Cir. 1950). There Judge Hand called the issue "as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts." 183 F.2d at 162.

In cases of obvious invalidity, however, a court which has concluded that a patent is not infringed may also declare the patent invalid,[17] even though the issue is technically moot in light of the decree of non-infringement. In a future infringement suit against the same parties or privies, the determination of invalidity, although not "essential to the judgment," will have conclusive estoppel effect.[18]

Thus in patent law, special policy considerations compel courts both to alter their applications of estoppel with regard to particular validity issues, and to limit judgments in anticipation of possible future effects of collateral estoppel. These restrictions of the doctrine are more drastic than those in tax law, but the limitations on application in both fields illustrate the strong impact of the forces of policy on the simple common-law doctrine of estoppel.

THE EXISTENCE OF CONFLICTING STANDARDS GOVERNING THE APPLICATION OF ESTOPPEL

The difficulty of applying collateral estoppel is compounded by the tendency of courts to enunciate rules in terms of general applicability. For example, Judge Learned Hand stated a seemingly broad doctrine of collateral estoppel in a tax case, *The Evergreens v. Nunan.*[19] In that case, Judge Hand distinguished between two categories of fact: "ultimate" facts, to which collateral estoppel traditionally applied, and "mediate data," which were never given collateral estoppel effect.[20] "Ultimate" facts were defined as those "upon whose combined occurrence the law raises the duty, or the right, in question,"[21] while "mediate data" provided a rational inference of an ultimate fact.[22] The court then restricted the doctrine by stating that no fact established in the first action would be estopped unless it was an "ultimate" fact in the second action.[23]

Since the *Evergreens* statement is clearly appropriate in an area of substantive law which demands a restrictive use of collateral estoppel, some courts have found the rule too restrictive for general application.[24] Dissatisfaction with *Evergreens* led to the adoption of a broader standard in *Hyman v. Regenstein*,[25] a patent assignment case. That case explicitly

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[17] *Id.* at 162.

[18] Note 11 *supra.*

[19] 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

[20] *Id.* at 928.

[21] It is important not to confuse "ultimate" facts with the ultimate issue of the case. *See* 1 B.J. MOORE, FEDERAL PRACTICE ¶ 0.442[2] (2d ed. 1965).

[22] *Id.*

[23] 141 F.2d at 931.

[24] *E.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). In this case, the court questioned the validity of *Evergreens'* rigid rule, stating that its literal application to criminal law was "more likely to be found in law reviews than in life . . . ." 289 F.2d at 917.

[25] 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 259 U.S. 913 (1959).

rejected *Evergreens*,[26] stating that an issue should be collaterally estopped only if, in the first action, that issue was both necessary to the judgment and foreseeably important in future litigation.[27] This rule seems to focus on preventing future prejudice to a losing party by a double test of "necessity" and "foreseeability." But the real difference between *Hyman* and *Evergreens*, insofar as practical consequences are concerned, is that the *Hyman* rule will allow mediate data to be used in a subsequent action, *if* such use is foreseeable at the time of the first trial.[28] This is a considerably broader standard because it does not necessarily bar the use of estoppel when circumstances of fact or law are different in the subsequent action. The application of these two standards to a given fact situation could therefore produce conflicting results.[29]

The case of *United States v. Kramer*[30] clearly illustrates that these standards or "theories" of application formulated in different areas of substantive law can create diverse results when applied to the same fact situation. Defendant had been acquitted on a charge of aiding and abetting the robbery of a post office.[31] It was determined that defendant had not "participated" in any way. In a subsequent proceeding against defendant for conspiracy in connection with the same robbery, he asserted that collateral estoppel should apply to acquit him in the instant action, since conspiracy implies participation, and the issue of participation had previously been settled in his favor.[32] The government argued, however, that participation would be only mediate data in the conspiracy action, and that collateral estoppel should not apply, by virtue of the *Evergreens* doctrine.[33] But the court in *Kramer* cited the *Hyman* rule in full[34] and held

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[26]*Id.* at 510-11.

[27]*Id.* at 511. The latter criterion was intimated in *Evergreens* as a possible better rule if the law were "recast." 141 F.2d at 929.

[28]One might argue that an action is "foreseeable" if it grows out of the same transaction or occurrence involving most or all of the same ultimate facts. In such a case, those ultimate facts would be of importance in that subsequent action, being ultimate in that action as well. But if the subsequent action grew out of a separate transaction or occurrence from the first action, such that it constituted a totally new set of ultimate facts, then such action might be deemed "unforeseeable." Consequently, it would be unforeseeable that the ultimate facts of the first action would be used as evidence (mediate data) in a second, unrelated action, and would not be estopped. Of course this reads much into the words "foreseeable" and "importance" and also substitutes the equally vague terminology of "transaction or occurrence."

[29]*See generally* F. James, Civil Procedure § 11.19 (1965).

[30]289 F.2d 909 (2d Cir. 1961), *rev'g* United States v. Kosmol, 173 F. Supp. 280 (E.D.N.Y. 1959).

[31]289 F.2d at 912.

[32]*Id.*

[33]*Id.* at 916. *See* text accompanying note 23 *supra.*

[34]289 F.2d at 917.

that estoppel should apply, because the second charge grew out of the "same transaction" as the first.[35] The transaction test was apparently the court's conception of what was "foreseeable" in applying estoppel.[36]

The use of the broader *Hyman* rule does not seem unwarranted here since the issues in each action are separate only to an extent that is academic, and probably would be wasteful and perhaps unjust to relitigate. If the court had not disapproved of the use of *Evergreens* in criminal law, and had desired a contrary outcome, it could have applied the narrower rule. That a court may have its choice of outcomes depending on whether it desires a broad or narrow application of collateral estoppel is a troublesome product of the co-existence of the two theories under the same doctrinal label.

As a result of past confusion in the application of collateral estoppel, and perhaps in an attempt to improve on the abstract categorizations of *Evergreens*, the United States Supreme Court discussed its interpretation of collateral estoppel in *Commissioner v. Sunnen*.[37] This case, like *Evergreens*, involved the question of the application of collateral estoppel in tax law, and was concerned with the careful restriction of estoppel where circumstances of fact or law have changed or are dissimilar between actions. The Court strictly proscribed the use of facts which were essential to the judgment in the first action in situations where the second case was not identical to the first.[38] But the Court expressed this ideal by saying:

> [I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding.[39]

By identity of form, the Court indicated that it meant the "same set of events or documents and the same bundle of legal principles" that contributed to rendering the prior judgment.[40] It is not surprising that this language has itself led to some confusion as to how strictly the case should be applied.[41]

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[35] *Id.*

[36] *See* note 28 *supra.*

[37] 333 U.S. 591 (1948).

[38] *Id.* at 601-02.

[39] *Id.* at 601.

[40] *Id.* at 602.

[41] *See* text accompanying notes 52-56 *infra.*

DIFFICULTIES IN THE APPLICATION OF AN ABSTRACT OR AMBIGUOUS THEORY OF ESTOPPEL

Even when a court decides what estoppel rule it should use, there remains the problem of applying it correctly to the case at hand. Difficulties in understanding the terminology or wading through ambiguous language which supposedly functions as the "test" of whether or not to use the doctrine may lead to serious distortions of the estoppel doctrine.[42] Moreover, courts must be careful in their analysis of a given fact situation and in the application of estoppel principles. The New York case of *Hinchey v. Sellers*[43] is a good illustration of confused analysis in the application of an abstract rule.

In *Hinchey,* plaintiff's decedents were killed in an auto accident in New York. To establish the liability of the owner of the car in which the decedent was killed, the plaintiff had to establish that the driver had permission to use the car. In an earlier suit in New Hampshire to recover from the owner's insurer, the court had held that the driver did not have permission.[44] The owner-defendant in the New York case sought to invoke collateral estoppel as to that issue and thereby defeat the action.[45] The trial court agreed with the defendants and granted their motion for summary judgment.[46] The appellate division reversed,[47] and cited *Evergreens* in holding that "permission" in the New Hampshire case would be merely mediate data in the New York action, and therefore collateral estoppel should not apply.[48]

The court of appeals reversed, rejecting the idea that the New Hamp-

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[42]In addition to the problem of semantics there are related doctrines which, by their associated terminology and conceptual resemblance to collateral estoppel, tend to become confused with it on occasion. *See* Hyman v. Regenstein, 222 F.2d 545 (5th Cir. 1955). For example, the concepts of bar and merger, the "cause of action," and the all-inclusive term "res judicata" must be understood, if only for the purpose of knowing when *not* to apply them, since the occasions for their use are somewhat similar. *See* RESTATEMENT OF JUDGMENTS §§ 45-49 (1942). Merger is a term applied to a judgment in plaintiff's favor which prevents plaintiff from suing on the original cause of action or on issues which might have been litigated, but were omitted from the original action; bar is applied to a judgment in favor of defendant, and similarly "extinguishes" the cause of action, even to items of the claim that were not in fact raised in the former action. Whenever bar, merger, or collateral estoppel prevent reopening of a cause of action or relitigating an issue, the term "res judicata" is used to describe the effect. F. JAMES, CIVIL PROCEDURE § 11.9 (1965).

[43]7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

[44]Hinchey v. National Sur. Co., 99 N.H. 373, 111 A.2d 827 (1955).

[45]Hinchey v. Sellers, 1 Misc. 2d 711, 147 N.Y.S.2d 893 (Sup. Ct. 1955).

[46]*Id.*

[47]5 App. Div. 2d 440, 172 N.Y.S.2d 47 (1958).

[48]*Id.* at 441, 172 N.Y.S.2d at 53.

shire finding established merely mediate data.[49] Although its analysis was somewhat confused, the court managed to make clear that it thought: (1) the ultimate legal issues in the two cases were not identical, (2) "permission" was an ultimate fact in the New Hampshire case, and (3) the "operative facts relating to permission" were the same in both cases. Despite the use of the Hohfeldian "operative fact"[50] which suggests a parallel to Hand's "ultimate" fact, it seems that the court is really saying in (3) that mediate data are the same in both cases.

The court's equation of the mediate data of the two cases led to the application of collateral estoppel; however, the use of such mediate data in the subsequent case is precisely what *Evergreens* sought to avoid.[51] Had the court correctly seen that the ultimate facts were separable, due to the dissimilarity of the legal surroundings, it probably would have rejected application of the doctrine.

Like *Evergreens*, the language in *Sunnen* has met with varying interpretations. For example, where a warranty offer had been interpreted as a "price adjustment" for tax purposes in a prior suit,[52] the Tax Court, citing *Sunnen*, refused to apply collateral estoppel to that ultimate holding in the year following the suit because "distinct and separate transactions" were involved.[53] But the warranty offers, which were the basis of judgment in each case, had not been changed between actions. In another case involving repetitious claims,[54] the Tax Court found that since the court's previous determination that taxpayer was transferring his partnership assets to his daughter there had been no change of material facts.[55] Collateral estoppel was invoked since this apparently was the same question which had confronted the Tax Court before. However, in the Tax Court's zeal to compare only the "events and legal principles" of the two actions, it had overlooked the possibility that circumstances might have changed since the last action,[56] even though the "forms" of the actions were identical.

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[49]7 N.Y.2d at 293, 165 N.E.2d at 159, 197 N.Y.S.2d at 133.

[50]*See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 32-35 (1923).

[51]See text accompanying note 23 *supra*. The dissent in *Hinchey* apparently perceived the message of *Evergreens* correctly and concluded that collateral estoppel should not apply. It urged that the facts surrounding "permission" in Pennsylvania contract law constituted an entirely different question from "permission" under the New York traffic laws, in which the particular factors of public policy and legislative intent were relevant. Hinchey v. Sellers, 7 N.Y.2d 287, 298, 165 N.E.2d 156, 162, 197 N.Y.S.2d 129, 137 (1959) (dissenting opinion).

[52]Philco Corp. v. United States, 214 F. Supp. 892 (E.D. Pa. 1963).

[53]*Id.* at 894. After rejecting the collateral estoppel doctrine the court indicated that stare decisis may still be used.

[54]Alexander v. Commissioner, 22 T.C. 318 (1954), *rev'd in part*, 224 F.2d 788 (5th Cir. 1955).

[55]22 T.C. at 320.

[56]*See* Alexander v. Commissioner, 224 F.2d 788, 793 (5th Cir. 1955).

Thus these two tax cases seem to take *Sunnen* too literally in the first instance, and to miss the focus of the case altogether in the second.[57] The latter misapplication appears particularly unfortunate since the thrust of the *Sunnen* opinion seems clearly to bar the use of collateral estoppel in the second action if legal or factual circumstances have in fact changed.[58]

One might speculate that the abstract nature and ambiguity of the estoppel rules exemplified herein result from the attempt to limit estoppel application to accomodate policy restrictions. Certainly the *Hyman* rule of "foreseeability," which is neither derived from tax law nor concerned with restricting the doctrine,[59] is simpler. But one still must clarify "foreseeability" to make it workable, and if this could be done, it would be at the risk of establishing another complex and fragile semantic structure, not unlike that of *Evergreens* or *Sunnen*.[60]

CONCLUSION

In summary it may be said that several factors militate against development of a clear rule of universal application for collateral estoppel: the policies in some areas of law require highly restrictive application of estoppel, and the rules developed to accomodate these restrictions may create diverse or unjust results when applied in other fields of law in which those policies are absent. Moreover, the estoppel rules or standards with which a court must work are usually ambiguous and difficult to apply in all but the simplest fact situations.

Perhaps a greater appreciation of the fact that an estoppel theory suitable to one area of law may be quite unsuitable to another might ensure that courts give consideration to (1) the real distinctions of fact and law that may exist between actions, and (2) the consequences that may follow from a broad or narrow application of estoppel in light of (3) the underlying policy concerns of the law in the case at hand. Judicial focus on these elements, particular to each case and to each area of law, might also reduce time spent finding and attempting to fit facts into narrow and often ambiguous semantic categories.

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[57]For a good discussion of the problems courts have had with the *Sunnen* case, see Branscomb, *Collateral Estoppel in Tax Cases: Static and Separable Facts*, 37 TEXAS L. REV. 584 (1959). The author indicated that tax courts are troubled by the application of collateral estoppel in two situations: first, where there has been a recurrence of an act or event previously considered in an earlier action (where there may now be dissimilarity); second, where there has been a continuing relation which the court must examine for the possibility of change from year to year. Both types of cases are discussed in text accompanying notes 52-56 *supra*.

[58]*See* text accompanying note 39 *supra*. The word "separable" should be interpreted to mean changed with time or in dissimilar factual or legal surroundings.

[59]See text accompanying note 28 *supra*.

[60]See note 28 *supra*.