Promoting Finality: Using Offensive, Nonmutual Collateral Estoppel in Employment Arbitration

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INTRODUCTION

Imagine you work at Quickie-Mart, a grocery store chain that employs around five hundred people. Before beginning work, Quickie-Mart requires all employees to sign an adhesion contract containing an arbitration clause, which mandates arbitration of all disputes that arise out of employment. The arbitration agreement includes a class action waiver, which means that all employees waive their right to file a class action suit in court. Perhaps the agreement is explicit that class arbitration is also forbidden. Since you needed the job, you signed the agreement without much concern, as did all your coworkers.

After working at Quickie-Mart for over a year, you and fifteen of your coworkers realize that you all have been misclassified as independent contractors rather than as employees. This misclassification adversely affects your legal rights and benefits because independent contractors, unlike employees, receive less protection under various labor and employment laws. You collectively confer and decide to raise this issue with your boss at Quickie-Mart. In a workplace without an arbitration agreement, you and your coworkers could file a lawsuit alleging misclassification in violation of state or federal employment law because all sixteen of you have the same job responsibilities, have the same job descriptions, and do the same work. Perhaps you would even file a class action suit on behalf of other Quickie-Mart employees who are also misclassified. Both of these joint actions would allow you and your coworkers to pool resources, and Quickie-Mart would be forced to address the issues presented by all employees together in one action.

However, you and your coworkers cannot file a lawsuit in court because you all signed an arbitration agreement with Quickie-Mart. You cannot file a class action or a sixteen-person joint action because you all waived your rights to do so. Instead, you each have to file individual demands to arbitrate based on your individual arbitration contracts. Perhaps you are the first employee to be heard in arbitration, and you win: the arbitrator found that Quickie-Mart misclassified you as an independent contractor and denied you the legal benefits of your employee status. The question for the rest of your coworkers is whether they can use your judgment against the employer in their own individual arbitrations—that is, can they use offensive, nonmutual collateral estoppel, a form of issue preclusion?

Under ordinary rules of issue preclusion, because Quickie-Mart has litigated and lost the question as to whether you and your coworkers are independent contractors, it cannot relitigate that issue in the later cases. But do these "ordinary" rules apply in arbitration, rather than in court? What if there is a confidentiality clause in the arbitration contract—does that mean that none of Quickie-Mart's employees will be able to use another employee's successful judgment because none of the employees would know the result of any other employee's arbitration?

There is no settled law in this area to answer these questions for employers, employees, or arbitrators. The central question of this Note is whether employees can use offensive, nonmutual collateral estoppel in employment arbitration. Offensive nonmutual collateral estoppel is a procedural device that prevents a party

from relitigating an issue that was fully decided in a previous case.[1] While offensive use of nonmutual collateral estoppel has been allowed in court proceedings, even providing preclusive effect to a previous arbitration decision, there is no law that controls how an *arbitrator* deals with the preclusive effect of a previous arbitration result. The question of offensive use of nonmutual collateral estoppel in arbitration has been discussed in other areas of legal scholarship,[2] but most of these discussions relate to whether and how a *court* should employ preclusion doctrines to arbitration decisions.[3] The question of whether and how an *arbitrator* should apply preclusion from arbitration to arbitration has not been critically explored.

This Note argues that offensive, nonmutual collateral estoppel should be used from arbitration to arbitration, especially if an arbitrator determines that the parties intended to do so. However, many arbitration contracts might fail to include a provision specifically covering the preclusive effects of prior arbitration decisions. Despite this contractual silence, an arbitrator should employ offensive, nonmutual collateral estoppel because it is the fairest way to ensure that a final decision in arbitration is actually final. If an employer intends for arbitration to be a binding, final judgment, then the employer should be willing to have that judgment bind the employer in arbitration just like the judgment would in court.

The focus of this Note is limited to the employment arbitration setting, where adhesive arbitration agreements are increasingly common,[4] and where the parties frequently do not have equal bargaining power in making these agreements. The employment setting may give rise to different issues for preclusion than, for example, consumer or labor arbitrations, which may not have such unequal parties to the contract (labor) or the same kind of necessity that faces a job seeker (consumer). This Note does not attempt to address all the potential permutations of collateral estoppel in arbitration; it is meant to serve as an argument for the use of offensive, nonmutual collateral estoppel in employment arbitrations. But the same arguments regarding efficiency and finality are likely to apply in other arbitration settings.

Part I of this Note discusses the background law of arbitration and offensive, nonmutual collateral estoppel. Part II discusses the problem of using offensive, nonmutual collateral estoppel in the arbitration setting through the lens of different cases applying offensive, nonmutual collateral estoppel to arbitration decisions in court. Part III provides a potential solution to this problem by showing how and

1. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29 (1982).

2. *See, e.g.*, Timothy J. Heinsz, *Grieve it Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275 (1997); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988).

3. *See, e.g.*, Heinsz, *supra* note 2; Shell, *supra* note 2.

4. *See, e.g.*, Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. 2013) (holding arbitration clause in employment contract unconscionable and unenforceable); Prokopeva v. Carnival Corp., No. C-08-213, 2008 WL 4276975 (S.D. Tex. Sept. 10, 2008) (enforcing arbitration clause in employment contract).

why offensive, nonmutual collateral estoppel should be used from arbitration to arbitration.

I. OFFENSIVE, NONMUTUAL COLLATERAL ESTOPPEL AND EMPLOYMENT ARBITRATION

This Part proceeds in four subsections. First, Section A discusses the law behind collateral estoppel, particularly focusing on the Supreme Court's decision to allow offensive, nonmutual collateral estoppel in *Parklane Hosiery Co. v. Shore*. Second, Section B uses two case studies to demonstrate how lower courts have applied the Supreme Court's decision and framework from *Parklane*. Third, Section C explains how the Court has developed the law of offensive, nonmutual collateral estoppel after *Parklane*. And last, Section D paints a broad picture of the Supreme Court's current legal landscape for class action procedures and employment arbitration.

A. Collateral Estoppel

Collateral estoppel, or issue preclusion, means that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[5] Along with res judicata, or claim preclusion, this doctrine has the effect of promoting finality: "the conclusive resolution of disputes within [a court's] jurisdiction."[6] The Supreme Court has explained that the policy considerations behind collateral estoppel and res judicata are fairness and efficiency. The doctrines are meant "to preclude parties from contesting matters that they have had a full and fair opportunity to litigate," which "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[7]

In *Parklane Hosiery Co. v. Shore*, the Supreme Court first authorized the use of the procedural device of offensive, nonmutual collateral estoppel.[8] The case signaled a further liberalization of the doctrine and application of collateral estoppel.[9] In *Parklane*, the Court explained the difference between offensive and defensive uses of collateral estoppel as based on the differences of the party trying to use preclusion:

> [O]ffensive use of collateral estoppel occurs when the plaintiff seeks to

5. Montana v. United States, 440 U.S. 147, 153 (1979).
6. *Id.*
7. *Id.* at 153–54.
8. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979).
9. The liberalization of the doctrine had begun in 1942 in state courts, *see* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892 (Cal. 1942), and in 1971 by the Supreme Court, *see* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971), but offensive, nonmutual collateral estoppel was not recognized by the Court or used widely by federal courts until *Parklane*.

> foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.[10]

While both offensive and defensive uses of collateral estoppel involve a party who has already litigated and lost, the use of offensive, *nonmutual* collateral estoppel was seen as a large liberalization of the preclusion doctrine because previously, offensive use of collateral estoppel required privity of parties.[11] Offensive, nonmutual collateral estoppel entails different policy considerations and a different test than defensive collateral estoppel and offensive, mutual collateral estoppel. In offensive, nonmutual collateral estoppel, the plaintiff is relieved of proving one or more parts of the plaintiff's prima facie case by relying on a different plaintiff's litigation against the same defendant. In *Parklane*, the Court was faced with resolving the question of how to balance the fairness concerns engendered by offensive, nonmutual use of collateral estoppel while also promoting the finality and efficiency policy considerations that gave rise to the doctrine in the first place.

Parklane involved a class action instituted by stockholder plaintiffs against a corporation and its officers, directors, and stockholders who had collectively made a false statement in a merger.[12] The Securities Exchange Commission (SEC) also sued the same defendants in a separate action and alleged the same claim as the class of plaintiffs.[13] The SEC's action reached a final decision in the trial court before the stockholders' class action was decided.[14] The district court decided in the SEC's favor, finding that the defendants had indeed made a false statement.[15] The class of plaintiffs in the first action then moved for summary judgment in their class action case, arguing that the defendants could not relitigate the issue of making a false statement because of the collateral estoppel effect of the SEC judgment.[16] The district court denied the stockholder plaintiffs' motion because it found that allowing offensive, nonmutual collateral estoppel would violate the defendants' Seventh Amendment rights.[17] The Court of Appeals for the Second Circuit reversed, holding the defendants had a "full and fair opportunity to litigate" the factual issues disputed in the class action suit in the SEC suit, and so collateral estoppel was appropriate.[18] The Supreme Court then granted certiorari to resolve a

10. *Parklane*, 439 U.S. at 326 n.4.

11. *See id.* at 347 (Rehnquist, J., dissenting) (explaining that prior to *Blonder-Tongue*, courts required identical parties, or parties in privity with the previous parties, for collateral estoppel).

12. *Id.* at 324.

13. *See id.*

14. *See id.*

15. *Id.* at 324–25.

16. *Id.* at 325.

17. *Id.*

18. *Id.*

circuit split on whether offensive use of nonmutual collateral estoppel was appropriate in private party civil litigation.[19]

The Court in *Parklane* upheld the use of offensive, nonmutual collateral estoppel in the stockholders' class action suit.[20] The Court explained that "the preferable approach for dealing with" the potential problems of this procedural device "[was] not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[21] The Court's "general rule" was that "in cases where a plaintiff could have easily joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[22] The Court pointed to judicial economy, joinder (mis-)incentives, and fairness to the defendant as the key reasons for exercising caution in allowing offensive, nonmutual collateral estoppel.[23]

As the Court acknowledged in *Parklane*, "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does."[24] Defensive use encourages the plaintiff to join all potential defendants in one action to avoid preclusion based on collateral estoppel in a later proceeding.[25] Offensive use can encourage a plaintiff "to adopt a 'wait and see' attitude" because the plaintiff will not be bound by a previous suit favorable to the defendant, but the plaintiff will be able to use a defendant's previous loss against that defendant.[26] This "wait and see" problem cuts against both judicial economy and the purpose of party joinder, giving trial courts a good reason to look askance at a plaintiff attempting to use offensive, nonmutual collateral estoppel in most situations.

Additionally, the Court found that unfairness to the defendant was another policy reason militating against the use of offensive, nonmutual collateral estoppel.[27] Unfairness to the defendant could play out in several different ways: (1) the defendant could have different incentives to defend in different suits; (2) the previous judgment against the defendant could be inconsistent with other previous judgments; and (3) there could be differences in the procedural opportunities available in the different actions.[28] Each of these situations provides different analyses for trial judges determining whether a motion for collateral estoppel is appropriate.

The first circumstance of unfairness to a defendant is fairly easy to understand.

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19. *Id.* at 325–26.
20. *See id.* at 331–33.
21. *Id.* at 331.
22. *Id.*
23. *Id.* at 329–31.
24. *Id.* at 329.
25. *Id.* at 329–30.
26. *Id.* at 330 (citing Nevarov v. Caldwell, 327 P.2d 111, 115 (Cal. Ct. App. 1958) and Reardon v. Allen, 213 A.2d 26, 31–32 (N.J. Super. Ct. Law Div. 1965)).
27. *Id.*
28. *See id.* at 330–31.

As the Court explained, "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable."[29] This makes intuitive sense: why would a court enforce a prior judgment against a defendant when the subsequent case has a totally different potential result, such as a large difference in damages sought against the defendant?[30] To do so would be unfair to the defendant and unnecessarily raise the stakes of smaller litigation. On the other hand, if a defendant in a low-stakes case could foresee a successive, high-stakes case, then the unfairness of using collateral estoppel would be lessened and thus perhaps offensive, nonmutual collateral estoppel would be appropriate.

The second circumstance of unfairness is inconsistent judgments. This is the subject of a famous example from Professor Brainerd Currie's argument challenging the use of offensive, nonmutual collateral estoppel as unfair.[31] The Court explained Professor Currie's example in its *Parklane* decision:

> [A] railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.[32]

It seems patently unfair to allow a cunning plaintiff to wait until one bad case against the defendant comes down before bringing a claim, while the defendant cannot reference any cases that went in the defendant's favor. Of course, this assumes that joinder of plaintiffs is possible, which is not always the case.[33] The Court's reiteration of Professor Currie's example demonstrates that the Court was also seeking to avoid these kinds of inconsistent results when allowing the use of offensive, nonmutual collateral estoppel.

Lastly, the third circumstance focuses on procedural unfairness. This is particularly relevant to a discussion of arbitration, where the procedures can vary widely and are supposed to be more streamlined than a court adjudication of the same dispute. The Court did not discuss the application of offensive, nonmutual collateral estoppel to arbitration procedures in *Parklane*, but it did discuss the potential unfairness that could arise where a "defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in

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29. *Id.* at 330 (citing The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944) and Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965)).

30. This was the case in *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (2d Cir. 1965), cited by the Court in *Parklane*, 439 U.S. at 330. In *Berner*, the court found that the differences in the amounts found against the airlines in the different suits counseled against the use of collateral estoppel, even absent concerns about mutuality. *See Berner*, 346 F.2d at 539–41.

31. *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 285–86 (1957).

32. *Parklane*, 439 U.S. at 330 n.14.

33. *Cf.* FED. R. CIV. P. 19–21 (covering required joinder of parties, permissive joinder of parties, and misjoinder and nonjoinder of parties).

full scale discovery or call witnesses."[34] The Court also noted that the unfairness "is particularly acute in cases of offensive estoppel[] . . . because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action."[35] In some cases, however, the defendant will have chosen the forum, lessening the potential procedural unfairness. This is usually the case in arbitration. The defendant in most employment arbitrations is the employer, who has usually chosen the arbitral forum to resolve the employment dispute by requiring employees to sign adhesive employment agreements with an arbitration agreement. Thus, arbitration is particularly well suited for avoiding this third type of unfairness.

Despite all the potential problems with offensive, nonmutual collateral estoppel, the Court upheld its use in *Parklane*.[36] The Court explained that allowing its use in that case would "not reward a private plaintiff who could have joined in the previous action" because the stockholders in the class action likely could not have joined in the SEC's lawsuit, demonstrating that there were no joinder misincentives or judicial economy concerns weighing against the use of offensive, nonmutual collateral estoppel.[37] The Court also found no unfairness to the defendants for three main reasons. First, the Court found the defendants "had every incentive to litigate the SEC lawsuit fully and vigorously" because of "the serious allegations made in the SEC's complaint" and "the foreseeability of subsequent private suits that typically follow a successful Government judgment."[38] Second, the SEC judgment "was not inconsistent with any previous decision."[39] And third, the class action suit by the stockholders did not have any "procedural opportunities available to the [defendants] that were unavailable in the [SEC] action of a kind that might be likely to cause a different result."[40] The Court affirmed the Second Circuit's decision to allow the offensive use of nonmutual collateral estoppel.[41] With the *Parklane* decision, the Supreme Court led the lower federal courts into utilizing the procedural device of offensive, nonmutual collateral estoppel.

B. Lower Courts' Application of the Parklane *Offensive, Nonmutual Collateral Estoppel Rule*

Lower courts' applications of the general rule announced in *Parklane* have focused on the policy considerations of fairness and promoting finality. This is usually done through a party-centric analysis of the preclusion issue: the court must determine (1) which party is seeking preclusion; (2) which parties were present in the case for which preclusion is based upon; (3) and what role the party against

34. *Parklane*, 439 U.S. at 331 n.15.
35. *Id.*
36. *Id.* at 331–33.
37. *Id.* at 331–32.
38. *Id.* at 332.
39. *Id.*
40. *Id.*
41. *Id.* at 337. The Court also found that the Seventh Amendment was not a bar to the use of offensive, nonmutual collateral estoppel. *Id.*

whom preclusion is sought had in the prior case. The courts applying *Parklane* have focused on fairness and a party-centric analysis because preclusion affects the rights of parties to the suit. Preclusion focuses on claims (res judicata) or issues (collateral estoppel), but the application of a preclusive doctrine is always to a set of parties, so concerns of fairness to those parties underlie the application of these doctrines.

The lower courts' approach is consistent with the Restatement (Second) of Judgment's treatment of issue preclusion. The Restatement calls for collateral estoppel effect to be granted when the issue is (1) "actually litigated and determined by a valid and final judgment," and (2) the decision on that issue is "essential to the judgment."[42] The Restatement's extension of this approach to nonmutual cases further analyzes the parties involved in the different cases. A party that would face issue preclusion in a mutual case faces preclusion in a subsequent nonmutual case when there is a "full and fair opportunity to litigate the issue in the first action," with attention paid to other considerations that could make doing so unfair to that party.[43] The Restatement explains the rationale of nonmutual issue preclusion in terms of fairness to the parties:

> A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries. Equivalence of litigating risk, while a proper element in determining whether preclusion should be imposed, is only one of several considerations relevant in determining the fairness of estopping a party from retrying an issue he has already contested.[44]

The other considerations that the Restatement mentions are akin to those raised by the Court in *Parklane* when discussing fairness to the party being precluded. These considerations include: compatibility of the remedies in the different suits; procedural opportunities in the different fora; whether the party seeking preclusion could have joined in the previous action; the consistency of different determinations of the same issue; the relationships among the parties that could affect the outcome of the prior action; and other similar concerns.[45] These considerations reflect the fact that while preclusion promotes the finality of prior adjudications, it should not promote such finality in the absence of fairness to the parties.

To illustrate how lower courts apply the *Parklane* rule, this Section examines two instructive cases where the courts focused on fairness through a party-centric analysis to determine the appropriateness of offensive, nonmutual collateral estoppel. First is the Ninth Circuit's approach in *Robi v. Five Platters, Inc.*, where

42. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 1, § 27.
43. *Id.* § 29.
44. *Id.* § 29 cmt. b.
45. *See id.* § 29, illus. (1)–(8).

inconsistent prior judgments precluded the use of offensive, nonmutual collateral estoppel as unfair to the defendant. Second is the Third Circuit's analysis in *Raytech Corp. v. White*, which allowed for offensive, nonmutual collateral estoppel because doing so would not be unfair to the defendant, who could foresee subsequent suits and every reason to litigate aggressively in the first suit. While the courts reached opposite results in these cases, both courts focused on the *Parklane* considerations of fairness to the defendant when determining whether to allow offensive, nonmutual collateral estoppel.

The Ninth Circuit in *Robi v. Five Platters, Inc.* determined that a trial court's decision to allow offensive, nonmutual collateral estoppel was an abuse of discretion because there were inconsistent judgments on the issue sought to be precluded.[46] In the case, one of the plaintiffs, Robi, had a judgment against the defendant, Five Platters.[47] The other plaintiff, Williams, had separately sued the defendant twice and lost both cases.[48] The two plaintiffs were contesting the ownership of the name "Five Platters" with their previous employer-corporation, Five Platters, Inc.[49] Williams sought to use Robi's prior successful judgment against Five Platters in a California federal district court.[50] The Ninth Circuit explained that when faced with inconsistent judgments, it would apply a "last in time rule" that provides preclusive effect to the most recent judgment "so that finality is achieved and the parties are encouraged to appeal an inconsistent judgment directly rather than attack it collaterally before another court."[51] For Robi, his previous state court decision had claim preclusive effects on the current federal case, and so the Ninth Circuit agreed with the lower court in determining that Robi could successfully claim res judicata in the suit.[52]

However, Williams was not a party to Robi's state case and hence there was no res judicata effect for his case based on Robi's prior judgment. Instead, Williams was trying to use offensive, nonmutual collateral estoppel to prevent Five Platters from relitigating the issues it lost against Robi in Robi's prior state case and now Robi's federal case.[53] The district court had allowed Williams to do this, primarily basing its decision on the last-in-time rule because it had decided Robi's suit against Five Platters, Inc. before deciding Williams's case.[54] The Ninth Circuit reversed this decision based on unfairness to the defendant.

First, the court pointed out that in *Parklane*, the Supreme Court "encouraged district courts . . . to apply offensive issue preclusion in such a way that the incentives to increase rather than decrease the total amount of litigation would be

46. *See* Robi v. Five Platters, Inc., 838 F.2d 318, 329–30 (9th Cir. 1988).
47. *Id.* at 320.
48. *Id.* at 320–21.
49. *Id.* at 320.
50. *See id.*
51. *Id.* at 323.
52. *Id.* at 324.
53. *Id.* at 320.
54. *Id.* at 326–28.

minimized."[55] It found that Williams's case presented that litigation misincentive situation because Williams had already attempted to use Robi's successful suit in his previous unsuccessful suits rather than joining in Robi's suits in the first instance. Thus, Williams was trying to gain a "benefit by waiting on the sidelines rather than joining in the first litigation" by Robi.[56] Second, the court found that the multiple inconsistent judgments increased the unfairness to the defendant because the district court was ignoring the judgments adverse to Williams and only providing preclusive effect to the judgment beneficial to Williams.[57] Williams's attempted use of offensive, nonmutual collateral estoppel was different from that in *Parklane* because "the party against whom issue preclusion was asserted had experienced inconsistent judgments in litigation with parties other than the present party opponent."[58] Thus, the Ninth Circuit found that Williams's use of offensive, nonmutual collateral estoppel was not allowed.[59]

Similarly, in *Raytech Corp. v. White*, the Third Circuit focused on the fairness to the defendant in finding that offensive, nonmutual collateral estoppel was appropriately applied by the district court.[60] The defendant, Raytech, was an offshoot company of a different, asbestos-producing company that had experienced considerable asbestos-related litigation and was struggling financially.[61] In a previous suit brought by a different plaintiff in a federal district court in Oregon, *Schmoll v. ACandS, Inc.*,[62] Raytech submitted to the court the question of whether Raytech was "a successor in liability" to the asbestos producing company.[63] The Oregon district court found Raytech was a successor in liability and legally responsible for the other company's strict liability torts.[64] Raytech then filed for Chapter 11 bankruptcy and filed a suit in a different federal district court seeking a declaratory judgment that it was "not liable for the asbestos-related torts" of the previous asbestos producing company in terms of Raytech's bankruptcy liability.[65] The district court decided that the previous *Schmoll* decision had a preclusive effect on Raytech's bankruptcy action because the two cases presented the same question of successor liability.[66] Thus, Raytech was collaterally estopped from relitigating its successor liability for the asbestos producing company.

The Third Circuit affirmed the district court's use of offensive, nonmutual collateral estoppel in this case because it found all the technical requirements of

55. *Id.* at 329.
56. *Id.*
57. *Id.*
58. *Id.* at 330.
59. *Id.* at 329–30.
60. Raytech Corp. v. White, 54 F.3d 187, 196 (3d Cir. 1995).
61. *Id.* at 189.
62. Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988).
63. *Id.* at 869.
64. *Id.* at 874–75.
65. *Raytech*, 54 F.3d at 190.
66. *Id.*

collateral estoppel were met.[67] Additionally, it found that there was no unfairness to Raytech based on the *Parklane* considerations.[68] Raytech primarily argued that facts had changed since *Schmoll* that would make it unfair for Raytech to be "collaterally estopped from relitigating the successor liability issue."[69] These facts included Raytech's payment of a substantial amount of money to the previous asbestos company for purchasing from that company some of its profitable parts.[70] Raytech also argued that it could not have foreseen the importance of the *Schmoll* decision, but the *Schmoll* court's record demonstrated "that the parties submitted thousands of pages of documents and deposition transcripts for [the *Schmoll* court's] consideration regarding the successor liability issue" and so the district court had dismissed this unfairness argument out of hand, as did the Third Circuit.[71] The Third Circuit found no essential facts changed from *Schmoll* to the current bankruptcy litigation, and since the issue of successor liability was fully litigated in *Schmoll*, Raytech could not relitigate the issue.[72] Thus, the use of offensive, nonmutual collateral estoppel was found to be appropriate in this case.

C. Further Supreme Court Development of Collateral Estoppel Doctrine

Since *Parklane*, the Supreme Court has recognized limits to the offensive use of collateral estoppel, such as not allowing the government to be offensively collaterally estopped by a nonmutual party.[73] In *United States v. Mendoza*, the Court explained that the government was a different kind of party than those involved in the previous cases where it had allowed offensive, nonmutual collateral estoppel, such as *Parklane*, because the latter cases had "involved disputes over private rights between private litigants."[74] The Court characterized the difference between public and private actors in relation to the "geographic breadth of Government litigation and also, most importantly . . . the nature of the issues the Government litigates."[75]

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67. *Id.* at 193. The Third Circuit explained that "[t]raditionally, courts have required the presence of four factors before collateral estoppel may be applied: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Id.* at 190. This is another way of stating the analysis by the Restatement. *See supra* notes 42–43.

68. *Id.* at 196.

69. *Id.* at 195.

70. *See id.*

71. *Id.* at 196 n.9.

72. *See id.*

73. *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 158 (1984). The Court explained that its holding was limited to *nonmutual* collateral estoppel; it found that if the parties were the same, or res judicata was to be applied, then there was no categorical rule disallowing preclusion against the government. *Id.* at 163–64.

74. *Id.* at 159.

75. *Id.* The Court also explained that allowing preclusion against the government would not only change the way the Court granted certiorari because it usually waits for a conflict to occur before granting review, but would also change the way the Solicitor General operated in deciding which cases to appeal because the Solicitor General often considers different concerns than a private litigant considers when making the decision to appeal. *See id.* at 160–61.

The Court found that the government was "party to a far greater number of cases on a nationwide basis" than private entities and certain claims—like constitutional ones—are "of substantial public importance" and can only be raised against the government.[76] Thus, the government is more likely than other private parties to face "lawsuits against different parties which nonetheless involve the same legal issues," and allowing offensive, nonmutual collateral estoppel to be used against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[77] Thus, the Court found that the policy considerations that differentiated the government as a party to a suit from private entities as parties to a suit also counseled against allowing offensive, nonmutual collateral estoppel to apply against the government.[78] The Court's holding in *Parklane* is also limited to federal courts deciding cases where federal procedural and preclusive rules apply. This means that a different approach can be taken in state courts[79] or in diversity cases applying state law in federal courts.[80]

Yet, the Court has simultaneously expanded the use of offensive, nonmutual collateral estoppel in other situations, such as by allowing administrative hearings and arbitration decisions to have res judicata and collateral estoppel effects on federal courts.[81] In *United States v. Utah Construction*, the Court held an administrative agency's findings of fact preclusive to the Court of Claims's resolution of a contractual dispute between a private construction and mining company and the United States government because of the parties' agreement and the Wunderlich Act.[82] But, importantly, the Court's result was also "harmonious with general principles of collateral estoppel."[83] The Court explained that "[w]hen an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[84] The Court further cited to *Goldstein v. Doft*, explaining the case as one "where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator,"

76. *Id.* at 159–60.

77. *Id.* at 160.

78. *Id.* at 162.

79. *See, e.g.*, Ditta v. City of Clinton, 391 So. 2d 627, 629 (Miss. 1980) (requiring privity of parties for both res judicata and collateral estoppel to be used under Mississippi law).

80. *See, e.g.*, Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973) ("In a diversity action in federal court the state law is controlling on the question of applicability of the collateral estoppel doctrine to a given set of circumstances."); Breeland v. Sec. Ins. Co., 421 F.2d 918, 921 (5th Cir. 1969) (holding the same for "questions of res judicata and estoppel"); *see also* Priest v. Am. Smelting & Ref. Co., 409 F.2d 1229, 1231 (9th Cir. 1969) (same).

81. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421–22 (1966) (citing Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966)). In *Goldstein*, the court applied collateral estoppel to decisions of an arbitrator. *Goldstein*, 236 F. Supp. at 732.

82. *Utah Constr.*, 384 U.S. at 421, 423.

83. *Id.* at 421.

84. *Id.* at 422.

which suggests that the Court implicitly approved the use of collateral estoppel to arbitration decisions.[85] The Court later reaffirmed *Utah Construction* in *University of Tennessee v. Elliott*,[86] where it restated *Utah Construction*'s policy statement: "giving preclusive effect to administrative fact finding serves the value underlying general principles of collateral estoppel: enforcing repose."[87] Lower courts since have continued to apply preclusive effect to arbitral decisions[88] and administrative agency decisions or fact finding.[89]

D. Arbitration, Collateral Estoppel, and Where to Go From Here

The Supreme Court's implicit allowance of preclusion based on arbitration decisions, and lower federal courts' actual granting of such preclusive effect, is particularly important for employment disputes because many employers require employees to sign arbitration agreements for work-related disputes. The Court has interpreted the Federal Arbitration Act[90] (FAA) to require enforcement of arbitration agreements in most employment settings.[91] The FAA is the federal mandate in favor of enforcing arbitration contracts and it preempts all contrary state law that may favor resolving certain disputes—statutory or otherwise—in a judicial forum.[92] Thus, all employees whose employers require arbitration agreements are now required to arbitrate any claim covered by the agreement, whether or not the claim arises from federal or state statutory rights.[93] The Court has taken further strides in enforcing arbitration contracts: It has recognized that class action waivers

85. *Id.*

86. Univ. of Tenn. v. Elliott, 478 U.S. 788, 797–98 (1986).

87. *Id.* at 798.

88. *See, e.g.*, Pike v. Freeman, 266 F.3d 78, 90–92 (2d Cir. 2001) (explaining the rule that preclusive effects can attach to "past determinations in arbitral proceedings" but finding the elements required for preclusion not met in the case at bar); Kroeger v. U.S. Postal Serv., 865 F.2d 235, 238–39 (Fed. Cir. 1988) (affirming an administrative law judge's application of collateral estoppel to a labor arbitration decision); Schattner v. Girard, Inc., 668 F.2d 1366, 1368–69 (D.C. Cir. 1981) (per curiam) (affirming district court's preclusion of certain claims based on a previous commercial arbitration decision); Old Republic Ins. Co. v. Lanier, 790 So. 2d 922, 929, 931 (Ala. 2000) (giving res judicata effect to a prior arbitration decision).

89. *See, e.g.*, *Elliot*, 478 U.S. at 794; Miller v. Cty. of Santa Cruz, 39 F.3d 1030, 1032–33 (9th Cir. 1994); Layne v. Campbell Cty. Dep't of Soc. Servs., 939 F.2d 217, 219 (4th Cir. 1991).

90. Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012).

91. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

92. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (citation omitted)).

93. This is assuming, of course, that the arbitration agreement is enforceable. The FAA has an exception that allows "such grounds as exist at law or in equity for the revocation of any contract" to be used to find an arbitration agreement unenforceable. 9 U.S.C. § 2; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."). The Court in *Concepcion* listed "'fraud, duress, or unconscionability'" as permissible contract-based grounds to invalidate an arbitration contract. *Concepcion*, 13 S. Ct. at 1746 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

are enforceable,[94] even where the statute at issue expressly permits collective action.[95]

The Court's decision to enforce these class action waivers derives from the Court's contractual view of arbitration agreements.[96] The Court has found that a party cannot be compelled to submit to class arbitration absent an agreement to do so.[97] But the Court has allowed class arbitration to occur if it effectuates the parties' intent.[98] In *Oxford Health Plans LLC v. Sutter*, the arbitrator interpreted the parties' arbitration agreement to allow class arbitration.[99] The health insurance company that had designed the arbitration contract went to federal court to vacate the arbitrator's decision, but the court denied the company's motion.[100]

The Supreme Court unanimously affirmed the decision to allow class arbitration to proceed as determined by the arbitrator.[101] The health insurance company argued that the arbitrator's decision should be overturned under Section 10(a)(4) of the FAA, "which authorizes a federal court to set aside an arbitral award 'where the arbitrator[] exceeded [his] powers.'"[102] But the Court explained that this was a narrow exception: "the sole question for [the Court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[103] In a footnote, the Court noted that this case may have reached a different result if the company had argued that whether class arbitration was available was a "so-called 'question of arbitrability,'" because such questions are subject to de novo court review "absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute."[104] Because the company had failed to make that argument and had instead "agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures," the Court found that it could not answer the question left open by *Stolt-Nielsen* of "whether the availability of class arbitration is a question of arbitrability."[105] Thus, this area of

94. *Concepcion*, 13 S. Ct. at 1753 (striking down as preempted California's *Discover Bank* rule, which had prevented a consumer from being forced to arbitrate small-value claims and instead gave the consumers an option to form a class action); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013).

95. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (finding that the Age Discrimination in Employment Act, which authorized class actions to vindicate statutory rights, did not prevent arbitration on an individual basis).

96. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

97. Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (finding no class arbitration could be compelled by the arbitrators where both parties expressly stipulated that they had not come to a decision on class arbitration in making their arbitration agreement).

98. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2070–71 (2013).

99. *Id.* at 2067.

100. *Id.* at 2068.

101. *Id.* at 2071.

102. *Id.* at 2068 (alterations in original) (quoting 9 U.S.C. § 10(a)(4) (2012)).

103. *Id.*

104. *Id.* at 2068 n.2 (alterations in original) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)).

105. *Id.* (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 680 (2010)).

employment arbitration—and arbitration more generally—is still open to debate since the Court has not decided the extent of its review of class arbitration.

However, the Court did not hold that class arbitration was binding on other class members.[106] In a concurring opinion, Justice Alito, joined by Justice Thomas, expressed strong doubts as to whether an absent class member to a class arbitration could be bound by the arbitrator's decision.[107] Justice Alito explained that absent class members "never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration" and thus, "it [wa]s far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute."[108] The Justices also raised the issue of collateral attack to class arbitrations, which may "allow absent class members to unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'"[109] This is similar to the concerns the Court had about offensive, nonmutual collateral estoppel in *Parklane*: both opinions express a desire to avoid a counterproductive, wait-and-see incentive for later plaintiffs or class members. Thus, at least two members of the current Court have expressed a view that preclusion between arbitrations could be problematic due to the contractual nature of arbitration as well as fairness and efficiency concerns.

This discussion of the potential availability of class procedures in arbitration connects to the fairness considerations of *Parklane*. In *Parklane*, the Court had discussed the ability of plaintiffs to avoid joining in a suit in order to use that suit offensively against the same defendant.[110] However, if an arbitration plaintiff were unable to join a different arbitration, perhaps because of a class arbitration waiver, then this consideration weighing against offensive, nonmutual collateral estoppel would not be present in the plaintiff's arbitration proceeding. Further, the other fairness concerns of the Court in *Parklane* are often lessened in an arbitral forum. For example, the defendant in an employment arbitration is usually—if not always—the employer, which would be the party that drafted the arbitration agreement and thus chose the arbitration forum and the procedures available to the arbitral parties. Also absent is the element of surprise because the employer has chosen this forum to resolve all disputes, and if the employer is treating all employees of a certain type in a potentially illegal way, then the arbitrations against that employer are foreseeable. Of course, there could still be procedural unfairness to the employer if different procedures are used in different arbitrations or if the procedures the arbitration allows are so curtailed as to prevent a full and fair hearing from taking place. But the latter issue would also raise due process concerns for the

106. *See id.* at 2066 ("We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.").

107. *Id.* at 2071 (Alito, J., concurring).

108. *Id.*

109. *Id.* at 2072 (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 546–47 (1974)).

110. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

employees dealing with forced arbitration of their statutory rights under questionable arbitral procedures.[111]

Additionally, part of the argument against class action procedures, both in court and in arbitration, is that class procedures raise the stakes of litigation too high for defendants and risk potentially frivolous claims being treated more seriously because of those high stakes.[112] These procedures also encourage the defendant to settle even frivolous claims in order to avoid not only the expense of litigation but also the potential for a huge award. In the employment context, lowering the stakes of employment disputes is at least part of the reason why employers began requiring arbitration in the first place. Large employers also tend to have uniform personnel policies, which can lead to the same factual and legal issues arising across a class of plaintiff-employees. By requiring employees to agree to an adhesive employment contract that forbids class procedures and mandates individual arbitration of employment disputes, large companies mitigate the risk that these high-stake class procedures otherwise entail. The Supreme Court's enforcement of employment arbitration agreements and class action waivers accommodates this concern. Thus, the Court could find applying preclusion inappropriate because preclusion could also raise a defendant's risks from a single decision by allowing that decision to have preclusive effect in a later arbitration.

However, the reason why the stakes are so high in these kinds of cases is often a function of the beneficial size of large employers. Companies receive benefits of efficiency and economies of scale by becoming large, and they often have to employ a large workforce to support the size of the company. The employer's decision to expand and have a larger number of employees should not mean that the necessary increase in the size and stakes of litigation should weigh as an "unfairness" consideration for the employer—the employer has received an equal advantage in terms of its profits and business success. Further, allowing preclusion is not the same as allowing class actions or class arbitrations. Preclusion does not mean that if a large employer loses one arbitration, then it will automatically lose the fifteen—or hundred—arbitrations that follow. Rather, some arbitrations will include different facts that prevent preclusion from attaching to a prior decision, or some arbitrations will have different stakes or will simply fail the *Parklane* fairness considerations. Thus, allowing preclusion does not mean an automatic win for a party in any case; it simply prevents relitigation or rearbitration of a legal issue that has been fully and fairly decided. Employment arbitrations in these large companies with uniform personnel policies are the perfect location for using arbitration-to-arbitration preclusion because of the uniformity leading to similar factual and legal

111. *See* discussion *infra* pp. 680.

112. *See* Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* DR Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175, 176, 192–99 (2014) (discussing arguments for and against class procedures in arbitration and litigation, particularly in an employment context); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686–87 (2010) ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation.").

issues, and because using preclusion increases dispute resolution efficiency for all parties.

The only purpose for a categorical decision that offensive, nonmutual collateral estoppel or other preclusion doctrines cannot apply to arbitration even when all the *Parklane* considerations are met is the suppression of claims. This kind of "claim suppressing" arbitration has been addressed in fuller detail by David S. Schwartz in *Claim-Suppressing Arbitration: The New Rules*.[113] The Court should not allow those who have the bargaining power to require arbitration to then use that decision to suppress claims, whether in the preclusion context as this Note focuses on, or in arbitration more generally, as Schwartz discusses. It is arguably more efficient for employers to allow preclusion to attach to arbitration decisions rather than try to avoid it. If all the *Parklane* considerations are satisfied, then the use of offensive, nonmutual collateral estoppel speeds up arbitrations, reducing costs for all parties involved. It also encourages all parties to arbitrate their issue at the same intensity and to reach a correct result. If the employer loses, then the employer was wrong and it is more efficient for that employer to then settle with the remaining employees with the same legal issue and similar facts rather than to rearbitrate the same kind of case over and over. The arbitration awards may end up being a lot of money for the employer, but that is a consequence of the size of the employer and covered by its economy of scale. However, as the Supreme Court has not spoken on this issue specifically, whether offensive, nonmutual collateral estoppel can and should be applied from arbitration to arbitration is still an open issue for employers and employees, and the arbitrators interpreting arbitration agreements.

II. WHETHER AND HOW OFFENSIVE, NONMUTUAL COLLATERAL ESTOPPEL CAN BE USED IN ARBITRATION

As discussed in Part I,[114] an employer who requires an employee to sign an arbitration agreement containing a class action waiver can also include class arbitration in that waiver. This inability to use any class procedure is why offensive, nonmutual collateral estoppel is important for employment arbitration. If an employee cannot join with other employees in a class action, then the employees will all have to arbitrate separately. And if the employees all have the same legal issue and similar facts, the employees will want to use a fellow employee's favorable judgment against the employer in their own later arbitrations, just like they could do in a court under *Parklane*. Using the previous judgment against the employer helps the employees mitigate against the cost of losing class procedures in the arbitration agreement. Most importantly, if the decision of the arbitration is actually a binding, final judgment—just like a court decision—then it should have the same preclusive effect as a court decision.

Can offensive, nonmutual collateral estoppel be used in arbitration? The

113. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012).

114. *See* discussion *supra* Part I.D.

Supreme Court has not answered this question. However, several circuit courts and state courts have reached decisions allowing or precluding offensive, nonmutual collateral estoppel in arbitration decisions. This Part will discuss cases from the Ninth Circuit, the Second Circuit, and the California Supreme Court with the aim of illustrating how courts apply—or decide not to apply—offensive, nonmutual collateral estoppel in arbitration proceedings. The Second and Ninth Circuits generally agree with each other on why and how to apply offensive, nonmutual collateral estoppel in arbitration. However, the California Supreme Court found that private arbitration is unlike regular litigation and so preclusion doctrines should apply differently, and in the case of offensive, nonmutual collateral estoppel, not apply at all. However, the California Supreme Court's approach is reconcilable with the circuit courts' approach because the California Supreme Court was focused on private party dealings rather than employment arbitration, as discussed further below.

A. The Ninth Circuit Approach: Broad Discretion

The Ninth Circuit has decided that arbitrators have "broad discretion" to determine whether collateral estoppel should be applied in an arbitral proceeding.[115] In *Collins v. D.R. Horton*, the plaintiffs were two executives of a company that merged with D.R. Horton.[116] In anticipation of the merger, these plaintiffs and another executive, Hickcox, signed a new employment agreement—including a new severance package—with the company that merged into D.R. Horton.[117] When D.R. Horton terminated Hickcox without cause, the plaintiffs resigned under the "good reason" provision of their employment contracts—but D.R. Horton refused to honor their severance packages, including a contested provision for shares of stock.[118]

Hickcox and the plaintiffs filed separate suits against D.R. Horton with "nearly identical breach of contract and fraud claims" for the shares of stock.[119] D.R. Horton then moved to compel arbitration in Hickcox's case based on an arbitration agreement in the employment contract, but at that time, the Ninth Circuit held that the FAA did not apply to employment contracts; thus, the district court denied the motion.[120] Hickcox's and the other two plaintiffs' trials proceeded in federal district court, with Hickcox's trial set for two months prior to the other two plaintiffs.[121] The jury found for Hickcox on all grounds, including the claim about the shares of stock that Hickcox and the two plaintiffs had in common.[122]

115. Collins v. D.R. Horton, Inc., 505 F.3d 874, 882 (9th Cir. 2007).
116. *Id.* at 876.
117. *Id.* at 876–77.
118. *Id.* at 877.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 878.

However, before the two plaintiffs' trial began, the Supreme Court held arbitration clauses enforceable even in employment contracts, reversing the contrary Ninth Circuit rule; thus, the other two plaintiffs had to arbitrate their claims.[123] The plaintiffs moved for summary judgment on the basis of offensive, nonmutual collateral estoppel for the breach of contract and fraud claims for the shares of stock, which were identical to the claims in Hickcox's case.[124]

The question answered by the Ninth Circuit in *Collins* is a bit different than the question posed by this Note; the Ninth Circuit was reviewing the arbitrators' decision whether to give preclusive effect to a previous trial court proceeding, rather than a previous arbitral decision.[125] In making their decision, the arbitrators were concerned that if the trial court judgment in Hickcox's case was overturned on appeal and the arbitrators had given Hickcox's decision preclusive effect in the arbitration, then there would be a problem because their arbitration award would not be subject to the same kind of judicial review that would accompany a preclusion decision in a court case.[126] The arbitrators explained that "[p]racticality and fairness" guided their decision to not give preclusive effect to Hickcox's case because "estoppel, if now ordered, cannot later be undone if the Hickcox judgment is later reversed."[127] The panel of arbitrators found for D.R. Horton on the breach of contract and fraud claims premised on the agreement to provide shares of stock, unlike the decision in Hickcox's case.[128] In response, the two plaintiffs filed suit in federal district court claiming the arbitrators "displayed a manifest disregard for the law when deciding not to apply offensive nonmutual collateral estoppel to bar Horton from relitigating whether Horton made an enforceable 30,000 share promise."[129]

The Ninth Circuit held that arbitrators have to give prior court judgments preclusive effect, but that the arbitrators decide whether the prerequisites for collateral estoppel are met and have the "same broad discretion" of trial courts to determine whether to apply offensive, nonmutual collateral estoppel.[130] The court found that the arbitrators in the *Collins* case did not manifestly disregard the law because the arbitrators considered the court judgment as final, but also recognized that the FAA's "narrow scope of review limits the ability of an arbitration defendant to overturn a collateral estoppel-based arbitration award in the event the judgment upon which it is based is vacated or reversed on appeal," a distinction which the court found supported by precedent.[131] The real basis of the court's affirmance, however, was that "'[t]he governing law alleged to have been ignored by the

123. *Id.*
124. *Id.*
125. *Id.* at 883.
126. *Id.* at 878.
127. *Id.*
128. *Id.*
129. *Id.* at 879.
130. *Id.* at 882.
131. *Id.* at 883.

arbitrators [was not] well defined, explicit, and clearly applicable'" because the arbitrators had no precedent to rely on when determining whether and how to apply offensive, nonmutual collateral estoppel in the case.[132] But after *Collins*, it is clear that the Ninth Circuit would support an arbitrator's decision to apply offensive, nonmutual collateral estoppel if the conditions were right, as arbitrators have the same broad discretion as a trial court in this area.

B. The Second Circuit Approach: Broad Discretion

Like the Ninth Circuit, the Second Circuit has found that arbitrators have broad discretion when determining how and when to give preclusive effects in arbitration decisions. In *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, the Second Circuit determined that an arbitration panel did not manifestly disregard the law[133] when refusing to grant offensive, nonmutual collateral estoppel effect to the decision of a previous arbitration.[134] In that case, a company, Ontario, arbitrated against Bear Stearns based on "a massive securities fraud perpetrated by [Baron,]" a company for which Bear Stearns was the clearing broker.[135] The arbitration was before a panel of arbitrators from the National Association of Securities Dealers, Inc. (NASD), and the NASD arbitrators ruled in favor of Bear Stearns.[136]

When Bear Stearns sought to confirm the award in federal district court, Ontario cross-moved to vacate the award, arguing "that Bear Stearns was collaterally estopped from denying liability because it had lost another arbitration conducted before another NASD panel" on the same issue.[137] Thus, Ontario wanted the arbitral panel to apply offensive, nonmutual collateral estoppel; its argument was that the arbitrators' decision in the Bear Stearns–Ontario arbitration was inconsistent with a prior arbitration between Bear Stearns and another company hurt by the Baron fraud.[138] Bear Stearns agreed that there were inconsistent judgments, but pointed out that offensive, nonmutual collateral estoppel was inappropriate precisely because of those inconsistent judgments. Bear Stearns argued there was only one case favorable to Ontario, but there were two other NASD arbitral decisions arising from the same Baron fraud that were favorable to Bear Stearns, and these other panel decisions were decided after the one Ontario sought to use for collateral estoppel.[139] In denying Ontario's request for collateral

132. *Id.* at 884 (emphasis omitted) (quoting Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004)).

133. "Manifest disregard of the law" is the standard of review courts apply to arbitration decisions based on an interpretation of § 10 of the FAA. 9 U.S.C. § 10(a)(4) (2012); *see also* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584–85 (2008) (explaining that "manifest disregard of the law" was a standard of review based on § 10 of the FAA, but cautioning against expanding the terms of the statute through using that language).

134. Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 91–93 (2d Cir. 2005).

135. *Id.* at 89.

136. *Id.*

137. *Id.*

138. *Id.* at 89–90.

139. *Id.* at 90.

estoppel, the arbitrators "gave no explanation," but the Second Circuit found this not to be a problem in affirming the arbitrators' decision.[140]

The court recognized that arbitration decisions "may effect collateral estoppel in a later litigation or arbitration if the proponent can show 'with clarity and certainty' that the same issues were resolved."[141] Further, the court found, "a court must satisfy itself that application of the doctrine is fair" before allowing offensive, nonmutual collateral estoppel to be employed.[142] And the Second Circuit recognized that arbitrators—just like trial judges—have "broad discretion" in making the determination of whether collateral estoppel is appropriate.[143] Examining the case at bar, the Second Circuit found that the arbitrators "had discretion to apply collateral estoppel or not" because of the "differing results reached by different panels"—inconsistent judgments being one of the *Parklane* considerations that caution against allowing offensive, nonmutual collateral estoppel.[144] Thus, the Second Circuit, like the Ninth Circuit, recognized and deferred to the discretion and fairness decisions of the arbitrators when determining the appropriateness of using offensive, nonmutual collateral estoppel in arbitrations.

C. The California Supreme Court Approach: Contractually Bound

The California Supreme Court has taken a different approach than the Second and Ninth Circuits in relation to the offensive use of nonmutual collateral estoppel in arbitration. In *Vandenberg v. Superior Court*,[145] the California Supreme Court held that "a private arbitration award, even if judicially confirmed, may not have a nonmutual collateral estoppel effect under California law unless there was an agreement to that effect in the particular case."[146]

The parties in *Vandenberg* were a private party, Vandenberg, and a group of insurance companies whom Vandenberg sued for "various causes of action arising out of the failure to defend, settle, or indemnify" Vandenberg in a previous arbitration between Vandenberg and Vandenberg's commercial landlord.[147] The landlord and Vandenberg used private arbitration to settle their dispute as to whether oil pollution on the landlord's land breached the lease between the landlord and Vandenberg, with Vandenberg only agreeing to arbitrate if it was binding.[148] The arbitration resulted in the arbitrator determining that Vandenberg was at fault for the pollution and that this was a breach of the lease agreement; the award against Vandenberg was four million dollars.[149] The insurance companies denied

140. *Id.*
141. *Id.* at 91 (quoting Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 49 (2d Cir. 2003)).
142. *Id.*
143. *Id.* at 91–92.
144. *Id.* at 92.
145. Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999).
146. *Id.* at 234.
147. *Id.* at 234–35.
148. *Id.* at 235.
149. *Id.*

Vandenberg's request for indemnification and instead argued that their insurance contracts did not cover the kind of pollution that the arbitrator decided had occurred in the arbitration between Vandenberg and the landlord. Essentially, the insurance companies attempted to use offensive, nonmutual collateral estoppel to prevent Vandenberg from relitigating the pollution issue.[150]

The trial court had allowed the companies to use collateral estoppel, but the California Court of Appeal reversed, holding that "absent a contrary agreement by the arbitral parties, a party to private arbitration is not barred from relitigating issues decided by the arbitrator when those issues arise in a different case involving a different adversary and different causes of action."[151] The appellate court found it unfair to allow offensive preclusion in that kind of case because "private arbitration lacks significant safeguards of court litigation, particularly the right to full judicial review."[152] This decision found arbitration lacked procedural safeguards, despite the fact that the arbitration between Vandenberg and his landlord was "before a retired federal judge" with "[f]ormal discovery," "transcribed proceedings," "representation by counsel, and extensive evidence, briefing, and argument," and concluded with a "lengthy and detailed decision" by the arbitrator.[153] The case then went to the California Supreme Court for review.

The case asked the California Supreme Court to examine whether "an arbitration governed by California's private arbitration law" is subject to nonmutual collateral estoppel.[154] The court expressly noted that its decision did not cover the res judicata effects of arbitration decisions, mutual collateral estoppel, the application of the FAA in contrast to the state arbitration law, labor arbitrations, or other arbitrations under other California state laws; it left open these various circumstances for different cases that called for such decisions.[155] The private arbitration law of California under which the court decided *Vandenberg* is very similar to the FAA in its terms: "The fundamental premise of the scheme is that '[a] written agreement to submit [either a present or a future controversy] to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.'"[156] However, unlike the Second and Ninth Circuit's interpretation of arbitration under the FAA, the California Supreme Court found that the private arbitration law did not allow arbitrators broad discretion to apply offensive, nonmutual collateral estoppel.[157]

150. *Id.* at 235–36.
151. *Id.* at 236.
152. *Id.*
153. *Id.* at 235.
154. *Id.* at 233–34.
155. *Id.* at 234 n.2.
156. *Id.* at 238 (quoting CAL. CIV. PROC. CODE § 1281 (West 1998)). The California law is very similar to the FAA's savings clause. 9 U.S.C. § 2 (2012) (providing that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").
157. *See Vandenberg*, 982 P.2d at 234.

The California Supreme Court focused on the contractual nature of arbitration, and found that agreeing to a binding arbitral decision in one case "does not mean each arbitral party also consents that issues decided against him by this informal, imprecise method may bind him, in the same manner as a court trial, in *all future* disputes, *regardless* of the stakes, against *all* adversaries, known and unknown."[158] While, of course, this is not—and should not be—the issue in offensive, nonmutual collateral estoppel cases—as *Parklane* would require the stakes to be similar and the dispute to be somewhat predictable according to *Parklane*'s fairness factors—the California Supreme Court still found that "[*t*]*he very fact* that arbitration is by nature an informal process, not strictly bound by evidence, law, or judicial oversight, suggests reasonable parties would hesitate to agree that the arbitrator's findings in their own dispute should thereafter bind them in cases involving different adversaries and claims."[159]

The court acknowledged the traditional justifications of collateral estoppel include "preserv[ing] the integrity of the judicial system, promot[ing] judicial economy, and protect[ing] litigants from harassment by vexatious litigation."[160] However, in justifying its rule denying offensive, nonmutual collateral estoppel effect to private arbitration awards, the court explained that "because a private arbitrator's award is *outside* the judicial system, denying the award collateral estoppel effect has no adverse impact on judicial integrity. . . . [and] later relitigation does not undermine judicial economy by requiring duplication of judicial resources to decide the same issue."[161] Furthermore, the court stated that "when collateral estoppel is invoked by a *nonparty* to the private arbitration, the doctrine does not serve the policy against harassment by vexatious litigation"; but rather, "the doctrine is asserted . . . to gain vicarious advantage from a litigation victory *won by another*."[162] Thus, the court found that the case presented "a situation in which the policies underlying the doctrine of collateral estoppel must yield to the contractual basis of private arbitration, i.e., the principle that the scope and effect of the arbitration are for the parties themselves to decide."[163]

In applying these principles to Vandenberg's suit against the insurance companies, the court noted that these companies were not parties to the arbitration between Vandenberg and the landlord and that Vandenberg's insurance claims were "entirely distinct from the breach of lease claims" decided in the arbitration.[164] Thus, under the court's newly stated rule, the insurance companies would have to show Vandenberg and the landlord agreed "to give the arbitrator's decision nonmutual collateral estoppel effect."[165] The court found the settlement agreement amongst all

158. *Id.* at 239.
159. *Id.* at 239–40.
160. *Id.* at 237.
161. *Id.* at 240.
162. *Id.*
163. *Id.*
164. *Id.* at 243.
165. *Id.*

the parties that led to the arbitration between Vandenberg and his landlord "strongly suggest[ed] the parties' intent that, while the arbitration would be 'binding' between Vandenberg and [his landlord], it should *not* have collateral estoppel effect in favor of Vandenberg's insurers."[166] Thus, California's contract-based approach to offensive, nonmutual collateral estoppel announced in *Vandenberg* stands in contrast to the broad discretion model adopted by the Second and Ninth Circuits.

D. The Discretionary Approach Versus the Contractual Approach

Vandenberg reflects a vision of arbitration as contractual in nature. Under that vision, the availability of certain procedures depends entirely on the parties including that procedure in their agreement.[167] The California Supreme Court in *Vandenberg* found that generally, "the traditional justifications for collateral estoppel . . . have diminished force when the nonmutual prong of the doctrine is applied to private arbitration without the arbitral parties' specific consent."[168] However, this contractually-focused view of offensive, nonmutual collateral estoppel is at odds with the approaches taken by the Second and Ninth Circuits, which grants arbitrators the same discretion as trial judges to provide preclusive effect to previous decisions. The contractual view of arbitration fails to recognize that arbitration is merely a private decision-making process of claims that could—and some argue should—be decided in a public decision-making process. Thus, the Second and Ninth Circuit's decision to treat preclusion in arbitration just as it would be treated in court is more consistent with the desire for arbitration to be a final decision making process because preclusion provides finality.

The California Supreme Court did recognize that "some commentators, and most other courts addressing the issue, have taken a contrary approach" to the one it adopted.[169] The court noted that these courts and commentators had three main justifications: first, "the general policy against relitigation of issues already decided"; second, "that collateral estoppel causes no injustice when the party to be bound had a full and fair opportunity to litigate the issues to be foreclosed"; and third, "that 'final' and 'binding' arbitration necessarily implies the possibility of collateral estoppel, particularly when (as in California) the law gives judicially confirmed arbitration awards the force and effect of civil judgments."[170] However, the California Supreme Court decided that these arguments in favor of using collateral estoppel "[gave] insufficient consideration and weight to the voluntary, contractual, and informal nature of private arbitration, and to the consequent reasonable

166. *Id.*

167. *See id.* at 240 ("[T]here is little basis to surmise that mere silence implies the arbitral parties' acceptance of nonmutual collateral estoppel. A general rule that confirmed private arbitration awards may have such effect would thus violate the fundamental premise that private arbitration is a contractual proceeding *whose scope and effect are defined and limited by the parties' consent*.").

168. *Id.*

169. *Id.* at 240–41.

170. *Id.* at 241.

expectations of the arbitral parties."[171] The court stated that the finality argument was the "most sophisticated" of the justifications, but the court still rejected it because of the contractual nature of arbitration and because the private arbitration statutes "do not warn parties who choose arbitration over court litigation that the arbitrator's award may be used against them by third persons to resolve different causes of action."[172] However, the California Supreme Court failed to see that by contracting to conclusively resolve a dispute by arbitration, the parties to an arbitration agreement should be found to have agreed to preclusive effect because preclusion effectuates finality.

The difference in rules between the Second and Ninth Circuits and the California Supreme Court might be explained by the fact that the California Supreme Court was focused on private arbitration under a state statute promoting use of such court alternatives. However, *Bear, Stearns* and *Collins* also involved private party arbitration; the only real difference is that the Second and Ninth Circuits were evaluating the arbitrators' decisions in light of the FAA instead of state law. But, as noted above, there is not much difference between the FAA and the California law, so it is not entirely clear what sustained the different approaches besides the contractual view of the California Supreme Court and the trial court discretion view of the federal courts.

This divergence between the courts points to a larger issue: is arbitration just a contractual matter, meaning that private ordering, rather than public ordering, of procedures should be the rule? There has been much discussion about the benefits and problems that arise from private ordering of dispute resolution procedures, like arbitration.[173] The California Supreme Court's decision in *Vandenberg* promotes private ordering of arbitration procedures: if the parties did not specifically agree to preclusion, then the California Supreme Court determined that arbitrators and courts cannot impose it upon them. This moves arbitration further away from court adjudications of disputes; a party is limited on what kinds of court procedures they can agree to in a court setting,[174] but an arbitrator is not bound by the Constitution, the Federal Rules of Civil Procedure, or other judicially-imposed limits on jurisdiction or procedure. For parties who are not able to change the terms in arbitration contracts—like many employees who are subject to adhesive employment agreements containing an arbitration clause—this poses a significant problem that should be addressed.

171. *Id.*

172. *Id.* at 241–42.

173. *See, e.g.*, Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355 (2003); Jamie Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011); Schwartz, *supra* note 113; Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435 (1999).

174. *See* Dodge, *supra* note 173, at 766.

III. WHY ARBITRATORS SHOULD USE OFFENSIVE, NONMUTUAL COLLATERAL ESTOPPEL IN EMPLOYMENT ARBITRATIONS

A. Offensive, Nonmutual Collateral Estoppel Promotes Finality

Arbitrators should allow offensive use of nonmutual collateral estoppel in employment arbitrations, where adhesive contracts are becoming ubiquitous. Doing so effectuates the policies behind arbitration and it treats the arbitral decision just like a final court decision, as an arbitral decision is supposed to be. If a decision is final and binding, then in a court setting, preclusive effects attach to the final and binding judgment. The same should occur with final and binding arbitration. If a party can relitigate or rearbitrate, then the prior procedure was not final and binding. If no preclusive effect is given to a past arbitration award, this would allow a party to have the benefits of a final, binding decision if it were in the party's favor, but also the benefit of rearbitrating the issue if the decision were not in the party's favor. This is the classic "have your cake and eat it, too" kind of problem.

This problem is exacerbated in the employment arbitration context, where one party—the employer—has the power to impose an adhesive contract on the other party—the employee—and thus set up the arbitration procedures. Returning to the Introduction of the Note, where employees at Quickie-Mart were seeking to arbitrate their status as employees or independent contractors, these workers most likely did not get to bargain with Quickie-Mart prior to signing the adhesive arbitration agreement. Quickie-Mart, working with company lawyers perhaps, came up with an arbitration agreement that included a provision requiring all arbitration awards to be final and binding on the parties. If Quickie-Mart also included a provision that said, for example, "no arbitrator is allowed to give preclusive effect to the results of a prior arbitration," then Quickie-Mart would get not only the benefit of forcing its employees into final, binding arbitration, but also the opportunity to rearbitrate identical issues or claims resolved against it in subsequent arbitrations.

Or, thinking back to the California Supreme Court's decision in *Vandenberg*, the employer could remain silent in the contract as to preclusion. What would this mean? An arbitrator applying California law would be forbidden to provide offensive, nonmutual collateral estoppel effect to one arbitral decision against the employer in a subsequent arbitration. This means that the employer is guaranteed the benefit of finality in each individual arbitration without any countervailing risk of preclusion in a later arbitration. The court will not overturn an arbitrator's decision for failing to employ this procedure, but might reverse for allowing it, since allowing preclusion could be considered a manifest disregard of California law. Of course, the court in *Vandenberg* did not disallow parties from creating an arbitration contract that included a preclusion procedure. But it is unlikely that an employer—or any other party with superior bargaining power—would create an adhesive arbitration contract that allowed for all kinds of preclusion to apply to arbitration decisions. As the party that will often be the common defendant to many different

actions, the employer will likely want to avoid being stuck with an arbitration decision that decided the case unfavorably to it, as would happen with offensive, nonmutual collateral estoppel.

However, this Note argues that it does not make sense to allow preclusion to be decided by parties, much less one party, to a dispute-ordering system that involves final adjudications of statutory rights. The problem with the contract model of arbitration is that, taken too far, it allows parties to agree to contradictory things, like "final judgment" and "no preclusive effect." The court system does not allow this kind of inconsistency because it inhibits the proper functioning of the courts and defeats the other policy considerations that support preclusion.

The benefit to the contract view is that it sees arbitration for what it is: a decision to *not* go to court to resolve a dispute. This means that the rules that apply in court might not be desirable in a noncourt setting. Viewing arbitration this way, it might be consistent to say that preclusion does not always apply, even with final judgments. Using a different party's win against a common defendant is problematic from a contractual point of view because there are two different contracts at issue. For example, in an arbitration between you and your employer, preclusion should apply as it would in a court. Not even *Vandenberg* would disagree with that statement. Your employer could not relitigate or rearbitrate the same claim or the same issues against you—both res judicata and mutual collateral estoppel would apply. But the contractual model would say that the decision in the arbitration between you and your employer could not have preclusive effect in a second, subsequent arbitration between your employer and your coworker: no offensive, nonmutual collateral estoppel. This is because there are two separate contracts at issue in the two arbitrations: one between you and the employer, another between your coworker and the employer. This interpretation is consistent with Justice Alito's concurrence in *Oxford Health*. His issue with class arbitration was that each arbitration contract was a separate contract; thus, it did not make sense to say that any other party would be bound by the class arbitration besides the two parties actually involved in the dispute.

This contractual view of arbitration seems to make sense when the arbitration is about a contract issue, because then it seems like each contract is a separate agreement between two distinct parties and the disputes that are resolved are arising from those separate agreements. But in employment arbitration contracts, the parties often agree to arbitrate all claims arising out of employment, including state and federal statutory rights. The rights of all employees against the employer are the same; the rights arise from a statute, not the separate agreements. Thus, with statutory claims, the contractual view of *Vandenberg* and Justice Alito makes less sense.

B. Procedural Versus Substantive Rights

The Supreme Court's decisions have made an exception to the general rule of enforcing arbitration contracts when the arbitration agreement prevents "effective vindication" of statutory rights.[175] This sets up a distinction between procedural and substantive rights when it comes to arbitration. Preclusion seems like a technically procedural doctrine rather than substantive law, but the common concept of procedure shaping and affecting substance[176] means that the procedure of preclusion affects substantive statutory rights.[177] So to say that an employer cannot change the substantive rights of an employee by choosing the arbitral forum might also mean that the employer cannot impose procedures that change the way that a substantive right is decided. Why would it matter that each employee has a separately signed agreement with the employer? The employer's duties and the employees' rights are exactly the same no matter what their individual contracts contain. An employer cannot contract around Title VII or California's Fair Employment and Housing Act (FEHA)—why would an employer be able to contract around the preclusive effect of an adverse Title VII or FEHA decision? In a court adjudication of these kinds of rights, a second employee seeking to use a previous decision against the employer has the ability to draw on preclusion doctrines to vindicate that statutory right. It is not clear why it should be any different in arbitration.

Of course, it is not always simple to determine the difference between a procedural right and a substantive right. This means that determining when an arbitration contract provision, like prohibiting preclusion, inhibits effective vindication of substantive rights will not always be clear. The Supreme Court has noted in other contexts that it is not always clear as to whether a decision about the finality of a judgment is procedural or substantive. In *Gasperini v. Center for Humanities*, for example, the Court evaluated whether a federal court sitting in diversity jurisdiction was required under the *Erie* doctrine to apply a New York state law that had appellate courts reviewing jury awards under a higher standard than the federal standard of review.[178] The Court decided that the New York law was both substantive and procedural under the *Erie* doctrine.[179] The law was substantive because the "standard control[led] how much a plaintiff [could] be awarded" but the law was also procedural because it "assign[ed] decisionmaking authority to New

175. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310–11 (2013). Justice Scalia's majority opinion also mentioned that the exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impractical." *Id.* (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)).

176. *See generally* Albert Kocourek, *Substance and Procedure*, 10 FORDHAM L. REV. 157 (1941).

177. *See also* cases cited *supra* note 80 and accompanying parentheticals (discussing how state preclusion doctrine has been treated as controlling in federal diversity cases, which points to the substantive nature of preclusion doctrines).

178. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418–19 (1996). The Court was also faced with a challenge under the Seventh Amendment for a federal court applying that state law. *Id.*

179. *Id.* at 426.

York's Appellate Division" rather than a jury or trial court judge.[180] New York's law affected how final a jury award or trial judge's decision was, and the Court determined it was a complex law of both procedural and substantive import for the purposes of federal diversity jurisdiction.

Perhaps this same idea of being both substantive and procedural from *Gasperini* would apply to preclusion doctrines, which are also rules that affect the finality of decisions. This would raise interesting complexities in the effective vindication exception to arbitration. For example, an employer's decision to not allow preclusive effects to attach to an employment arbitration decision would then be a substantive change in the arbitration that should not be allowed because it would prevent employment rights from being effectively vindicated. And if an employment arbitration agreement prevented the use of offensive, nonmutual collateral estoppel to arbitration decisions against the employer, then that agreement not only affects the substance of the arbitration but also would seem to have the sole purpose of suppressing claims. An employer cannot contract out of preclusion doctrines only to suppress claims; to allow an employer to do so would have a substantive rather than procedural effect and would thus seem to be in violation of the effective vindication exception to arbitration agreement enforcement. This should clearly be the case if the employer had a provision in the arbitration agreement that required the FAA's limited review of arbitration decisions if challenged by the employee, but allowed de novo review of the decision if challenged by the employer. This would not only be unconscionable, it would also be a procedural change that, like *Gasperini*, would have substantive effects as well.

In any case, while there is a difference between vindicating a procedural and a substantive right, at some point modifying the process can waive the statutory right. That is why arbitration of statutory rights involves a different set of concerns than just contractual rights. When an employee agrees to a contract that involves resolution of the employee's statutory rights, the employee is not waiving any aspect of that statutory right. The employee has merely agreed to have the dispute resolved in a different forum. Due process considerations still apply.[181] There is a question then of whether preventing an employee from using collateral estoppel to vindicate statutory rights raises due process concerns. An employee still has the right to a full and fair hearing, whether that hearing is in arbitration or in court. Going back to the Quickie-Mart employee example in the Introduction, is it fair to have employee number six or seven, much less number twelve, rearbitrating the same legal issue when that issue has been resolved against the employer every other time? In court, the answer would likely be no, as long as all the other *Parklane* considerations were met. Why should arbitration change the nature of the due process fairness owed to the employee? The answer is clear: it should not.

180. *Id.*

181. *See* Schwartz, *supra* note 113, at 245.

C. *Preclusion and Finality Promote Fair Arbitration*

The FAA only allows very narrow judicial review of arbitration decisions, even less than is granted to appellate review of discretionary decisions of trial courts.[182] The requirements for vacating an arbitration award in Section 10 of the FAA even alludes to the finality granted to these decisions; the statute allows the court to vacate the award "where the arbitrators exceeded their powers, or so imperfectly executed them that a *mutual, final and definite award* upon the subject matter submitted was not made."[183] Thus, not allowing preclusion doctrines such as offensive, nonmutual collateral estoppel in arbitration is at odds with the degree of finality granted to arbitration decisions by the courts. It also conflicts with the general rule of the Restatement (Second) of Judgments, which holds arbitration decisions to the same res judicata and issue preclusive effects as a court decision, subject to the limitations of the arbitration agreement.[184]

Preclusion is meant to effectuate the policy goals of making a decision final and binding. The Supreme Court has found that both collateral estoppel and res judicata "[have] the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[185] Collateral estoppel—offensive or defensive; mutual or nonmutual—applies "once a court has decided an issue of fact or law necessary to its judgment."[186] Its application means that the "decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation."[187] The Court in *Mendoza* also noted that *Parklane* "involved disputes over private rights between private litigants"[188] and that "'[i]n such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue.'"[189] Because collateral estoppel is meant to give finality to decisions, it is consistent with the goals of arbitration to give preclusive effect to arbitral decisions.

However, preclusive doctrines are in tension with a common arbitration provision: confidentiality clauses. Although this Note cannot provide a full treatment of how confidentiality agreements in arbitration contracts could be effected by or affect preclusion, it should be noted that there is a potential intersection between these issues. Confidentiality clauses could essentially allow an arbitration contract drafter to prevent offensive, nonmutual collateral estoppel

182. Trial court's discretionary decisions are reviewed for "abuse of discretion." An arbitration award is reviewed for "manifest disregard of the law."

183. 9 U.S.C. § 10(a)(4) (2012) (emphasis added).

184. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 1, § 84.

185. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

186. United States v. Mendoza, 464 U.S. 154, 158 (1984).

187. *Id.*

188. *Mendoza*, 464 U.S. at 159. This analysis also applies to *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971).

189. *Mendoza*, 464 U.S. at 159 (alterations in original) (quoting Standefer v. United States, 447 U.S. 10, 24 (1980)).

without expressly disallowing it because subsequent parties will not learn about prior decisions so as to use the prior decisions against the common defendant. This back way around preclusion again raises the policies of finality and fairness. Enforcement of a confidentiality clause should be consistent with these other policy considerations and should not trump them. A party should not be able to argue that the confidentiality provision prevents the arbitrator from employing otherwise useable or required procedures. Therefore, in order to achieve finality and fairness, confidentiality provisions should not be enforced in a way that prevents finality of arbitral determinations of law and fact.

CONCLUSION

This Note addressed the question of whether employment arbitrations should use the preclusion doctrine of offensive, nonmutual collateral estoppel and argued that arbitrators should employ this doctrine. Doing so promotes finality, fairness, and efficiency for all parties. If arbitration is meant to provide a full and final decision, then the preclusive doctrines that provide full and final decisions in courts should also be used in arbitration. Offensive, nonmutual collateral estoppel is fair for all parties: if the *Parklane* factors are met, then the defendant and the plaintiff will be on equal footing when a preclusion doctrine is used. Lastly, offensive, nonmutual collateral estoppel is efficient, which is part of why employment arbitration is used in the first place. An employer wants to increase the speed and decrease the formality with which commonplace employment disputes are resolved. One way to achieve that result is through the use of collateral estoppel—including offensive, nonmutual collateral estoppel—so that the same legal issues are not needlessly rearbitrated. If arbitration is a fair alternative to a court proceeding for making final, binding decisions, then it should be treated as such. Finality is best achieved by proper use of preclusion doctrines; employment arbitrators should promote this finality by using offensive, nonmutual collateral estoppel where appropriate.