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Use of Juror Depositions to Bar Collateral Estoppel: A Necessary Safeguard or Dangerous Precedent?

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NOTES

Use of Juror Depositions to Bar Collateral Estoppel: A Necessary Safeguard or Dangerous Precedent?

I. INTRODUCTION

On November 29, 1979, in *Katz v. Eli Lilly & Co.*,[1] Judge Edward R. Neaher of the Eastern District of New York ruled that Eli Lilly, the defendant in a federal "DES daughter" action for wrongful death, was entitled to depose the jurors from a prior state court case against it in order to demonstrate that those jurors had arrived at a compromise verdict. By showing that the jury had reached its verdict through compromise, the defendant blocked the use of collateral estoppel by the plaintiff in the federal action. *Katz* is thus one of the latest in a long series of decisions that have altered the application of collateral estoppel or, as it is sometimes known, issue preclusion.[2] The *Katz* decision, however, marks the first time a judge has allowed such a detailed inquiry into the mental processes of a jury for the purpose of determining whether the requirements for the use of collateral estoppel have been satisfied.[3] Furthermore, Judge Neaher's ruling raises many questions concerning the extent to which one can use depositions for this purpose and the problems that can arise with their use. For example, would depositions still be appropriate if one or more of the jurors in the previous trial had died? What validity should the court give to such depositions if some of the jurors disagree with others as to what occurred in the decisionmaking process, or if only one juror disagrees with all the others? What steps should a court take if the jurors refuse to be deposed? Should judges also be subject to investigation concerning the basis for their decisions in pre-

1. 84 F.R.D. 378 (E.D.N.Y. 1979).
2. *See generally* notes 16-50 *infra* and accompanying text.
3. *See* Katz v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979).

vious trials? Finally, how do the *Katz* decision and its various ramifications relate to the continuing abrogation of the mutuality requirement?

This Note initially discusses the doctrine of collateral estoppel and its policy justifications. Next, it describes the mutuality requirement for the use of collateral estoppel, tracing the abandonment of the mutuality rule by an increasing number of courts and presenting the policy arguments for and against such abandonment. Then the Note turns to the three corollaries of the collateral estoppel theory and explores the different methods that parties may use to establish each one. The Note also discusses the possibility that those methods may conflict with the basic policy of preserving the privacy and inviolability of the jury system. Finally, the Note considers the various problems posed by *Katz*, including the relationship of those problems to the judicial abrogation of the mutuality requirement.

II. THE THEORY OF COLLATERAL ESTOPPEL

A. *Definition and Policy*

In *Cromwell v. County of Sac*,[4] an 1876 case, the United States Supreme Court defined the theory of collateral estoppel and distinguished it from the related concept of res judicata. Res judicata precludes a second action when it involves the same cause of action between the same parties in a prior lawsuit. Res judicata affects any cause of action that was actually presented in the first action or that should have been presented in the first action.[5] On the other hand, when the second case involves a different cause of action, the doctrine of collateral estoppel operates to preclude deliberation as to any issue upon which a judge or jury actually based a finding or verdict in the first action.[6] Offensive, or affirmative,

4. 94 U.S. 351 (1876).

5. *Id.* at 352-53. Res judicata involves two concepts known as merger and bar:

> The term "merger" is used to describe the effect of a judgment in plaintiff's favor. Such a judgment extinguishes the entire claim or cause of action which was the subject of the former action and merges it in the judgment . . . . Plaintiff may no longer sue on the original cause of action or any item thereof even if that item was omitted from the original action.
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> The term "bar" is used to describe the effect of a judgment on the merits for the defendant. Such a judgment extinguishes the entire cause of action or claim which was the subject of the action in which the judgment was rendered, including items of that claim which were not in fact raised in the former action.

F. JAMES, CIVIL PROCEDURE § 11.9 (1965).

6. 94 U.S. at 350-51.

application of collateral estoppel is the use of a prior judgment by a plaintiff in order to establish some point against the defendant. Defensive use of collateral estoppel involves the use of a judgment by a defendant to prevent litigation on some particular issue raised by the plaintiff.[7] Unlike res judicata, collateral estoppel concerns only issues that were actually raised and determined in the first action.[8]

Because collateral estoppel does not apply to issues not litigated and determined in a former action, three corollaries of collateral estoppel have arisen.[9] In order to satisfy these corollaries, the party seeking the benefit of collateral estoppel must show that during the former action the presently contested issue was actually litigated,[10] finally determined by the judicial tribunal,[11] and necessarily so determined.[12]

The requirement that the relevant issue actually have been litigated in the prior case means that a party may raise a previously omitted point in later contexts. This corollary operates as a recognition that the situations in which collateral estoppel may arise are

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7. *Katz* is an example of the attempted use of offensive collateral estoppel. Plaintiff wanted to use a prior judgment against Eli Lilly as proof of the defectiveness of its product, DES. If collateral estoppel had applied, plaintiff would not have had to litigato the issue of defectiveness. *See* 84 F.R.D. at 381. For a discussion of offensive and defensive application of collateral estoppel, see M. GREEN, BASIC CIVIL PROCEDURE 218-22 (1972).

8. F. JAMES & G. HAZARD, CIVIL PROCEDURE 563 (2d ed. 1977). The authors point out that many legal scholars now refer to collateral estoppel as "issue preclusion." In addition, collateral estoppel applies ouly to issues of fact, McGrath v. Gold, 36 N.Y.2d 406, 411, 330 N.E.2d 35, 37, 369 N.Y.S.2d 62, 65 (1975), although it may be invoked for mixed questions of law and fact, People v. Plevy, 67 A.D.2d 591, 595 n.3, 416 N.Y.S.2d 41, 44 n.3 (1979).

9. F. JAMES & G. HAZARD, *supra* note 8, at 563-64. *See, e.g.*, Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 453 (D.D.C. 1978).

10. *E.g.*, Russell v. Place, 94 U.S. 606 (1876); Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 453 (D.D.C. 1978).

11. *E.g.*, 77 F.R.D. 448, 453 (D.D.C. 1978); *see* F. JAMES & G. HAZARD, *supra* note 8, at 563-64.

12. *E.g.*, Rios v. Davis, 373 S.W.2d 386 (Tex. Civ. App. 1963). *See also* Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204 (1953)(judgment in a case involving two or more issues is conclusive as to all the issues when all are decided in favor of same party and the judgment rests upon them jointly, since the decision of one issue in such case is no less necessary or material than the decision of the other).

Some courts and legal scholars have presented a slightly different group of corollaries; they require that the party seeking to use collateral estoppel establish the following points: first, that the issue in the two cases is identical; second, that the issue was actually litigated in the first action; third, that the issue was necessary to the first judgment; and last, that the application of collateral estoppel would be fair. Once that burden is met, the other party must demonstrate that he did not have a full and fair opportunity to litigate the issue in order to avoid the application of collateral estoppel. *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); Kroll, *Principles of Collateral Estoppel in Products Liability*, 1979 INS. L.J. 313, 314-15.

variable and extremely difficult to predict; therefore, there should not be undue pressure to litigate every conceivable issue in any one case in order to avoid being estopped from litigating it in a subsequent case.[13] The requirement that the determination of the issue was necessary to the result is a recognition of the fact that the parties, the judge, and/or the jury are all more likely to have focused time and effort on the necessary points. Furthermore, unnecessary findings are usually not appealable.[14] Thus, collateral estoppel is not simply a weapon or a shield that functions whenever a party satisfies certain mechanical tests. Because collateral estoppel involves considerations of fairness and close scrutiny of both actions, courts have exercised a great deal of discretion in attempting to apply collateral estoppel justly.[15]

B. Mutuality

One area of collateral estoppel in which courts traditionally exercised little or no discretion was the requirement of mutuality.[16] In order to satisfy the mutuality requirement, the opposing parties in the second action must be the same as, or in privity with, the parties in the first action.[17] Due process has been the standard ra-

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13. F. JAMES & G. HAZARD, *supra* note 8, at 564-65.

14. *Id.* at 570. An example of a determination not being necessary to a final judgment arises when one party is sued for negligence in relation to an automobile accident and in turn counterclaims against the plaintiff for contributory negligence. If the result is a verdict for the defendant, a determination that the defendant was not negligent is not necessary to that result. Therefore, the issue of the defendant's negligence is not precluded in later actions involving that accident.

15. *See* Kroll, *supra* note 12, at 327. The twin policies of protecting the same litigants from having to relitigate the same issues and of protecting the public from excessive litigation underlie both collateral estoppel and res judicata. 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1] at 1809 (2d ed. 1948).

16. Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Suggs v. Alabama Power Co., 271 Ala. 168, 123 So. 2d 4 (1960); Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968); Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969); Stillpass v. Kenton County Airport Bd., Inc., 403 S.W.2d 46 (Ky. 1966); Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964); Raz v. Mills, 233 Or. 452, 378 P.2d 959 (1963); Booth v. Kirk, 53 Tenn. App. 139, 381 S.W.2d 312 (1963); Swilley v. McCain, 374 S.W.2d 871 (Tex. 1964).

17. *See* F. JAMES & G. HAZARD, *supra* note 8, at 575-76. Generally there are two types of privity that satisfy the mutuality requirement. In the first situation, a nonparty to the prior action was represented in that action by someone authorized to act in his behalf. The second type of privity occurs when the legal rights of a nonparty to the first action were so defined that their survival depended on the outcome of the prior action. *Id.* For a discussion of collateral estoppel, mutuality, and privity, see Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511, 512-17. The author emphasizes the point that privity involves more than simply a similar interest in the subject matter.

tionale for the mutuality requirement, the argument being that any determination of a factual issue against a person who lacked an opportunity to argue that issue in court violated his constitutional rights.[18] Despite its constitutional grounds, however, mutuality has been the target of criticism by legal scholars, judges, and lawyers for many years. For example, in the early nineteenth century Jeremy Bentham wrote of the mutuality requirement:

> There is a reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; hut there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely hecause his adversary was not. It is . . . the very height of absurdity.[19]

Exceptions to the doctrines of collateral estoppel and of mutuality developed gradually, because of the problems arising from a rigid mutuality requirement. For instance, a nominal party who is named as a party-plaintiff or a party-defendant, yet who has no control over the litigation, cannot be bound by a judgment in the case.[20] On the other hand, a person who is not named as a party, but who "vouches in" and assumes control because he has a monetary interest in the outcome of the litigation, will not be allowed in a subsequent case to try factual issues that were actually litigated and necessarily determined. This situation is known as the indemnitor/indemnitee exception.[21] Generally, courts have long recognized exceptions to the mutuality requirement in cases in which the defendants have a principal/agent, master/servant, or indemnitee/indemnitor relationship.[22]

In the last forty years, however, an increasing number of jurisdictions have not been content merely to carve out exceptions to the doctrine of mutuality in very limited situations, but have

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18. *See* F. JAMES & G. HAZARD, *supra* note 8, at 575. *See also* Ashe v. Swenson, 397 U.S. 436 (1970); Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918). *But see* Gerrard v. Larsen, 517 F.2d 1127 (8th Cir. 1975); Roode v. Michaelian, 373 F. Supp. 53 (S.D.N.Y. 1974).

19. 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. London 1843).

20. *See* Berch, *supra* note 17, at 517.

21. *Id.* at 518. Courts have extended this exception to the situation in which a plaintiff sues an indemnitor, loses, and then sues the indemnitee. Many courts have not allowed the suit against the indemnitee, even though it fits within the limits of traditional mutuality, because otherwise "either tbe first judgment in the indemnitor's favor would be meaningless or the indemnitee's valuable right of indemnification would be lost." Furthermore, before the advent of Rule 23 concerning class actions, some courts sidestepped the mutuality doctrine by allowing absentee class members to intervene after a finding in favor of the class. (Rule 23 now operates both to benefit and to bind absentees). *Id.* at 519-21.

22. 41 Mo. L. REV. 521, 523 (1976).

openly rejected the doctrine itself, although in varying degrees. In 1942 Justice Traynor of the California Supreme Court launched the initial attack on mutuality in *Bernhard v. Bank of America.*[23] A probate court had determined that the transfer of funds from a decedent's account to an account managed by a third party was a gift of the amount of the deposit. Later Helen Bernhard, a beneficiary under the decedent's will, became administratrix of the estate and sued the transferee bank to recover the deposit. The bank argued that the finding of the probate court precluded any further litigation on the issue, but Bernhard responded that lack of mutuality prevented this defense because the bank had not been a party to the previous action.[24]

Since the bank had only derivative liability, if any, the court could have decided the case simply by using one of the mutuality exceptions. Justice Traynor, however, cut deeply into the application of mutuality by holding that a party could utilize collateral estoppel once three questions were answered affirmatively. First, is the issue in question identical to the issue in the first action? Second, was there a final judgment on the merits of that issue in the first action? Last, is the party against whom the plea is asserted a party or in privity with a party to the prior litigation?[25] Although *Bernhard* involved defensive use of collateral estoppel, Justice Traynor wrote his opinion broadly enough to encompass both offensive and defensive situations.

Several courts, however, began to develop 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.[26] This limitation prevented unsuccessful litigants from returning to the courtroom simply by switching opponents and promoted consolidation of litigation at the outset.[27] State courts generally adhered to the defensive use limitation,[28] whereas federal

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23. 19 Cal. 2d 807, 122 P.2d 892 (1942).

24. *Id.* at 809-10, 122 P.2d at 893-94.

25. *Id.* at 813, 122 P.2d at 895.

26. *See* 19 DE PAUL L. REV. 410, 414 (1969). Another limitation employed after the establishment of the "Bernhard Doctrine" was that of "initiative," which meant that a party could not be estopped from relitigating an issue in a second action unless he had taken the initiative in the first suit, regardless of the particular circumstances. *Id.* at 413. The California Supreme Court, however, soon rejected this limitation. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439 (1962). For a discussion of the initiative limitation in the period immediately following *Bernhard,* see Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281, 316-21 (1957).

27. 19 DE PAUL L. REV. 410, 413 (1969).

28. *Id.* at 415-16. *See also* Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d

courts were more willing to allow nonparties to prior actions to assert the collateral estoppel doctrine offensively.[29] Federal courts then began to apply the "full and fair opportunity" rule, under which a party could assert collateral estoppel affirmatively or defensively if four criteria were met. First, the party to be estopped must have had an adequate opportunity to gather and present depositions and interrogatories in the prior action. Second, the party to be estopped must have had the opportunity to call witnesses and cross-examine his adversary's witnesses. Third, the prior action must have been a fair adversary proceeding. Fourth, there must have been a final determination on the issue in question.[30] The first state court to adopt the federal "full and fair opportunity" rule was the New York Court of Appeals in *B.R. DeWitt, Inc. v. Hall.*[31] Although the holding of that case was restricted to the situation "where the plaintiff in the present action . . . derives his right to recovery from the plaintiff in the first action,"[32] the court allowed collateral estoppel to be applied offensively. The same court repeated its use of the federal rule a few years later in *Schwartz v. Public Administrator.*[33] In 1969, however, another New York state court allowed a nonparty who did not derive any rights from a party to employ collateral estoppel affirmatively in a multiple litigant situation in *Hart v. American Airlines, Inc.*[34] In fact, most courts that have abandoned the mutu-

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360 (1977); Miller v. City of Bakersfield, 256 Cal. App. 2d 820, 64 Cal. Rptr. 469 (1967); McGary v. Rocky Ford Nat'l Bank, 523 P.2d 479 (Colo. App. 1974); Morneau v. Stark Enterprises, 56 Hawaii 420, 539 P.2d 472 (1975); Schneberger v. United States Fidelity & Guar. Co., 213 N.W.2d 913 (Iowa 1973); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 238 N.E.2d 55 (1968); Gerhardt v. Miller, 532 S.W.2d 852 (Mo. App. 1975); Lougee v. Beres, 113 N.H. 712, 313 A.2d 422 (1973); Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7 (Okla. 1974); Sample v. Chapman, 7 Wash. App. 129, 497 P.2d 1334 (1972).

29. *See, e.g.*, Maryland *ex rel.* Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.) (issues of res judicata and mutuality), *cert. dismissed*, 379 U.S. 951 (1964).

30. Maryland *ex rel.* Gliedman v. Capital Airlines, Inc., 267 F. Supp. at 304.

31. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). *DeWitt* added two questions to those posed by Justice Traynor. First, does the party against whom collateral estoppel is plead have a fair opportunity to present his side? Second, is there any reason, in equity, that would argue against application of collateral estoppel?

32. *Id.* at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.

33. 24 N.Y.2d 65, 248 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

34. 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969). Similarly, James and Hazard discuss the problems of affirmative application of collateral estoppel, yet they conclude that it is usually fair in the multiple litigant, mass tort cases. *See* F. JAMES & G. HAZARD, *supra* note 8, at 580-82.

ality rule are now willing to apply collateral estoppel both defensively and offensively, depending completely upon the circumstances of each case.[35] In this case-by-case analysis, courts examine such factors as whether the application would achieve anomalous results;[36] whether the amount involved in the first action was substantially less than that in the second; whether the party asserting the estoppel was a party in the first action;[37] whether the litigant against whom estoppel is claimed had a full and fair opportunity to present and defend his position;[38] whether the necessary identity of issues exists;[39] whether the issues were competently, fully, and fairly litigated previously;[40] whether the party against whom the assertion is made can present any reasonable grounds for denying collateral estoppel;[41] and whether the estoppel assertion is offensive or defensive.[42]

Several state courts, however, have continued to adhere to the mutuality requirement. For example, in *Spettigue v. Mahoney*[43] the Arizona Court of Appeals held that plaintiffs who were not parties or privy to prior litigation were not entitled to the benefit of that judgment, even though the contentions of liability were exactly the same. In fact, there was a great overlap between evidence in the two actions when the issue of liability was tried again. The court pointed out that many factors—such as the selection of the judge and the jury, the choice of attorneys, the presence of witnesses and the presentation of their testimony, the relationship between witnesses and the trier of fact, and the choice of forum—can detract from the truthseeking goal of a trial. The court then concluded that no judgment should be used as the basis for a plea of collateral estoppel without the protection of the mutuality requirement.

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35. *See* F. JAMES & G. HAZARD, *supra* note 8, at 580-82.

36. Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (offensive use denied when defendant had passively defended first suit because of claim for nominal damages); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964)(offensive use allowed when defendant had anticipated additional plaintiffs and had litigated fully).

37. Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969).

38. Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973); Thomas v. Consolidated Coal Co., 380 F.2d 69 (4th Cir.), *cert. denied*, 389 U.S. 1004 (1967).

39. Pennington v. Snow, 471 P.2d 370 (Alaska 1970).

40. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Davis v. Nielson, 9 Wash. App. 864, 515 P.2d 995 (1973).

41. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

42. Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969).

43. 8 Ariz. App. 281, 445 P.2d 557 (1968).

The United States Supreme Court had stated the traditional mutuality doctrine in 1936 in *Triplett v. Lowell*,[44] but it took a fresh look at the issue during the decade of the 1970s. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[45] the Court reexamined the *Triplett* rule in the context of patent litigation, rejecting that rule in favor of abrogation of mutuality in situations in which the patentee had a full and fair opportunity to litigate and lost.

The Supreme Court's most recent statement concerning mutuality appeared in *Parklane Hosiery Co. v. Shore*,[46] in which stockholders attempted to collaterally estop the corporation from relitigating issues resolved against it in a previous SEC suit. The opinion discusses extensively the differences between offensive and defensive use of collateral estoppel, with particular emphasis on the problems associated with offensive application of the doctrine. Such problems include the encouragement of a "wait and see" attitude[47] on the part of potential plaintiffs, the dilemma of a series of inconsistent verdicts, and the possibility of a difference between the procedural opportunities provided to the parties in the first and second forums.[48] The Court concluded that a case-by-case approach was the best method of deciding collateral estoppel cases and thus reiterated its emphasis on a grant of broad discretion to trial courts. Based upon the *Parklane* facts, the Court decided that offensive use of collateral estoppel was not unfair, because the stockholders probably could not have joined in the SEC enforcement action, the SEC decision was not inconsistent with any prior decisions, the defendants had every incentive to litigate fully the first time, and there was no difference between procedural opportunities afforded the litigants, and thus no likelihood of a different result.[49] In addition, the *Parklane* decision abolished the mutuality

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44. 297 U.S. 638 (1936).

45. 402 U.S. 313 (1971). For discussions of the *Blonder-Tongue* opinion, see Note, *Patents—Collateral Estoppel—Defendant in Patent Infringement Suit May Plead Collateral Estoppel Against Owner Whose Patent Has Been Declared Invalid in Prior Suit Against Different Defendant*, 60 GEO. L.J. 1126 (1972); Note, *Patents—Collateral Estoppel—Judicial Invalidation of Patent Bars Suit Against Different Infringer*, 50 TEX. L. REV. 559 (1972).

46. 439 U.S. 322 (1979).

47. For example, if the finding in a prior case is favorable to a potential plaintiff, he will have greater incentive to bring his own suit; if the result is unfavorable, he will refrain. In any case, he will be unwilling to join his case with that of other plaintiffs at the outset.

48. 439 U.S. at 329-31.

49. *Id.* at 331-33. In this case the Supreme Court overruled the trial court's decision, which was based upon potitioners' seventh amendment right to a jury trial. The Court held

doctrine and replaced it with the full and fair opportunity rule, another aspect of its case-by-case approach. Thus, the Court limited the use of collateral estoppel to situations in which it was fair to the litigants, yet expanded the notion to situations in which its use was not allowed in the past. After *Parklane*, mutuality is extinct in the federal courts.[50]

III. Establishing the Three Corollaries

A. *Issue Actually Litigated*

In attempting to apply collateral estoppel, a litigant must first establish that the relevant issue was actually litigated in a prior action.[51] The party seeking to assert the estoppel has the burden of proof with respect to this issue. Therefore, the litigant cannot shift to the judge the burden of reading the prior record on his own initiative, but must request perusal of that record.[52] Although the pleadings are usually a good source to determine the matters that were put in issue, occasionally matters are put in issue without appearing in the pleadings. The party claiming the estoppel may then examine any part of the record in the prior action, including the transcript. If there is no record or if the record is incomplete, the party may also present the testimony of anyone who observed the trial, including a judge or juror, for the purpose of establishing this first corollary.[53]

For example, in *Popp v. Eberlein*[54] the plaintiffs, the Popp family, sought to set aside distraint tax sales by the IRS of six parcels of their land. Defendants in *Popp* claimed collateral estoppel based upon plaintiffs' loss of an earlier quiet title action against them. The Popps were not represented by counsel in the first action, and in response to the claim for collateral estoppel, they filed an affidavit stating that the first judge had not allowed them to offer evidence of the invalidity of the sales.

The court reporter for the prior state court proceeding had not

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that application of collateral estoppel in this situation would not violate that right. *Id.* at 333-37.

50. *See* 48 U. Cin. L. Rev. 611, 617 (1979).

51. *See* notes 9, 10, and 13 *supra* and accompanying text.

52. United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968), *aff'd*, 441 F.2d 855 (2d Cir.), *cert. denied*, 404 U.S. 914 (1971).

53. F. James & G. Hazard, *supra* note 8, at 565, 567. *See also* Russell v. Place, 94 U.S. 606 (1876)(may show the precise question raised by means of extrinsic evidence outside the record); Slater v. Skirving, 51 Neb. 108, 70 N.W. 493 (1897)(when the record is uncertain parol evidence is admissible).

54. 409 F.2d 309 (7th Cir.), *cert. denied*, 396 U.S. 909 (1969).

prepared a transcript and had subsequently lost her notes. Furthermore, the judge for that trial had died. The judge in the later federal case allowed the Popps, the state court clerk, the court reporter, the attorneys, and an IRS agent who had attended the trial to testify as to what had occurred. The court concluded from the testimony that, contrary to the allegations in their affidavit, the Popps had a full and fair opportunity to present and litigate their claims in the first case and thus were estopped from relitigating the same issues.[55]

B. Issue Determined

Once the party asserting estoppel can show that the issue at hand was litigated previously, he must then establish that the matter was actually determined.[56] Ordinarily, a court will make specific findings of fact and conclusions of law from which one can determine the issues that were resolved.[57] As long as a court has jurisdiction, its judgments will be given conclusive effect. Thus, a state court can observe the judgment of a federal court, and a federal court that of a state court.[58]

When there are doubts as to what issues were determined, as is often the case with a jury's general verdict, a party must resolve the ambiguity by means of admissible evidence or lose the benefit of collateral estoppel. In *Carte v. McKenzie*[59] plaintiff-lessee had sued his lessor for locking him out of his dwelling, and the court had awarded damages. Plaintiff then sued again for conversion of personal property, but defendant responded that the prior pleadings had discussed personalty and that therefore the damages encompassed both real and personal property. The findings of fact and conclusions of law in the first case gave plaintiff the right to possession of personalty but did not mention damages for conversion. Therefore, the *Carte* court did not apply collateral estoppel because the trial judge in the prior action had not stated clearly what the damages included.

As with the first corollary, a party may use any portion of the prior record or the testimony of a qualified observer in order to

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55. *Id.* at 310.

56. *See* notes 9 and 11 *supra* and accompanying text.

57. F. JAMES & G. HAZARD, *supra* note 8, at 567.

58. M. GREEN, *supra* note 7, at 209; *e.g.*, Vernitron Corp. v. Benjamin, 440 F.2d 105 (2d Cir. 1971); Roth v. McAllister Bros., 316 F.2d 143 (2d Cir. 1963); Shell Oil Co. v. Texas Gas Transmission Corp., 176 So. 2d 692 (La. Ct. App. 1965).

59. 430 S.W.2d 559 (Tex. Civ. App. 1968).

establish that an issue was determined. A party, however, may not ordinarily demonstrate the second corollary by presenting the testimony of a member of the tribunal—judge or juror. Thus, courts do not allow inquiries into the process of determination, except to examine specific findings, such as answers to interrogatories, made during the prior proceeding.[60]

Whenever the issues determined in the prior action are subject to any reasonable doubt, a court will deny the application of collateral estoppel.[61] For example, in *Duverney v. State*[62] plaintiff won a civil rights action in federal district court against a New York police officer. Subsequently, plaintiff brought an action in a New York state court for assault and battery, wrongful imprisonment, and malicious prosecution against the same defendant and another policeman. The judge, however, denied use of the judgment in the federal case as a basis for applying the doctrine of collateral estoppel in the state action. He cited not only the "inherent differences" between a federal civil rights claim and a state tort action, but also the inconsistencies in the jury verdict in the first case. Plaintiffs had levelled charges at two defendants in the first case, but, without explanation, the jury rendered a verdict against only one defendant. This ambiguity created enough reasonable doubt as to what was actually determined to disqualify the prior judgment as a basis for estoppel.[63]

Any court of competent jurisdiction is entitled to a presumption of regularity, but a party resisting the application of collateral estoppel may rebut that presumption with evidence of procedural irregularities. For instance, evidence that a judgment was the product of a nonadversary proceeding will render it useless as the basis for a collateral estoppel claim.[64] Similarly, proof of fraud destroys the presumption of regularity and fairness connected with a court's final judgment.[65] The party opposing the use of collateral estoppel may never simply presume the existence of fraud in the prior action, but must prove it with clear and convincing evidence.[66]

In the products liability area, courts have imposed a limitation

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60. F. JAMES & G. HAZARD, *supra* note 8, at 568.

61. *See* Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).

62. 96 Misc. 2d 898, 410 N.Y.S.2d 237 (Ct. Cl. 1978).

63. *Id.* at 914-16, 410 N.Y.S.2d at 248-49.

64. Aerojet-General Corp. v. Askew, 511 F.2d 710, 720 (5th Cir.), *cert. denied sub nom.* Metropolitan Dade County, Fla. v. Aerojet-General Corp., 423 U.S. 908 (1975).

65. Groves v. Witherspoon, 379 F. Supp. 52, 61 (E.D. Tenn. 1974).

66. *Id.*

on the issues upon which a manufacturer can be estopped. Even though all of the elements of negligence or strict liability—including duty, proximate cause, and damages—were determined earlier, the plaintiff can assert as a basis for estoppel only the determination of the defectiveness of the product. Plaintiffs must prove all the other elements anew in each action.[67]

C. *Issue Necessarily Determined*

Finally, the party asserting estoppel must demonstrate that the determination of the relevant issue was a necessary element of the prior judgment.[68] In *Occidental of Umm Al Qaywayn, Inc. v. Cities Service Oil Co.*[69] the district judge for the Western District of Louisiana, in declining to allow collateral estoppel, wrote, "[A] legal finding may be successfully utilized as collateral estoppel only when it is evident from the pleadings and the record that the finding was necessary to the final decree and was foreseeably of importance in possible future litigation."[70]

In *United States v. Barnes*[71] defendant was charged with perjury, but claimed that prior general jury verdicts acquitting him with respect to the same transaction provided him collateral estoppel protection from further prosecution. The court held that such a claim, based on a general jury verdict, required examination of the prior record including the pleadings, evidence, and jury charge so as to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[72] If the jury could have based its decision upon another issue to the exclusion of the one in question, collateral estoppel will not apply.

As with the mutuality problem, most courts advocate a case-by-case approach to the question whether an issue was necessarily determined. For example, when defendants in *United States v. Abatti*[73] filed a motion, based on a previous Tax Court acquittal, to dismiss a three part indictment, the court stated that it would take a "practical" rather than a "hypertechnical" approach in determin-

67. Kroll, *supra* note 12, at 319.

68. *See* notes 12 and 14 *supra* and accompanying text.

69. 396 F. Supp. 461 (W.D. La. 1975).

70. *Id.* at 467.

71. 386 F. Supp. 162 (E.D. Tenn. 1973), *aff'd*, 506 F.2d 1400 (6th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

72. *Id.* at 163 (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

73. 463 F. Supp. 596 (S.D. Cal. 1978).

ing what issues were necessarily determined.[74] Upon examining the record, the court concluded that the Tax Court had necessarily based its finding that the taxpayers had not understated their taxable income or income tax liability upon a determination that the taxpayers had no income above what was reported. This conclusion in turn justified the court's application of collateral estoppel, because the Tax Court decision was conclusive of all three charges of the indictment—tax evasion, making false tax returns, and aiding in the preparation of false tax returns.

D. "Full and Fair Opportunity to Litigate" Standard

The case-by-case analysis coupled with an emphasis on fairness has thus become a major consideration not only in the mutuality question, but also in all aspects of collateral estoppel.[75] In fact, many judges and legal scholars feel that fairness is the ultimate consideration, rather than reliance on any particular set of rules. Therefore, once the party moving for estoppel has satisfied the three corollaries, his opponent then has the chance to show that he did not have a full and fair opportunity to litigate the relevant issue in the prior action.[76] In *Schwartz v. Public Administrator*[77] the party opposing collateral estoppel did not meet his burden when he could not establish any instances of unfairness such as lack of adequate representation, prejudice due to the forum, tactical advantage by the plaintiff, introduction of any significant new evidence, excessive sympathy on the part of the first jury, or a compromise verdict.[78] Other cases also emphasize such factors as presence of counsel for the losing party, regularity and adequacy of the procedures, limits of the jurisdiction of the first court,[79] and competence and experience of counsel.[80] In addition, most courts employing the "fairness" rule require a strong showing of lack of

74. *Id.* at 600. *See also* Ashe v. Swenson, 397 U.S. 436, 444 (1970).

75. *See* notes 30-41 *supra* and accompanying text.

76. Kroll, *supra* note 12, at 315.

77. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969). The court wrote,

> New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity te contest the decision now said to be controlling.

Id. at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

78. *Id.* at 72, 246 N.E.2d at 729-30, 298 N.Y.S.2d at 961.

79. Read v. Sacco, 49 A.D.2d 471, 474, 375 N.Y.S.2d 371, 375 (1975).

80. Royal Business Funds Corp. v. Ehrlich, 78 Misc. 2d 305, 308, 356 N.Y.S.2d 407, 410 (1974).

an adequate prior opportunity to litigate.[81] The basic policy behind the "full and fair opportunity to litigate" standard is the encouragement of the resolution at a single trial of all claims arising from the same incident and the resultant saving of time, manpower, and money.[82]

IV. Determining Jury Misconduct

A. Basic Rules

The determination of the exact conclusion reached by a jury, particularly in the case of jury misconduct, poses many unique problems in the application of collateral estoppel. Generally, the existence of any reasonable doubt as to what was decided in a prior case—including doubt as to what issues a jury actually and necessarily determined—results in a denial of collateral estoppel.[83] Furthermore, the problem is compounded by the limits that courts traditionally have placed upon any investigation into the decision-making process in the jury room.[84]

As a general rule, a party cannot enlist the aid of a juror to impeach a jury verdict or to inquire into the state of mind of any jury members during their deliberations.[85] This exclusionary principle, which exists both at common law and in Federal Rule of Evidence 606(b),[86] is based upon a number of policy justifications.[87] Courts first developed the principle in order to protect jurors from harassment by defeated parties, to prevent inhibition of the deliberative process in the jury room, and to forestall a flood of merit-

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81. People v. Plevy, 67 A.D.2d 591, 416 N.Y.S.2d 41 (1979).

82. Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

83. Duverney v. State, 96 Misc. 2d 898, 909, 410 N.Y.S.2d 237, 244 (Ct. Cl. 1978).

84. *See generally* Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920 (1978).

85. King v. United States, 576 F.2d 432, 438 (2d Cir. 1978); United States v. Dioguardi, 492 F.2d 70, 79 (2d Cir. 1974); Heaver v. Ward, 68 Ill. App. 3d 236, 240-41, 386 N.E.2d 134, 138 (1979).

86. Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

87. *See generally* Mueller, *supra* note 84.

less post-verdict complaints and investigations.[88] Many courts also employ the principle to discourage jury tampering, which would be extremely difficult to discover,[89] and to preserve verdict finality and thus the jury system itself.[90] Finally, some courts reason that a juror's mental process is personal to him and should not be subjected to the test of someone else's testimony.[91]

In the United States two versions of the exclusionary principle have developed. The "Iowa Rule" excludes evidence of anything that "essentially inheres in the verdict itself," such as evidence that a juror did not assent to a verdict, did not understand the pleadings, testimony, or instructions, was influenced unduly by other jurors, or was mistaken in his calculation of a judgment. On the other hand, the "Iowa Rule" allows evidence of so-called "independent facts," such as proof that a witness and a juror discussed the case out of court, that a party, agent, or attorney improperly approached a juror, or that a jury reached its verdict by quotient or chance.[92] In contrast to the "Iowa Rule," the "federal rule" distinguishes between the actual effect of extraneous matter upon a juror's mind and the extraneous matter itself. A court will receive evidence of the former, but not the latter. Under the "federal rule" courts have excluded evidence of quotient verdicts, decisions to comply with a majority vote,[93] misunderstanding of instructions,[94] and misuse of evidence,[95] but have received evidence of improper communication with the bailiff[96] or parties[97] and the presentation of unauthorized evidence in the courtroom.[98]

Federal Rule of Evidence 606(b), although substantially similar to the "federal rule," is in some respects broader. The rule applies to any inquiry into the invalidity of a verdict or indictment,

88. King v. United States, 576 F.2d 432, 438 (2d Cir. 1978).

89. United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); United States v. Howard, 506 F.2d 865, 868-69 n.3 (5th Cir. 1975).

90. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

91. Heaver v. Ward, 68 Ill. App. 3d 236, 240-41, 386 N.E.2d 134, 138 (1979).

92. *See* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).

93. McDonald v. Pless, 238 U.S. 264 (1915).

94. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

95. Bryson v. United States, 238 F.2d 657, 665 (9th Cir. 1956), *cert. denied*, 355 U.S. 817 (1957).

96. Morgan v. Sun Oil Co., 109 F.2d 178, 180 (5th Cir. 1940).

97. Parker v. Gladden, 385 U.S. 363 (1966).

98. Washington Gas Light Co. v. Connolly, 214 F.2d 254, 257 (D.C. Cir. 1954).

and it operates to bar any testimony of a juror, orally or by affidavit, or any proof of his out-of-court statement on a matter as to which his testimony would be barred. Thus, a court will exclude evidence of any matter occurring or statement made during deliberations, the effect of anything upon any juror's mind or emotions, or the mental processes of any juror whose testimony is offered.[99] The only exceptions to Rule 606(b) are evidence of extraneous prejudicial information and of external influence improperly asserted upon the jury.[100] Proof of a compromise verdict does not fit into either exception and is therefore excluded under Rule 606(b).[101]

V. THE *Katz* CASE

A. Facts and Decision

Many of the principles of collateral estoppel and of post-verdict questioning of jurors collided in the New York district court case of *Katz v. Eli Lilly & Co.*[102] In 1975 Benna Katz had brought the original lawsuit seeking damages of $5,000,000 against Eli Lilly & Co. as a manufacturer of the drug diethylstilbestrol("DES"). Her complaint alleged that prior to her birth in 1953, a physician had prescribed DES for her mother, Esta Katz, in order to prevent miscarriage. When Benna Katz was eighteen her doctor discovered that she had adenocarcinoma of the vagina, and in 1977 Benna Katz died. Following her daughter's death, Esta Katz filed a new complaint as administratrix of her daughter's estate, seeking the same amount of damages and alleging breach of warranty and negligence in testing and distributing the drug in 1953.

On July 16, 1979, a New York state court jury, in a similar action captioned *Bichler v. Eli Lilly & Co.*,[103] returned a verdict against defendant Lilly in the amount of $500,000. Soon after the jury returned the *Bichler* verdict, attorneys for Lilly in the *Katz* case approached one of the jurors in *Bichler* and asked her to dis-

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99. Stiles v. Lawrie, 211 F.2d 188, 190 (6th Cir. 1954).

100. FED. R. EVID. 606(b).

101. Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977); United States v. Green, 523 F.2d 229, 234-35 (2d Cir., 1975), *cert. denied*, 423 U.S. 1074 (1976); Castleberry v. N.R.M. Corp., 470 F.2d 1113, 1116-18 (10th Cir. 1972); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947). *See also* United States v. Kohne, 358 F. Supp. 1046, 1048-50 (W.D. Pa.), *aff'd*, 487 F.2d 1395 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

102. 84 F.R.D. 378 (E.D.N.Y. 1979).

103. No. 65534 (N.Y. Sup. Ct., Bronx County, July 16, 1979).

cuss the jury's deliberations.[104] Subsequently, she and another juror made statements suggesting that the jury had reached the *Bichler* verdict through compromise; yet when served with a notice of deposition and subpoena, the first juror telephoned the state court trial judge to complain of harassment. Plaintiff in *Katz* then moved under Federal Rules of Civil Procedure 26 and 45 for an order to quash the subpoenas and to vacate the notices.[105]

In denying plaintiff's motion, the court stated that ordinarily there would be no question but that the depositions would be within the broad scope of discovery allowed under the Federal Rules of Civil Procedure. In this case, however, the intrusion into the mental processes of the jurors presented a problem. The court, however, noted that defendant was not seeking to impeach or undercut the finality of the *Bichler* verdict but rather to question the extent to which the *Bichler* judgment should be given collateral estoppel effect in *Katz*. Therefore, it concluded that the general rule that verdicts are unimpeachable[106] was not applicable to the present situation. Instead, the court accepted defendant's argument that several cases, while not directly on point, supported the proposition that there is no absolute rule against taking jury testimony for the sole purpose of blocking the collateral estoppel effect of a judgment.[107] In addition, the fact that the *Katz* plaintiff obviously intended to employ the *Bichler* verdict in an offensive application of collateral estoppel mandated that the court afford Eli Lilly every reasonable opportunity to examine the verdict sought to be asserted against it.[108] Judge Nealier concluded his opinion as

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104. The trial judge in the *Bichler* case gave the following instruction to the jurors concerning post-trial discussion:

> It's entirely up to you whether you wish to discuss the deliberations with anybody at all. You are not obligated to. If you do not wish to, please don't hesitate to refrain from saying anything. However, on the other hand, if it is your desire to talk about the case to anyone, you are free to do so, as well.

84 F.R.D. at 379.

105. *Id.* at 379-80.

106. *See, e.g.*, McDonald v. Pless, 238 U.S. 264 (1915); Gamell v. Mt. Sinai Hosp., 40 A.D.2d 1010, 339 N.Y.S.2d 31 (1972); Schrader v. Joseph H. Gertner, Jr., Inc., 282 A.D. 1064, 126 N.Y.S.2d 521 (1953); FED. R. EVID. 606(b).

107. *See, e.g.*, Clark v. United States, 289 U.S. 1 (1933); Redman v. United States, 77 F.2d 126 (9th Cir. 1935); United States v. Freedland, 111 F. Supp. 852 (D.N.D. 1953); People v. DeLucia, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967); Schrader v. Joseph H. Gertner, Jr., Inc., 282 A.D. 1064, 126 N.Y.S.2d 521 (1953); People *ex rel.* Nunns v. County Court, 188 A.D. 424, 176 N.Y.S. 858 (1919).

108. The *Katz* plaintiff could only use the prior judgment to estop defendant on the issue whether DES was a defective product. Other elements of liability, such as causation, would have to be proved anew. *See* note 67 *supra* and accompanying text.

follows:

> Thus, where as here defendant raises a colorable argument that the *Bichler* verdict was not the result of a fair and just determination of the facts, technical nicety is exalted over substantial justice if defendant is precluded from pursuing discovery of information to make out such a defense, if any. Accordingly, the court holds that, where through permissible investigation apart from the compulsion of any court order a party demonstrates a factual basis for a belief that a judgment asserted against it as collateral estoppel was based on a compromise verdict, further inquiry into the facts by depositions of jurors shown to have information relevant to the issues is warranted under the Federal Rules of Civil Procedure.[109]

B. Analysis

Judge Neaher correctly observed that the cases upon which defendant relied were not directly applicable to the *Katz* case, for none of them dealt with the denial of the collateral estoppel effect of a judgment. Instead, all but one of the cases arose out of criminal contempt proceedings against a juror who allegedly had given false or misleading answers on voir dire in order to gain admission to the jury and to aid one side or the other. The courts held that once a prima facie case of misconduct was presented, a court could receive evidence from other jurors concerning jury room conduct of the juror in question.[110] These holdings do not violate the rule that a juror cannot impeach his own verdict, because in a contempt proceeding there is no attack upon the verdict itself.[111]

The *Katz* defendant also cited *People v. DeLucia*,[112] which involved jurors who went to the scene of an attempted burglary to reenact the alleged crime. The court received testimony by the jurors concerning this "inherently prejudicial outside influence" to impeach the verdict—not as a repudiation of the prohibition against jurors impeaching their own verdicts, but as an exception to that prohibition. The court did not require proof of the extent of the visit's influence on the jurors once that extraneous influence was established.[113]

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109. 84 F.R.D. at 382.

110. *See* Clark v. United States, 289 U.S. 1 (1933)(evidence of intentional concealment overcame juror's privilege of secrecy as to conduct in jury room); Redman v. United States, 77 F.2d 126 (9th Cir. 1935)(when juror charged with contempt, court may consider conduct during jury deliberations); United States v. Freedland, 111 F. Supp. 852 (D.N.D. 1953)(can examine jury room conduct when there is evidence of sham juror); Schrader v. Joseph H. Gertner, Jr., Inc., 282 A.D. 1064, 126 N.Y.S.2d 521 (1953) (juror affidavits received to show others' misconduct in dealing with jury).

111. People *ex rel.* Nunns v. County Court, 188 A.D. 424, 176 N.Y.S. 858 (1919).

112. 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

113. *Id.* The court stated, "[T]hese jurors became unsworn witnesses against the de-

In *Katz* there was no attempt to overturn the *Bichler* verdict or to obtain a new trial in that case. This consideration, the case authority allowing the taking of jury testimony in some circumstances, and the emphasis on fairness in the application of collateral estoppel provide strong support for the *Katz* decision.

VI. MUTUALITY, THE JURY SYSTEM, AND THE *Katz* APPROACH

A. Katz—A Response

The abrogation of the mutuality requirement has coincided closely with an increase in mass tort/multiple plaintiff litigation, such as the "DES daughter," asbestosis, and DC-10 cases.[114] An increase in the application of offensive collateral estoppel, again often in actions involving numerous plaintiffs and a single defendant, has accompanied this abandonment of mutuality.[115] For example, in a recent medical malpractice and drug products liability suit brought by the mother of an infant who had died from the effects of a vaccination, the Second Circuit held that the plaintiff could use a 1968 Eighth Circuit case to estop the defendant on the issue of the inadequacy of the warnings issued with the vaccine.[116] Similarly, in 1980 a Texas district court held that the offensive use of collateral estoppel was appropriate in an asbestosis case.[117] Therefore, because the Fifth Circuit had found in 1973 that asbestos products as manufactured, sold, or distributed by the corporate defendants were defective and unreasonably dangerous,[118] the same defendants were now estopped from relitigating whether their asbestos products were defective and unreasonably dangerous.[119]

Courts and commentators have articulated fears concerning these changes in collateral estoppel analysis ever since the original implementation of the changes. One such discussion appeared

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fendants in direct contravention of their right, under the Sixth Amendment, 'to be confronted with the witnesses' against them." *Id.* at 279, 229 N.E.2d at 214, 282 N.Y.S.2d at 530 (quoting Parker v. Gladden, 385 U.S. 363 (1966)).

114. *See generally* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

115. 48 U. CIN. L. REV. 611, 613 (1979).

116. Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979).

117. Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980). Plaintiff had worked for thirty years as an insulator handling large quantities of asbestos materials. He claimed that the exposure to the asbestos had caused serious injury to his lungs and respiratory system.

118. Borel v. Fibreboard Corp., 493 F.2d 1076 (5th Cir. 1973).

119. 485 F. Supp. 242, 248 (E.D. Tex. 1980).

twelve years after the *Bernhard* decision in an article by Professor Brainerd Currie, who argued that *Bernhard* should not be applied to multiple plaintiff cases.[120] Using the illustration of a train accident from which fifty personal injury actions arise, he set forth a variety of situations in which strict application of the *Bernhard* doctrine would produce anomalous results. For example, he raised the possibility of the first twenty-five plaintiffs losing their cases against the railroad; the twenty-sixth, however, wins a case, and the next twenty-four plaintiffs successfully use that one victorious judgment as collateral estoppel against the defendant.[121] Currie bolstered his argument by noting that the twenty-sixth plaintiff may have won simply because the forum was inconvenient for the defendant, because unusual circumstances promoted sympathy for the plaintiff, or even because of a compromise verdict.[122]

Currie also discussed the distinction between offensive and defensive assertion of collateral estoppel. He employed a series of diagrams to demonstrate that whether collateral estoppel is asserted only by the defendant or by either party but only against a prior aggressor, the plea should be allowed in a *Bernhard* situation but not in the train wreck (multiple plaintiff) situation.[123] In a later article, however, Currie abandoned his multiple plaintiff "rule of thumb" because the anticipated broad application of *Bernhard* never really materialized. Currie concluded that most courts, having turned to the "full and fair opportunity to litigate" standard, carefully examined the facts of each case before applying collateral estoppel instead of engaging in "easy and cynical generalization."[124]

The Supreme Court has continued the trend observed by Currie in other courts. As recently as the *Parklane* decision, the Court discussed with some concern the problems peculiar to the offensive use of collateral estoppel.[125] The Court, however, refused to pre-

120. Currie, *supra* note 26. Currie also argued that the *Bernhard* doctrine should not be applied when the party to be estepped lacked the initiative in the first action. Subsequently, Currie modified this position to an emphasis on whether or not the party had a full and fair opportunity to litigate. *See* Currie, *supra* note 114, at 27-32. *See also* Currie, *supra* note 26.

121. Currie, *supra* note 26, at 286.

122. *Id.* at 288. For a discussion of the effect of evidence of a compromise verdict on the judicial decision to grant a new trial, see Leipert v. Honold, 39 Cal. 2d 462, 247 P.2d 324 (1952).

123. Currie, *supra* note 26, at 292-93.

124. Currie, *supra* note 114, at 32-37.

125. *See* text accompanying notes 46-50 *supra*.

clude the use of offensive collateral estoppel, opting instead to grant trial courts broad discretion to determine when estoppel should apply.[126]

The concerns about the abrogation of the mutuality requirement and the growing use of offensive collateral estoppel are compounded by what many see as the inherent flaws of the jury system. In fact, a major argument in support of a continued requirement of mutuality is the fallibility of the jury system. For instance, in *Spettigue v. Mahoney*,[127] an offensive collateral estoppel case, the Arizona Court of Appeals criticized the abrogation of mutuality by pointing out that many variable factors, including the selection and personality of the jury, diminish the reliability and accuracy of the trial process. The court stated:

> While this court believes that our system of justice has no peer in this fallible world, nevertheless, it is unable to consider that our trial processes unerringly discover Truth. The selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of the presentation of their testimony, the dynamics of the rapport between witnesses and fact-finder, and the personalities and appearances of the parties as they impress the fact-finder . . . variously determine the outcome of a contest conducted in the courts of this country.
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> . . . .
>
> [I]n one action a jury can proclaim one fact as verity and in a subsequent action a different jury can proclaim the opposite.[128]

In a similar vein, Professor Currie originally stated that his reluctance to extend the *Bernhard* doctrine to multiple plaintiff cases stemmed partly from a distrust of the jury, particularly its tendency to compromise the liability issue.[129]

The Minnesota *Schwartz* hearing exemplifies an attempt to deal with the flaws in the jury system. The hearing, which is designed to uncover jury misconduct while protecting jurors from harassment by parties out of court, involves questioning of jurors by the trial court while they are under oath. The questioning is on the record and in the presence of counsel.[130]

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126. 439 U.S. 322, 331 (1979).

127. 8 Ariz. App. 281, 445 P.2d 557 (1968).

128. *Id.* at 286, 445 P.2d at 562.

129. Currie, *supra* note 26, at 321. Currie suggests that perhaps jury cases should somehow be treated differently from other cases.

130. The *Schwartz* hearing is so named because it was first used in a Minnesota case styled Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960). In the Minnesota case of Quinn v. Winkel's, Inc., 279 N.W.2d 65 (Minn. 1979), the defendant bar owner, found liable for plaintiff's injuries sustained when shot by an assailant in the bar, argued that the trial court abused its discretion in denying defendant's request for a *Schwartz* hearing. The Minnesota Supreme Court ruled that such hearings were to be liber-

Judge Neaher's approach in *Katz* is simply a response to these often voiced criticisms concerning the combined effect of nonmutuality, offensive collateral estoppel, and a fallible jury system. *Katz* involved each of these elements. Because the *Katz* court did not require mutuality, Mrs. Katz's nonparty status in the *Bichler* suit did not preclude her from asserting collateral estoppel. Furthermore, because the court allowed offensive collateral estoppel her status as plaintiff did not preclude her from utilizing the estoppel doctrine. In the earlier suit, however, there was some evidence of a compromise verdict—the very possibility that Currie and others have found so troubling. In the exercise of its broad discretion, the court simply decided that more should be known about the *Bichler* verdict before allowing the offensive application of collateral estoppel in a nonmutual situation. In this situation, the court held that deposing jurors was the appropriate method for the defendant to disprove the establishment of the collateral estoppel corollaries. Absent this type of approach, the court obviously felt that the combination of nonmutuality and offensive collateral estoppel would place defendants at the mercy of any potential plaintiff in a multiple plaintiff case once a court reached a judgment unfavorable to the defendant.[131] In addition, the decision operates as a check on juries and attempts to prevent the repetition of injustices. *Katz* therefore typifies one of the major features of the collateral estoppel doctrine—its flexibility.[132] This flexibility is extremely significant because collateral estoppel, even more so than res judicata, can be "an extraordinarily dangerous instrument" when overextended.[133]

B. Arguments Against Katz

1. The Sufficiency of Present Collateral Estoppel Application

Despite the potential for abuse of collateral estoppel—a potential that prompted the taking of juror depositions in *Katz*—one

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ally granted once the moving party sufficiently alleged facts suggesting jury misconduct. In Zimmerman v. Witte Transp. Sys., 259 N.W.2d 260 (Minn. 1977), the Minnesota Supreme Court also stated that in connection with a *Schwartz* hearing neither an attorney nor his agents could initiate questioning of jurors; they could, however, question jurors who first came to them to report possible misconduct.

131. *See* 84 F.R.D. at 381-82.

132. *See* Hossler v. Barry, 403 A.2d 762 (Me. 1979).

133. "Over and over again it has been demonstrated that [collateral estoppel's] extension by merely logical processes of manipulation may produce results which are abhorrent to the sense of justice and to orderly law administration." Currie, *supra* note 26, at 289.

could argue that the safeguards that have developed in the application of the doctrine are fully sufficient to protect against most, if not all, such abuses. As Professor Currie observed several years after his initial article on the subject, generally courts do not allow collateral estoppel to be asserted by any and all nonparties in an indiscriminate manner.[134] Through the widespread use of the "full and fair opportunity to litigate" standard, courts are carefully scrutinizing the facts of the prior case and comparing them to the current litigation in an effort to avoid anomalous results.

In addition, any indications of a compromise verdict that would prompt the deposing of jurors would usually also prompt the court to deny application of collateral estoppel because of the concomitant reasonable doubt[135] concerning the sufficiency of the prior judgment. For example, the attorneys for Eli Lilly in *Katz* could have argued that the statements made by the two jurors provided enough evidence of a deficiency in the *Bichler* judgment to block its use as the basis for a collateral estoppel plea. Thus, the court could have reached the same result without venturing into the uncharted territory of deposing jurors in order to determine the preclusive effect of a judgment.

2. Inquiry into Juror's State of Mind

By distinguishing between inquiries into jury deliberations for the purpose of impeaching a jury verdict and inquiries for some other purpose,[136] Judge Neaher ignored the fact that many courts are reluctant to inquire into the state of mind of a juror for any purpose.[137] Federal Rule of Evidence 606(b), however, does deal only with the use of jurors' testimony to establish the invalidity of a verdict. Thus, it appears that Judge Neaher's ordering of juror depositions was within the limit of applicable law. Nevertheless, because of the lack of direct authoritative law and the inherent need for secrecy associated with jury deliberations, courts should exercise extreme caution before allowing inquiries into such deliberations for any reason.

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134. *See* text accompanying note 137 *infra*.

135. *See* notes 61-63 *supra* and accompanying text.

136. *See* text accompanying notes 106-09 *supra*.

137. King v. United States, 576 F.2d 432, 438 (2d Cir. 1978); United States v. Dioguardi, 492 F.2d 70, 79 (2d Cir. 1974); Heaver v. Ward, 68 Ill. App. 3d 236, 240, 386 N.E.2d 134, 138 (1979).

3. Negative Effect on Attitude toward Jury System

One of the historical policies behind the establishment of a jury system was not the belief that the jury was a particularly efficient method of administering justice, but rather that it was important that a person be judged by a group of laymen. A major role of the jury has always been to bring an element of common sense and community sensibility into the courtroom.[138] Consequently, judges and lawyers repeatedly impress upon jurors the significance of their responsibilities and of their decisionmaking processes.

A willingness to depose jurors concerning their deliberations in the jury room, if allowed to occur very frequently, could frustrate this policy of community participation in the legal system by affecting the attitudes of jurors toward their roles as decisionmakers. For example, if courts frequently, or even occasionally, require jurors to submit to discovery about matters occurring in the jury room, those jurors and potential jurors may begin to feel that their ability and authority to decide an issue is really negligible in our legal system. Whenever lawyers and judges can enter into the deliberative processes of a jury, this intrusion diminishes the jury's role as an independent voice of the community in judicial administration.

C. *Problems Raised by* Katz

Even more troublesome than the direct arguments waged against the result in *Katz* are the many unanswered questions that the case raises concerning the possible variations on the *Katz* fact pattern. For example, in *Katz* notice of deposition and subpoena were only served on two jurors. Although the court did not address the issue, it may be preferable to require that, if a party deposes at least one juror about jury deliberations, he must also depose all the others. Otherwise, there is always the possibility that the other jurors have completely different stories that would remain untold. In an analogous California case, *Johns v. City of Los Angeles*,[139] a single juror charged in an affidavit that another juror had made racially offensive statements concerning the black plaintiffs. Every other juror, however, emphatically denied that the accused juror ever made the statements. The appellate court held that the trial judge's acceptance of the one accusatory statement and his rejec-

138. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting).

139. 78 Cal. App. 3d 983, 144 Cal. Rptr. 629 (1978).

tion of the rest for no apparent reason constituted an abuse of discretion. The *Katz* opinion, on the other hand, does not deal with the potential problems arising from the knowledge of only two out of twelve jurors' statements about the existence of a compromise verdict. Similarly, the case does not provide any guidelines for handling a situation in which depositions are taken of all the jurors, but members of the group disagree as to how they reached their decision in the prior action. In addition, the intervening death of one or more of the jurors may taint the validity and reliability of the remaining jurors' statements.

Deposing jurors in order to defend against the offensive application of collateral estoppel, rather than to impeach the prior verdict, seems at first glance to be a just and simple method of examining a prior judgment. If courts were to move in this direction, however, some of the hypothetical situations discussed above would soon arise. Eventually a judge would have to decide whether depositions of only a few of the jury members, a majority of the jury members, or all of the jury members would suffice. This question would be particularly relevant if a juror came forward on his own to refute testimony given by other jurors. Assuming the court generally wants the depositions of all the jurors, it must then decide whether to take any depositions when some jurors are dead, unavailable, or in disagreement with one another. At that point the potential for confusion and unjust results may negate the policy of fairness underlying *Katz*.

A related problem occurs if a juror should absolutely refuse to acquiesce in discovery. Federal Rule of Civil Procedure 37 contains a system for sanctioning people who refuse to comply with discovery requests. For example, the party seeking discovery may apply for a court order compelling compliance. A court, however, may deny the motion and even issue a protective order for the person seeking to avoid discovery in order to guard against disclosure of privileged matter and to prevent harassment.[140] Courts generally have been reluctant to order the more drastic sanctions, except in the most outrageous situations.[141] Therefore, a court may be willing to authorize a notice of deposition in order to determine the soundness of a judgment as a basis for collateral estoppel, but be unwilling to impose strict penalties on a juror who claims in good faith that the jury room deliberations are privileged. Of course the

140. FED. R. CIV. PROC. 37(a)(2).
141. F. JAMES, CIVIL PROCEDURE § 6.13 (1965).

imposition of sanctions for the refusal to comply with discovery could lead eventually to litigation that would resolve more definitely the extent of a juror's privilege in refusing to disclose any part of the jury deliberations.

Another problem raised by the *Katz* decision is the extent of its holding. *Katz* involves a situation in which a plaintiff asserted offensive application of collateral estoppel, but it is not clear whether the holding of the case should be limited to offensive use. The approach in *Katz* does present a problem handling the reverse situation—an attempt by Eli Lilly to use a prior favorable judgment defensively to estop a subsequent plaintiff. Should the plaintiff be allowed the same opportunity to examine the jury's decisionmaking process in the prior litigation? The language in the opinion emphasizes the context of offensive application of collateral estoppel:

> Moreover, where as in this case plaintiff clearly intends to rely on "offensive" use of collateral estoppel, fundamental notions of fairness require that Lilly be afforded every reasonable opportunity to explore the factual basis for a claim that the judgment asserted as binding on it should not be accorded such an effect because based on a compromise verdict.[142]

Such language strongly suggests that the holding would not apply to defensive use cases. The *Parklane* decision also discusses the unique features and dangers of offensive collateral estoppel.[143] The absence of those dangers would probably swing the balance toward preservation of the confidentiality of jury room deliberations in the defensive situation.

It may be desirable to limit the *Katz* holding not only to offensive use in general, but also to offensive use in mass tort cases. Certainly the mass tort/multiple plaintiff cases magnify the problems of offensive use, as Currie illustrated in his famous railroad hypothetical.[144] Allowing depositions of jurors in that successful twenty-sixth case would provide more information from which to determine whether that judgment should be used as the basis for a collateral estoppel plea by the next twenty-four plaintiffs. Yet, as Currie eventually concluded, courts have been thoughtfully applying collateral estoppel by using the "full and fair opportunity to litigate" standard,[145] so that it seems unnecessary to depose jurors—especially considering the many problems that such an ap-

142. 84 F.R.D. at 381-82.
143. *See* text accompanying notes 45-48 *supra*.
144. *See* text accompanying notes 120-22 *supra*.
145. *See* text accompanying note 30 *supra*.

proach raises.

A related question is whether the *Katz* decision applies only to compromise verdicts. The holding sentence in the final paragraph of the opinion speaks only of allowing depositions when "a party demonstrates a factual basis for a belief that a judgment asserted against it as collateral estoppel was based on a compromise verdict . . . ."[146] On the other hand, if a prior judgment is invalid as the basis for a collateral estoppel plea because it is based upon a compromise verdict, then it should be equally invalid due to inadequate representation in the first case, prejudice because of the forum, fraud, or some other kind of jury misconduct.[147] A defendant could readily use *Katz* to argue for engaging in discovery whenever there are indications of any of these problems. In fact, signs of any of the factors used in a "full and fair opportunity to litigate" analysis could become grounds for exploring the first case by means of juror depositions. Again, such a result would be an overreaction to the potential dangers of collateral estoppel. If a party can demonstrate a "factual basis for a belief that a judgment asserted against it as collateral estoppel was based on a compromise verdict" or on some other flaw, then that demonstration ordinarily will be sufficient to block the application of collateral estoppel.

Finally, is *Katz* limited only to obtaining jurors' testimony, or could a court use it to justify taking the depositions of judges and lawyers in prior cases? Usually in situations in which the record of the first trial is either incomplete or nonexistent, one can question a judge, juror, lawyer, or any observer to determine what issues were actually litigated,[148] but one may not do so to ascertain what issues were determined.[149] *Katz*, however, expands the situations in which jurors may be questioned, and its rationale could potentially do the same for judges and lawyers. In *Dodge v. Carri-Craft, Inc.*[150] a Wisconsin district court refused to consider a letter, written by a state court judge to defense counsel stating that a prior action had been dismissed without prejudice, in determining whether a subsequent federal action was barred by res judicata. The result, however, may be different in a case involving collateral estoppel because of the changes in the analysis of collateral estoppel and the greater degree of flexibility allowed in its application.

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146. 84 F.R.D. at 382.
147. *See* text accompanying notes 65, 75-82 *supra*.
148. *See* text accompanying note 53 *supra*.
149. *See* text accompanying note 60 *supra*.
150. 332 F. Supp. 651 (E.D. Wis. 1971).

Furthermore, certain jury related problems—such as disagreement among jurors—would not exist when deposing a single judge. Such problems, however, would arise if the prior case was tried in a three judge district court. The potential for harassment would also arise if courts allowed more freedom to question judges about their decisions.

Unique problems accompany an extension of *Katz* to the deposing of lawyers. A trial attorney's role as an advocate[151] in an adversary proceeding would probably tend to render suspect his conclusions as to what issues were determined. In addition, the attorney is not a part of the tribunal—as is a judge or juror—and is not privy to the actual issues that resulted in a verdict. Therefore, there is little to be gained by deposing lawyers concerning the second and third corollaries, while the same possibility for harassment remains. In fact, the use of lawyers' testimony in prior cases to determine the validity of a judgment as the basis for a collateral estoppel plea would increase the possibility of getting a skewed account of the events that occurred.

VII. Conclusion

Although *Katz v. Eli Lilly* is only a single district court decision, it represents a very significant and natural result of the changes occurring in the collateral estoppel doctrine. The decision, however, may be an overreaction to the problems generated by those changes. The very circumstances that raise the question whether to depose jurors often dictate that collateral estoppel not be allowed. A situation could arise in which the indications of some flaw in the prior judgment are so slight as to fail to bar application of collateral estoppel, yet the ramifications of inadvertently basing a decision on a flawed judgment are so great that they warrant taking the depositions of jurors in the prior action. *Katz* may very well be such a case. In future cases, however, judges should guard against freely allowing depositions of jurors when the circumstances already create enough reasonable doubt about a judgment to prevent it from serving as the basis for the application of collateral estoppel.

Ina Ruth Bigham

151. *See* ABA Code of Professional Responsibility, Canon 7.