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## This Week's Feature

### Defenses to Offensive Collateral Estoppel

*by Patrick W. Begos, Begos Horgan & Brown LLP, Bronxville, NY, and Westport, CT*

You are representing your client, Insureco, in a bad faith action, in which the plaintiff has alleged that Insureco improperly refused to settle an accident claim, exposing the plaintiff to costs and liability. The plaintiff has alleged that Insureco's misconduct was part of a nationwide scheme to meet corporate fiscal goals by capping payouts on claims, by rewarding adjusters who altered files, and by covering up relevant documentation. For support, the plaintiff is relying on a decision in a previous action against Insureco by another insured (Campbell), which issued a historic punitive damages award against Insureco after finding that it had a national policy of engaging in all of the misconduct the plaintiff is alleging. See, e.g., *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd*, 538 U.S. 408 (2003), *on remand*, 98 P.3d 409 (Utah 2004).

The plaintiff argues that the trial court's extensive findings of misconduct in Campbell's action, which were affirmed on appeal, collaterally estop Insureco from disputing those dishonest corporate practices in the present case. You are incredulous. It is obvious that collateral estoppel cannot be used so expansively. If the plaintiff could estop Insureco from denying it had a policy of bad-faith claim handling, then Insureco would forever be at a disadvantage in the courts. So would any other company that has been burdened by similarly bad precedent. You hit the books, certain that the plaintiff's estoppel claim is a house of cards that will easily fall.

Your first stop is general case law on collateral estoppel. "Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact ... necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984). Collateral estoppel can be used *offensively*, meaning that a plaintiff who was a nonparty to the prior lawsuit can foreclose a defendant from relitigating an issue that the defendant has previously lost. *Id.* This definition is not what you wanted to see. It would seem that any finding of fact made in the *Campbell* case could be conclusive in the plaintiff's action against Insureco, because those findings about the improper policies and practices were plainly necessary to the punitive damages judgment in *Campbell*. Clearly, more extensive research is required. Time to get an associate on the job.

Your associate digs into the history of collateral estoppel. First, she discovers that offensive collateral estoppel is a recent development. Originally, the "doctrine of mutuality" provided that collateral estoppel could apply only when *both* parties had been involved in the prior litigation. See, e.g., *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912) (it is "a principle of general elementary law that the estoppel of

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a judgment must be mutual”). As late as 1961, most state courts recognized and applied the doctrine of mutuality. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). This doctrine was eliminated in two steps. First, courts began to permit *defensive collateral estoppel*, in which a defendant could estop a plaintiff from asserting a claim that the plaintiff had previously lost against another defendant. *Blonder-Tongue, supra*. Then, in 1979, the Supreme Court authorized offensive collateral estoppel in the federal courts. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). But, significantly, it attached conditions.

*Parklane* recognized that there were problems with offensive collateral estoppel that did not arise with mutual or defensive estoppel. And it is in these problems that your associate finds the beginnings of your defense. Offensive collateral can “be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant[;]” and that it also can be unfair “where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.” *Parklane* 439 U.S. at 330-331. Accordingly, the Court held: “We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. *The general rule should be that in cases ... where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.*” 439 U.S. at 331 (emphasis added).

*Parklane* allows Insureco to argue that estopping it from disputing the plaintiff’s bad faith claim would be grossly unfair. Insureco has successfully defended numerous bad faith claims before and after the *Campbell* decision. Moreover, you have a second avenue for research that might prove fruitful: what “procedural opportunities” does Insureco have in the plaintiff’s case which were not available in *Campbell*? The proclivities of different venues could be significant, because *Parklane* recognized that a defendant does not get to choose the forum in which it is sued. A plaintiff’s ability to pick a favorable forum creates the potential for an aberrational, adverse decision in a particularly hostile venue, which should not be applied in future cases.

But your associate (bless her!) is not done. She finds another defense in further study of the elements of estoppel. Estoppel (offensive, defensive or mutual) is appropriate only where the issue in the two cases is the same, because one of its purposes is “preventing inconsistent decisions” *U.S. v. Mendoza*, 464 U.S. at 158. A very helpful formulation of this element comes from New York: “the issue ... must be the point actually to be determined in the second action or proceeding *such that a different judgment in the second would destroy or impair rights or interests established by the first.*” *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487 (N.Y. 1984) (internal quotes omitted; emphasis added). *Ryan*, in turn, relied on a 1929 decision by Judge (later Supreme Court Justice) Cardozo, *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 165 N.E. 456, 458 (N.Y. 1929). True to his reputation as a scholar of the common law, Judge Cardozo provided a number of examples in which he found the issues in two cases to be, and not to be, sufficiently identical. One is particularly relevant to Insureco.

Judge Cardozo described a case in which an insured under a fire policy asserted a claim under the policy, but lost because of a finding that he had breached conditions in the policy. The insured was properly precluded from asserting a later claim seeking to reform the policy and recover for the same loss. Significantly, Judge Cardozo noted: “A different

question would have been presented if the loss had been a later one.” *Schuykill Fuel*, 250 N.Y. at 309. The judgment in first action only barred re-litigating the question whether there was coverage for the particular loss. It did not preclude litigation over any subsequent loss, and the insured was free to attempt a new theory if he suffered a new loss.

More recently, in *E.D. ex rel. Demtchenko v. Tuffarelli*, No. 109-1209-cv, 2011 WL 294023, 3 (2d Cir. Feb. 1, 2011), the plaintiffs sought to rely on a family court’s finding that a child had not been neglected by his parents, to estop the defendants, who had originally removed the child due to neglect, from disputing the parents’ civil rights claim. The court rejected the offensive collateral estoppel claim, holding: “[a] decision [in the second case] that the defendants did not violate the plaintiffs’ constitutional rights ... would not ‘destroy or impair rights’ established by the family court.” The family court had returned the child to the parents, and that would not be undone regardless of what happened in the civil rights action.

This concept is directly applicable to the plaintiff’s case against Insureco. Obviously, plaintiff’s loss is not the same as Campbell’s loss. A finding that Insureco did not act in bad faith in rejecting plaintiff’s claim would have no effect on rights or interests established in Campbell’s case. To be sure, New York’s formulation of the identity element may be stricter than in other states, but it still might provide helpful authority in those states. It’s hard to go wrong citing Judge Cardozo on the common law.

As a final bonus, your associate finds numerous cases holding that the plaintiff should not be permitted to introduce into evidence the findings in the *Campbell* case. *Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir. 1993) (“such evidence should be excluded ... because judicial findings of fact present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice” [internal quotation marks omitted]); *U.S. v. Sine*, 493 F.3d 1021, 1034 (9th Cir. 2007) (same); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287 (11th Cir.), *rehearing denied*, 277 F.3d 1381 (11th Cir. 2001) (findings by other courts are inadmissible hearsay); *U.S. v. Jones*, 29 F.3d 1549, 1553-54 (11th Cir. 1994) (same). The same rule applies in a bench trial. *Couture v. UnumProvident Corp.*, 315 F. Supp. 2d 418, 428 (S.D.N.Y. 2004) (“My review of the case cannot be based on allegations of past abuses made in lawsuits that are not before me.”)

As you digest your associate’s work, you realize that a lawyer, either through creativity or pure luck, sometimes stumbles on an argument that initially seems outrageous, but turns out to have some support. Use of offensive collateral estoppel against a major insurance carrier accused of bad faith is an example. While you may be able to successfully oppose such arguments, the opposition often requires more precise analysis and argument than you might have expected at the outset.

**Patrick W. Begos**

***Begos Horgan & Brown LLP***

**Bronxville, New York and Westport, Connecticut**

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