ORIGINAL

In the

Supreme Court of the United States

PARKLANE HOSIERY COMPANY, INC., ET AL.,	)	
PETITIONERS,	)	
V.	)	
LEO M. SHORE,	)	No. 77-1305
RESPONDENT.	)	

Washington, D. C.
October 30, 1978

Pages 1 thru 37

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Petitioners,

v. No. 77-1305

LEO M. SHORE,

Respondent.

Washington, D. C.
Monday, October 30, 1978

The above-entitled matter came on for argument at 1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JACK B. LEVITT, ESQ., Goldman Cooperman & Levitt, 800 Third Avenue, New York, New York 10022, on behalf of the Petitioners.

SAMUEL K. ROSEN, ESQ., 122 East 42nd Street, New York, New York 10017, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1305, Parklane Hosiery Company against Shore.

Mr. Levitt, you may proceed.

ORAL ARGUMENT OF JACK B. LEVITT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEVITT: Mr. Chief Justice, and may it please the Court:

The principal issue presented in this appeal is whether a litigant loses his constitutional right to a trial jury by estoppel when the issue to be decided has been adjudicated adversely to him in a prior SEC injunction action, at which there was no right to a trial by jury and in which his present adversary was not a party.

The facts are these. Parklane Hosiery effected a going-private transaction in October 1974 by means of a merger in which a proxy was issued to its shareholders. A month later, in November '74, this class action was commenced on behalf of all the stockholders of the corporation, except those who had exercised their statutory dissenters' rights.

The class action proceeded to a class certification and to commencement of discovery. In May 1976, a year and a half after the class action had been begun and after the merger had been accomplished, the SEC, under the authority of Section 21 of the 1934 Exchange Act authorizing injunction

actions, commenced an action for an injunction and other relief, alleging as its grounds certain claimed material misrepresentations and omissions by Parklane in its proxy statement.

Two weeks after the SEC started its independent action, the Respondents here -- the Plaintiffs in the class action -- moved to amend their complaint so as to precisely track, to fall in behind the allegations of the SEC injunction complaint.

Pursuant to rules which permit the prompt trial of SEC injunction actions, the SEC injunction came on to be tried about one month after it was commenced, in June of 1976, and while the class action here was in an early stage of discovery.

After trial in September '76, the district judge who had heard the SEC injunction proceeding found that Parklane had violated the securities laws in the three precise respects that the SEC had alleged, the three material omissions or misrepresentations. But the district judge denied the injunction which was the root remedy that the SEC had requested, on the ground that there was no basis for an injunction, that the merger had long since been accomplished, that there was no evidence and not even a contention, as I understand it, that there was any on-going conduct that would suggest a concern, a public concern, for continuing wrongs or violations in the Securities laws.

Just after the judgment in the SEC proceeding, in November, I believe, 1976, Respondent here moved for partial summary judgment on the issues which had been adjudicated in the SEC non-jury injunction proceeding, on the theory that because the SEC injunction proceeding had included similar issues of fact, the Petitioner here was collaterally here estopped from relitigating those issues.

QUESTION: You say "similar." Are they more than similar?

MR. LEVITT: They are precisely the same, Mr. Justice Burger, as the issues contained in the amended complaint, or embraced in the amendment. There were some other claims in the class action and, of course, there would be other issues, at least including damages, still for trial. That's the sense in which there was a motion for partial summary judgment.

But to answer what I believe is the purport of your question, Mr. Chief Justice, yes, the request for partial summary judgment was coextensive with the findings of violation that had occurred in the SEC proceeding.

The District Court denied the motion for partial summary judgment in a short decision, motion denied, and relying on the Fifth Circuit decision in Rachal v. Hill, a 1970 Fifth Circuit decision.

On appeal, the Second Circuit Court of Appeals reversed the District Court, directed the entry of the summary

judgment which had been requested and, in effect, determined that the application of the doctrine of collateral estoppel, in this instance, ought to extinguish the right to a trial jury that the Petitioner, otherwise, concededly, would have had.

This appeal presents to the Court, for the first time since this Court's decision in Blonder-Tongue, a question of the proper reach and application of the doctrine of collateral estoppel in the absence of mutuality.

And Petitioners contend here, very briefly, that the test, the historical inquiry, as to the law in 1791 as a basis for determining the scope and limits of Seventh Amendment jury trial rights, if applied in accordance with what we contend is a fairly straightforward following of the cases of this Court, Dimick v. Schiedt and very recently Curtis v. Lother and others, demonstrate that Respondent couldn't have been estopped collaterally from a jury trial of his defenses in 1791 or, indeed, until the very recent relaxation of the mutuality of estoppel rule, and can't now be so estopped.

We believe also that that result is squarely consistent with this Court's decisions in Beacon Theatres, Dairy Queen and other cases, and that the Rachal decision, the Fifth Circuit decision in 1970, which until this case was the only case which presented an interface or a challenge to the Seventh Amendment by the new concept of nonmutual estoppel,

which had held to the contrary that a jury trial could not be extinguished by this mechanism, quite properly analyzed the law and this Court's decisions on the issue.

And, finally, we will contend that this Court's refusal, for which, of course, we shall contend, to apply collateral estoppel in the circumstances presented in this case would be wholly consistent with the Blonder-Tongue principle that nonmutual estoppel, even if the formal elements may be present, should not be applied where justice and equity dictate otherwise.

Now, Your Honors, before analysis or reference to the decision in the court below, I'll briefly summarize to you the Fifth Circuit decision in Rachal. There the SEC had sought and obtained an injunction against corporate behavior in a Securities Law violation context. Thereafter, a class action had been begun, and the class action plaintiffs, using the SEC judgment as its predicate, sought summary judgment, much as it is being attempted in this case. There, the Fifth Circuit squarely held that collateral estoppel may not be applied so as to deny a Seventh Amendment jury trial right. And, in so doing, the Court confronted the challenge of the Seventh Amendment in the face of this relatively new procedural mechanism, and acknowledged also that the change in the rules of mutuality still then emerging -- and I believe still now emerging -- but noted that the rule should not apply where

overriding issues of fairness dictate otherwise.

The Rachal court, the Fifth Circuit court, analyzed this Court's decision in Beacon Theatres, referred to the great respect which its language and its decision showed to the pre-eminence of the Seventh Amendment in the face of changing procedural mechanisms, in that case the Federal Rules, and found that the Beacon decision led inevitably to denial of estoppel.

Turning to the decision in the Second Circuit, the court below --

QUESTION: Blonder-Tongue, of course, involved the validity val non of a patent, didn't it?

MR. LEVITT: It did.

QUESTION: Let's assume that a patent was held to be invalid in the Second Circuit, and then in the Third Circuit -- and that had been done in a non-jury trial because nobody had asked for a jury -- and then in the Third Circuit the issue of that same patent's validity was raised in litigation and the person asserting the validity of the patent said, "Well, I want a jury trial on this issue." Does that mean that collateral estoppel just could not possibly prevail because of the Seventh Amendment right to a jury trial?

MR. LEVITT: I don't think so, Your Honor. I believe, in all events, that in the Blonder-Tongue context there was no jury trial question raised and moreover --

QUESTION: In my case there is. In the hypothetical

case embodied in my question, there is a jury trial question raised. The original determination of invalidity was made in a non-jury trial. Now the same issue is raised in a different circuit, involving the validity of the same patent, and the person asserting its validity says, "I want a jury trial," and there cannot possibly be collateral estoppel because there wasn't a jury trial in the other case.

MR. LEVITT: Well, Your Honor, I don't think -- Addressing myself to the question, as I understand it, the person seeking to avoid estoppel in the second case that you put would, in all events, be entitled to a trial. The question is whether the party who had litigated the case earlier -- in the Blonder-Tongue case, the alleged patent holder who had initiated the litigation and who in the litigation which he had initiated was met with the finding of invalidity of his own patent. And Blonder-Tongue said being confronted with a determination adverse to you in a case which you initiated, you can't now proceed to attempt to enforce against anybody.

QUESTION: What difference does it make as to who initiated the case, in terms of the legal principles involved?

MR. LEVITT: Well, Your Honor --

QUESTION: You mean the choice of jury waiver would be one, I suppose.

MR. LEVITT: It would and, Your Honor, as I think we will see in the context of this case, it is not at all

essential to the disposition of this case. I would comment upon your question to say that there has been much writing and speculation about the distinction, if any, and the weight which ought to be accorded to it, between the so-called defensive use of mutual estoppel and the so-called offensive use. I say so-called because many people contend, perhaps with some force, that there isn't a profound or astructural distinction between the two. I don't think it at all affects the line of reasoning or the ultimate decision by this Court in this case.

I would say, however, in response to your question, that I find some concern in the issue of whether -- I find a somewhat different standard, a somewhat different test, probably in order in considering whether a subsequent litigant can exploit a successful litigation by a predecessor and follow it by attempting to get summary judgment, attempting to get judgment almost by hypothesis, on the basis of that earlier adjudication.

I would be concerned about many factors affecting the earlier adjudication and its implication for the party who had not been a party to it and who is now faced with confrontation of the same issue.

Your Honor, returning, if I may, to the decision below. The Second Circuit, in reversing, held exactly to the contrary of Rachal. It found that collateral estoppel would

apply undisputedly, except for the jury trial issue. It reasoned, or at least it discovered --

QUESTION: Mr. Levitt, I am sorry to go back to Justice Stewart's question. I am not entirely sure I understand your answer.

Is your answer that there is a difference between defensive and offensive use of mutual estoppel? I thought you said you didn't think there was.

MR. LEVITT: In my judgment, sir, there should be.

QUESTION: There should be. But is it not correct that unless we draw that distinction, Blonder-Tongue decides this case?

MR. LEVITT: I don't think so, sir.

QUESTION: Why not?

MR. LEVITT: I don't think so, sir, for several reasons. First -- Your Honor, let me address myself to your question in the following fashion.

I believe that the offensive -- the so-called offensive use -- and this case, to my knowledge, as well as the Rachal case in the Fifth Circuit, presents the first such proposition for it -- deserves a different test. I do not think, Your Honor, that it will be crucial, by almost any line of reasoning, to Your Honors' decision, because I think this case will more than likely be presented primarily on the issue of its Seventh Amendment implication. But I do believe that

the level of examination, the concern about who was involved in the prior adjudication and what were the implications of the circumstances of that prior adjudication for the parties sought to be estopped by it in the second action and who was innocent of -- that is to say who was innocent of any participation in the earlier action -- probably should be a higher standard and should be a matter of concern.

To try and follow that for what use I believe it may have for the facts in this case -- I think the fact that the prior adjudication was an SEC injunction proceeding, for example, is one which ought to weigh in the balance of whether or not it ought to estop the subsequent party.

For example, Mr. Justice Stevens, in the relatively few cases, compared to the much writing and comment on the subject, cited in Respondent's brief for the application of offensive, so-called, use of estoppel, I find only three in which offensive use was actually applied. And I find there that in each of those three cases the party in whose shoes, so to speak, the new litigant finds himself, was a party of exactly identical rank and interest, so to speak, in the litigation of that issue, as was the later party sought to be estopped.

For example, the three cases that I can recall are a co-passenger in a taxicab, both innocent, both victimized, a full and fair opportunity, a jury trial right in the first

action, ergo, offensive estoppel. I do not find, apart from matters of legal analysis -- my sense of justice isn't troubled by that.

A co-passenger in an airplane, a mortgagee versus a mortgagor sucessively suing an insurance carrier, arising out of the same casualty. Where the implication and the facts are strong that the litigant to the earlier case had the same kinds of concern, the same view of the litigation as could be presumed to be that of the party to the second litigation who was sought to be estopped.

QUESTION: Isn't that only relevant where there is adequate motivation to go all out in making a complete defense?

MR. LEVITT: Yes.

QUESTION: Wouldn't your client have had the same motivation to defend against the Securities and Exchange Commission as he does in the damage --

MR. LEVITT: Your Honor, I don't think it is only a matter of motivation. I think it is a matter of many factors which inhere in a litigant's view of what the significance and implications of a litigation are to him.

To answer your question, no, I don't think his motivation would have been less to defend as it would to defend a private party action.

QUESTION: But there is, I suppose, a difference between the hypothetical case embodied in my question and those

three cases that you just mentioned to us. And the conclusion implicit in Mr. Justice Stevens' question is that here there was no -- you couldn't have had a jury trial in the first action, no matter how hard you tried.

MR. LEVITT: Right. The structure of the earlier adjudication was --

QUESTION: You simply had no right to a jury trial.

MR. LEVITT: Number one, there was no right to a jury trial, because the statute evidencing a policy very well expressed in the Government's amicus brief here, that the SEC was authorized by the Government to move quickly and flexibly to enjoin on-going wrongs. And, therefore, there should be no jury classic equity jurisdiction and no jury trial right.

QUESTION: Wouldn't this be equally true of any equity case in a court, as distinguished from a regulatory agency?

MR. LEVITT: No, Your Honor, I don't think so, because of the implications for most civil litigation of the Federal Rules. And that, in fact, relates us precisely to the Beacon Theatres case, which is the heart of what the Second and the Fifth Circuit seem to have been arguing about.

QUESTION: I perhaps didn't make my question clear.

MR. LEVITT: I am sorry, Mr. Chief Justice.

QUESTION: No jury in an SEC case -- not even a discretionary power, I suspect, on the part of SEC to call a

jury in --

MR. LEVITT: Correct.

QUESTION: -- An equity judge could, conceivably, have the power, on some factual question -- unusual, but he could call in a jury and submit certain questions, couldn't he? Possibly?

MR. LEVITT: Possibly, yes.

QUESTION: It's been done. It isn't the normal, but what's the basic difference? If the case is tried to judgment in the equity court with no jury and the case is tried to a determination in the SEC with no jury, why do you distinguish those two?

MR. LEVITT: Let me tell you why I do. Because I think that distinction goes very much to the heart of the issue presented here.

Beacon Theatres, which was interpreted in a precisely contrary manner by the Fifth Circuit and the Second Circuit -- Beacon Theatres said that in the face of the Federal Rules which, in terms of the merger of law and equity, presented both what used to be equitable and legal disputes in the same civil action, the Seventh Amendment with its command to continue to preserve jury trial rights, in the sense that they have been entitled to preservation historically and in accordance with the long line of this Court's cases, compels that any issues of fact in what would otherwise be a mixed legal and equitable case,

under the Federal Rules, must needs be tried by a jury, and that to try such issues of fact before an equity court would violate the mandate of the Seventh Amendment and the constitutional right of the litigant to advance the traditional common law claim.

And for that reason, Your Honor -- and I hope I am being responsive to your question -- for that reason, I would say to you that in the law under Beacon Theatres, under Dairy Queen and under Meeker v. Ambassador Oil, all cited and discussed in the brief, the law is clear that where there are issues of fact which are in aid of equitable claims and of legal claims, you may not extinguish the jury right created by those legal claims by a prior adjudication in equity.

That is the fair and, I believe, inevitable interpretation of Beacon Theatres and Dairy Queen. And I might say in that connection that the Second Circuit found a rather unusually narrow interpretation of Beacon Theatres. It said, in substance, and I hope I am not exaggerating, for the purpose of illuminating the Second Circuit's view -- It said in substance, Beacon Theatres was merely a scheduling case. It concerned itself with how issues ought to be ordered, and that's why it came up in a mandamus context, so that the District Court would have the proper direction.

Both the Rachal court in the Fifth Circuit and, I believe, the plainest kind of reading of Justice Black's

opinion for the majority, don't at all admit of that narrow construction. To us and to the Fifth Circuit it was a very ringing affirmation of Seventh Amendment rights, when confronted by the new structure of litigation imposed by the Federal Rules.

QUESTION: But, isn't it true that the whole presupposition of Beacon Theatres was that if the equity case were tried first it would be res judicata?

MR. LEVITT: No, Your Honor. That certainly is the interpretation --

QUESTION: As you know, I dissented in that case, so I perhaps don't understand it as well as you do.

MR. LEVITT: With the greatest respect, Mr. Justice Stewart, let me tell you why I think not. I think not because there is one sentence in Justice Black's decision for the majority which at least the Second Circuit turned to -- or it was the only one which we could find which could be argued to have supported the proposition that if ordered pre-litigation of jury issues as a one-half of a two-sided coin of permitting estoppel, if the order which the Supreme Court mandated were not followed.

Justice Black made one comment in Beacon Theatres and that was in the context of characterizing the circuit court below concerns, as expressed by the circuit court -- and Justice Black characterized it, at least in substance by

saying there is some concern expressed that if the equitable issues were tried first, why then an estoppel might follow with the legal issues.

But, Mr. Justice Stewart, I would suggest to you that our reading of Meeker v. Ambassador Oil leads us to conclude that the intention of Beacon Theatres was rather broader than that.

In Meeker, there was no mandamus. The District Court did not get the benefit of early warning about the order in which the Seventh Amendment preferred the issues to be tried, and the District Court, without the benefit of that, went ahead, where both legal and equitable relief was granted and ordered the equitable issues tried first before a court and without a jury. They were tried first; adversely to the jury claimant, the District Court found that in consequence, there was nothing to decide in the legal action because it was dependent on the premise of fact which was inherent in the equitable action. The case came to the United States Supreme Court, I believe, in 1963, and this Court reversed memorandum, decision reversed, citing Beacon Theatres and Dairy Queen, remanded the case. And our inquiry tells us, as is revealed in the brief, that the case went back and it was directed to be retried with the jury issues tried first. The order -- not which by mandamus -- but reflects a preference of this Court -- but with the greatest respect, the order which

we believe Justice Black, for the majority in Beacon directed that be held, and that the reciprocal consequence, far from being a permitted estoppel, is a retrial or an assertion of the Seventh Amendment mandate by a new trial, so that the Seventh Amendment, not by happenstance of a court's improper ordering of issues, be vitiated or be lost in the bargain.

To that issue also, Justice Black in Beacon Theatres -- the case argued to be limited merely to a scheduling of cases, stated, "A jury right cannot, through prior determination of equitable claims" -- "A jury right" -- forgive me -- "cannot be lost through prior determination of equitable claims except under the most imperative circumstances," which in view of flexible procedures of the Federal Rules, Justice Black could not even anticipate happening.

Now, relating these arguments and relating this foceral interpretation of Beacon Theatres to the matter at hand, we argue, as precisely as the Fifth Circuit found in Rachal, that what the Second Circuit here has done is a complete anomaly, because an SEC injunction, by statute, you cannot consolidate them with private cases; ergo, the issue cannot be presented to the court in a precisely Beacon Theatres context, that is to say consolidated cases, presenting the question of the order of trial of legal and equitable issues, because the 1934 Exchange Act prohibits a jury trial.

And the Fifth Circuit in Rachal said how is it possible that if these cases were consolidated for trial there is no way that the jury trial could have had to wait for the equitable trial or would have been bound by a result of an equitable trial. It is anomalous, the Fifth Circuit found, that the party who was not in the original adjudication, but the Respondent in this case, could, in effect, get a benefit of a pre-litigation, without jury, that he could not have had if the case were presented in the Beacon Theatres context.

Any other interpretation, I think, would do the greatest offense to the Beacon Theatres and Dairy Queen doctrines.

We contend also -- and the briefs demonstrate the line of reasoning, I think, quite simply -- that the traditional line of inquiry of whether a Seventh Amendment right concededly heretofore existed can be vitiated or lost. And that is the standard historical inquiry about what the state of the law as to jury rights was in 1791, can be applied in this instance, that the cases which were cited in the brief demonstrate the very simple sequence that there was no such thing as estoppel which could have extinguished the jury trial right, not only in 1791 but until 25 or 30 years ago, that this action is an action within the protection of the Seventh Amendment on the authority of this Court's decisions and that the introduction of a new procedural mechanism cannot be employed

to vitiate that Seventh Amendment right. If there must be an accommodation, as Justice Black found there must be with the merger provisions of the Federal Rules, the new procedure must accommodate to the Seventh Amendment.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Rosen.

ORAL ARGUMENT OF SAMUEL K. ROSEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ROSEN: Mr. Chief Justice, and may it please the Court:

We respectfully submit that Beacon Theatres is precisely a scheduling question. The issue presented in Beacon Theatres is when a court has before it both legal and equitable claims it must have the jury decide the legal claims first. Otherwise, there would be a preclusive effect of the determination of the equitable claims by the court, which would make it impossible for those claims to be heard by the jury. This is consistent with the common law in 1791, when the Seventh Amendment was adopted, in that a decree in equity between two parties in 1791 was preclusive on a subsequent legal action between those two parties. There is no anomaly in finding that the equitable action will preclude the re-litigation of the issues in a legal action.

QUESTION: But you have to parlay that together with the nonmutuality doctrine, which did not exist in 1791, don't

you, in order to make your case come out all right?

MR. ROSEN: Precisely, Your Honor. There are two -- It is a two-horse parlay.

QUESTION: And you've got to win both of them.

MR. ROSEN: That's correct. I think --

QUESTION: And you have so far.

MR. ROSEN: I think Blonder-Tongue has already been won.

QUESTION: Your point is you won each of them and now you are just combining them.

MR. ROSEN: That's right.

QUESTION: You haven't won each of them. They have been won by your predecessor. And now you seek to combine the two victories.

MR. ROSEN: There is no deprivation of the jury trial right in this action. The Defendants are going to have a jury trial in this action on all the issues not determined in the SEC action.

QUESTION: Is the claim in this case on collateral estoppel that the prior litigation determines not only the factual issues that were raised and decided, but a legal issue, too?

MR. ROSEN: In the SEC action, the District Court and the Court of Appeals, affirming unanimously, found that there were material misstatements in the subject proxy

statement.

QUESTION: And a violation of the statute?

MR. ROSEN: And a violation of the statute, that's correct.

Collateral estoppel relating to factual issues, we have moved for summary judgment only on the factual issue that there is -- that there were material misstatements in the proxy statement.

QUESTION: Do you think that is purely a factual question?

MR. ROSEN: It is a mixed question of fact in law.

QUESTION: So, collateral estoppel reaches that far, at least, you think?

MR. ROSEN: Yes.

QUESTION: Not just historical facts, but some characterization of them, in terms of the statute?

MR. ROSEN: Yes, I believe it does, Your Honor, but even if it doesn't, there would be a preclusion of the relitigation of the question of whether there are material misstatements and omissions in the proxy statement.

QUESTION: There would be preclusion as to whether these particular statements had been made.

MR. ROSEN: It is more than that, Your Honor. The fact that they are misleading and that they are not correct.

QUESTION: You mean misleading within the meaning of

the statute, or not?

MR. ROSEN: Yes, I mean misleading to the public shareholders of the company, that they thought, for example, that one of the findings of misleading statement was that there were no negotiations going on with the Federal Reserve Bank as to the negotiations to buy out a leasehold of Parklane.

QUESTION: Do you think your motion for summary judgment, that you just described in response to Justice White's question, should have been granted by a court before Blonder-Tongue was decided and while Triplet was still the law?

MR. ROSEN: Your Honor, there has been an erosion of the doctrine of mutuality. In the Second Circuit, at least, in 1964 --

QUESTION: Suppose you deal just with cases from this Court, since, I, for one, certainly don't pretend to be familiar with all the Court of Appeals cases.

MR. ROSEN: I would think that before Blonder-Tongue that this Court did not approve the mutuality -- required mutuality --

QUESTION: So, you then rely on Blonder-Tongue outside of the patent area and as a virtually absolute rule to justify summary judgment?

QUESTION: And offensive as well as defensive.

MR. ROSEN: Yes, I do.

Blonder-Tongue has been followed in a number of cases

in a number of circuits since it was decided in 1970. It has been followed, for example -- It has been followed and mutuality has been permitted -- nonmutuality has been permitted in an offenseive manner in the Seventh Circuit, in the Second Circuit and in the Sixth Circuit, all cases decided subsequent to Blonder-Tongue. And, in fact, Rachal v. Hill, the Fifth Circuit case, was decided before the Blonder-Tongue decision. So, it is not clear to me how the Fifth Circuit would have decided Rachal v. Hill, had Blonder-Tongue been decided prior to its decision in the Rachal case.

I think that offensive use of collateral estoppel should be permitted in this case, because at all times during the pendency of the SEC action the Defendants were aware of the existence of the private action, the Parklane v. Shore action. That also differentiates this case from the Rachal case, because in Rachal the private action was begun after the SEC action was begun.

QUESTION: What could they have done in order to obtain a right to jury trial in the private action in this case?

MR. ROSEN: They could have sought to expedite the private action instead of, for example, spending seven months after the complaint was filed to answer the complaint. The complaint was filed in November of 1974, the answer was, I believe in June of 1975.

QUESTION: But, ordinarily, the SEC action will have a priority that a private action won't.

MR. ROSEN: Unless the private action is ready for trial, prior to the time that the SEC action is brought, that's correct, the SEC will -- whichever case is ready first. If the SEC case is ready first, the SEC trial will be held first. If the private action is ready first, it will have its jury trial first. But, in this case, the Defendant had -- They were aware that the SEC was investigating the transaction. At the same time, they were aware of the existence of this action. If they wanted a jury trial in this action, they could have answered the complaint, not in seven months, but in two months, or whatever time they might have been able to get their answer together. They could have --

QUESTION: You can require them to answer in 20 days, can't you?

MR. ROSEN: As a matter of courtesy between attorneys -- When I was constantly being asked for three-week adjournments, four-week adjournments, on the answer it seemed to me if they want three weeks they can have three weeks. But it is not I who is now complaining about the loss of a jury trial. It is they who, having taken the strategic moves that they did in delaying answering and delaying depositions, it is they who are now complaining that that has caused them to lose a jury trial, right, because the SEC case was

heard before this case.

QUESTION: How far do you carry this particular rule? What if in the SEC action the finding had been in favor of the company, and then you brought this suit?

MR. ROSEN: Well, under the doctrine of collateral estoppel, we -- there would have been no right to collateral estoppel on the part of the company against --

QUESTION: There have been findings in its favor on the same issue in another case.

MR. ROSEN: But we would not have had our day in court. The difference between that case and the case here presented is the company has already had its day in court. There has been a full and fair adjudication of the issues. They don't deny that there has been a full and fair adjudication of the issues. There was a four-day trial. There was an appeal in the SEC action and the decision of the judge was affirmed unanimously by the Second Circuit.

QUESTION: But if that is the case, isn't this invariably going to give the private plaintiff two bites at the apple. He can just hold back until after the Government's case is tried. If the Government wins, he wins. If the Government loses, he gets his second bite at the apple.

MR. ROSEN: If the Government loses --

QUESTION: If the Government loses its case, the private plaintiff, by your answer to Justice White, isn't

bound. He has his own day in court. And if the Government wins, he simply hitches his cart onto the Government's victory.

MR. ROSEN: Well, as to the second part of your question, I believe one of the purposes of the Securities and Exchange Commission is to act to protect the public. So that, to the extent that they win in an action against a private corporation, the public shareholders ought to be entitled to hitch their wagon to the star of the SEC's action.

QUESTION: Take the Antitrust Statute, where, as I recall, there is a provision that in certain circumstances -- this is by Act of Congress -- judgment in favor of the Government can be used as a prima facie case. Now, there is nothing in the Securities Act like that, is there?

MR. ROSEN: That's correct, Your Honor. But what we have is a situation where, it seems to me, that in the Antitrust context Congress is limiting whatever collateral estoppel effect there might be to an antitrust action brought by the Government in the private action.

QUESTION: But, don't you think the intent of Congress in passing that Antitrust Act was to give private plaintiff's a benefit, rather than a detriment?

MR. ROSEN: It may have been at the time to give them a benefit, and to the extent that it was meant to give them a benefit, if there were a question -- If there is a question of a violation of the Seventh Amendment, in this

action, it seems to me there is also a question of a violation of the Seventh Amendment with respect to the Antitrust Act, which renders prima facie effect --

QUESTION: That still leaves it up to the jury. You wouldn't preclude -- You wouldn't want a directed verdict on the particular facts in this issue --

MR. ROSEN: Mr. Justice White, if I may, by rendering prima facie effect to the decision in the antitrust action, if neither side presents any evidence at that point, in a private action which is based on a Government action, brought against the same defendant, the plaintiff will win in the private action; whereas, if there were no prima facie effect given to the decision in the Government action, there would be -- the defendant would have won the case, since the private plaintiff would not have met his burden of proof.

QUESTION: Mr. Rosen, that's no answer, because if there is a jury sitting there and the defendant wants to put in evidence, he can do so. He has a right to present the issue to the jury in the antitrust context.

MR. ROSEN: That's correct, Your Honor. I am just suggesting -- I am not suggesting that he doesn't have --

QUESTION: It seems to me that your position effectively -- It either treats antitrust cases other than Government litigation, or else it goes farther than Section 5 of the Clayton Act, and says instead of being prima facie

effect, it is conclusive effect, even asking us to add to what Congress granted the plaintiff.

MR. ROSEN: When Congress passed the Clayton Act, the question of mutuality -- mutuality was still a requirement.

QUESTION: The law has developed since then. But if the law has developed, presumably all we have done is made this statute obsolete. We don't need it any more. The plaintiffs don't need it. That must be your view, isn't it?

MR. ROSEN: That is my view, Your Honor.

QUESTION: So, you think antitrust actions, prior decrees won't just be prima facie, but they will bind now?

MR. ROSEN: I don't think so, because --

QUESTION: I thought you just said that to Mr. Justice Stevens.

MR. ROSEN: That's correct, Your Honor. I am thinking it through now, if I may.

QUESTION: You don't want to say now that the statute is obsolete.

MR. ROSEN: The statute may be obsolete, but it is still the only Congressional mandate that the Court has to follow in determining what effect in a private action the decision in a Government antitrust action should have. It may be that the antitrust action should be treated differently. I don't know.

QUESTION: You mean as long as that statute is on

the books, Blonder-Tongue doesn't apply?

MR. ROSEN: It does not appear to apply to anti-trust actions, that is correct.

QUESTION: Why shouldn't we take it, though, as a legislative policy position, with respect to what prior Government decrees generally should stand for in later litigation?

MR. ROSEN: Because it is not part of the Securities Exchange Act of 1934. And Congress in passing the Securities Exchange Act in 1934 knew that it could have put in such a provision, having done it in the Clayton Act.

QUESTION: I know, but at that point they would have wanted to give plaintiff some benefits, because then there was a mutuality requirement.

QUESTION: That section of the Clayton Act has been amended three times since the Blonder-Tongue decision, 1974, 1976 and 19 -- So -- without changing the prima facie effect.

MR. ROSEN: Perhaps Congress intended there to be a special rule for antitrust action. It could be the reason.

QUESTION: I think each of those amendments was designed to help plaintiffs in antitrust cases.

QUESTION: Mr. Rosen, I didn't understand whether or not you conceded the correctness of my brother, Rehnquist's assumption in his question to you that the plaintiff gets two

bites at the apple. If the Government loses, the plaintiff can still try his case -- If the Government loses in the SEC case -- If the SEC loses, then the private plaintiff, the shareholder, can still try his case, de novo, without any effect of that prior determination. Is that correct?

MR. ROSEN: That is correct, Your Honor.

QUESTION: Let us say, in the SEC case, that the court had found as a fact that there were no material misstatements. Now, wouldn't that be of benefit to the defendant in your lawsuit?

MR. ROSEN: We are going to have a problem, whichever way the case is decided, because if they decide for the defendant in this action, the defendant will have two bites of the apple. We are dealing with a situation where there will either be two trials --

QUESTION: To get back to my question, why wouldn't the defendant be able to use that determination in the prior lawsuit, if there were no material misstatements in this proxy material?

MR. ROSEN: Because the plaintiff would not have had a day in court, not had a chance to present his witnesses who the SEC might not have called. There may be facts which are available to the private party of which the SEC may not have been aware, where, if there is collateral estoppel effect given against the defendant, he would have already put his

own case on. He would have put on all his witnesses, presented all the facts. He would have had his day in court and presented as full a trial and as full a record to the court as he would put on in the second case. That's the distinction between the two cases.

QUESTION: I was correct in my apprehension that you conceded the correctness of the proposition implicit in my brother, Rehnquist's question.

MR. ROSEN: Yes, sir.

This Court has recognized as recently as 1966 in the Katchen v. Landy case, that a decision in an equity action against one party will have preclusive effect against that party in a subsequent legal action. In that case, in the first action, there was no right to a jury trial. In the second action, were it not for the first action, there would have been a right to a jury trial.

I submit that there is no distinction between that case and a case in which there is a third party who is seeking to get the benefits of collateral estoppel. Since determinations at law and equity were entitled to the same respect in 1791, at the time of the enactment of the Seventh Amendment, to suggest that the modification in the mutuality principle is confined to instances where jury determination was present in the first action would not have been understood, I would submit, by the courts in 1791.

Each of the actions, either equitable or legal, in 1791, was treated with the same degree of respect. And each precluded relitigation in the second action when between the same two parties when mutuality was required. The erosion of the mutuality doctrine, I submit, requires that the same effect to equitable actions -- the same preclusive effect to equity determinations be granted to legal actions, whether or not the same two parties are present in the action.

I submit also that there are numerous policy considerations which require that decision. First, there is the question of judicial economy. To have a second trial on the same issues, by the same defendant, presenting the same facts, will take up, perhaps, an enormous amount of time in the Federal courts. Furthermore, the Securities and Exchange Commission is a Government body acting for the public shareholders, and the public shareholders should be entitled to the benefits of any decision gotten by the SEC in its actions.

QUESTION: Do you know any other instances under Federal statutes where Federal decrees are preclusive to any extent in private litigation, besides the antitrust laws?

MR. ROSEN: In the --

QUESTION: What are you reading from?

MR. ROSEN: From my brief, Your Honor. I just want to get the cite of the case. I believe under the labor laws, In Whitman Electric v. Local 363, International Brotherhood

Workers, 398 F. Supp. 1218, a 1974 Southern District case, I believe that preclusive effect was given in the second action.

QUESTION: I am wondering what other statutory provisions call for some kind of preclusive effect, besides the Antitrust Laws?

MR. ROSEN: I am not aware of any, Your Honor.

I believe that it is more a common law question, which is to be determined by the courts. Looking at whether there is a full and fair adjudication in the prior action --

QUESTION: You would make the same argument, I suppose, if there is an administrative agency determination that has been enforced in a court of appeals?

MR. ROSEN: Your Honor, not necessarily. First, of course, that's not the case before this Court, but secondly, the court would have an opportunity to examine the administrative determination to see whether there was, in fact, a full and fair opportunity for the defendant to present his case. The courts have the power, as this Court --

QUESTION: Then you suggest it would have to be in a court of law; the estopping judgment has to be from a court of law, not an agency, I take it?

MR. ROSEN: Not necessarily, Your Honor. This case only has to go as far as to say it must be in a court of law. But if there is a full and fair opportunity in the agency,

then perhaps the court should grant collateral estoppel. The court can look --

QUESTION: I take it, then, you wouldn't even limit it to a determination in a court of law at the behest of an agency? It could be a private plaintiff in the first suit?

MR. ROSEN: Yes, Your Honor.

QUESTION: Somebody who doesn't really represent the shareholders or the public?

MR. ROSEN: It is like the cases which have approved the use of the -- the affirmative use of collateral estoppel. The airplane crash case, the automobile case and the mortgage case, which were referred to by counsel for the Petitioner.

When there has been a full and fair opportunity in the prior action, regardless of whether the prior action was to a court or to a jury, then there would be collateral estoppel effect given. This has always been the case with respect to actions involving two parties. There has always been the preclusive effect of an equitable determination between two parties in a second action. The question here is whether mutuality -- the erosion of the doctrine of mutuality should change that rule when it comes to deciding an action involving a stranger to the first action. And it seems to us that the policy consideration which favors granting preclusive effect in a two-party situation also obtains in a three-party situation.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:55 o'clock, p.m., the case was submitted.)