RECENT DEVELOPMENTS

GOLDMAN, SACHS & CO. v. EDELSTEIN: THE APPLICATION OF COLLATERAL ESTOPPEL PRINCIPLES IN DEROGATION OF THE RIGHT TO JURY TRIAL

In *Goldman, Sachs & Co. v. Edelstein*,[1] the Second Circuit Court of Appeals held that where the prospective application of collateral estoppel principles might deprive a litigant of its constitutional right to trial by jury, mandamus is an appropriate remedy for the protection of that right. Goldman, Sachs was defendant in a number of similar actions seeking damages for alleged violations of the federal securities laws.[2] Of the fifteen cases pending against Goldman, Sachs which had been consolidated for pretrial discovery purposes in the Southern District of New York,[3] *Welch Foods, Inc. v. Goldman, Sachs & Co.*[4] in-

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1. 494 F.2d 76 (2d Cir. 1974).

HEREAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS RECENT DEVELOPMENT:

Brief for Petitioners, Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974) [hereinafter cited as Brief for Petitioners];

Brief for Respondent Franklin, Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974) [hereinafter cited as Brief for Respondent Franklin].

2. Goldman, Sachs was a dealer in the commercial paper of the Penn Central Transportation Company. Some thirty-five damage actions, with claims totaling approximately $52,000,000, were brought against Goldman, Sachs by institutions holding Penn Central promissory notes at the time of that railroad's reorganization. The actions primarily alleged violations of section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1970). Brief for Petitioners at 2-3. The district court exercised original jurisdiction over the cases pursuant to 28 U.S.C. § 1337 (1970). See Welch Foods, Inc. v. Goldman, Sachs & Co., Civil No. 70-4811-CLB (S.D.N.Y., Sept. 30, 1974), where the court denied Goldman, Sachs' motiou to dismiss several of the claims against it for lack of subject matter jurisdictiou.

In May, 1974, the SEC commenced its own enforcement action against Goldman, Sachs, and a consent decree resulted. SEC v. Goldman, Sachs & Co., [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,556 (S.D.N.Y. May 2, 1974).

3. All thirty-five damage actions pending against Goldman, Sachs were consolidated for pretrial discovery purposes by the Judicial Panel on Multi-district Litigation pursuant to 28 U.S.C. § 1407 (1970). Fifteeu of the consolidated cases commenced in New York were eventually assigned for all purposes to the Honorable David N. Edelstein, Chief Judge of the United States District Court for the Southern District of New York. Brief for Petitioners at 3.

4. Civil No. 70-4811 (S.D.N.Y., Oct. 17, 1974).

volved by far the largest claim.[5] *Welch* was to be tried to a jury,[6] and from the outset it was treated by the court and by all concerned parties as the "bellwether" case for trial.[7] However, toward the close of the discovery period the district judge unexpectedly announced that another of the consolidated cases, *Franklin Savings Bank v. Levy*,[8] would be tried first. All parties had waived their right to a jury trial in *Franklin*.[9] Because *Franklin* and *Welch* raised identical claims based on substantially the same proof,[10] Goldman, Sachs was fearful that an adverse judgment in *Franklin* might have the effect of collaterally estopping it from seeking a jury resolution in *Welch* on the issue of its liability. Goldman, Sachs was unsuccessful, however, in its efforts to have the district judge delay *Franklin*; it therefore filed a petition with

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5. 494 F.2d at 77. *Welch* represented $23,000,000 in claims against Goldman, Sachs, arising out of several purchases of Penn Central commercial paper. Brief for Petitioners at 3, app. A at 33; Brief for Respondent Franklin at 5. The complaint raised questions as to

> (1) the creditworthiness in 1969-70 of Penn Central, (2) whether or not Goldman, Sachs possessed adverse non-public information affecting the merchantability or creditworthiness of the Penn Central's notes, (3) whether the notes were in fact "prime," and if they were not, (4) whether Goldman, Sachs knew of their infirmities; (5) should have known; or (7) [*sic*] conducted itself in a reckless manner so that its customers did not learn the truth. Welch Foods, Inc. v. Goldman, Sachs & Co., Civil No. 70-4811-CLB at 23 (S.D.N.Y. Sept. 30, 1974).

6. The plaintiffs in *Welch* demanded a jury trial when they filed their original complaint. Brief for Respondent Franklin at 3-4. Goldman, Sachs was entitled to argue its case to a jury, even if the *Welch* plaintiffs had later unilaterally attempted to withdraw their demand. FED. R. CIV. P. 38(d).

7. Of the fifteen consolidated cases pending in the Southern District of New York, *Welch* was the first to be filed, and discovery in that case was conducted on an accelerated schedule. Throughout the pretrial proceedings, "the parties and the court, by their frequent references to procedures to be followed in presenting evidence to the jury, made it abundantly clear that *Welch* was to be tried first." 494 F.2d at 77.

8. Civil No. 71-882 (S.D.N.Y., filed Mar. 1, 1971). *Franklin* represented a $500,000 claim against Goldmau, Sachs arising out of a single purchase of Penn Central commercial paper. Brief for Petitioners, app. A at 33; Brief for Respondent Franklin at 5.

9. 494 F.2d at 79. Nothing in the briefs of either the petitioners or respondent Franklin Savings Bank, and nothing in the transcripts of the two pretrial hearings before the district judge, indicates why Goldman, Sachs waived its jury rights in the *Franklin* case. *See* Brief for Petitioners at 4, 15-16, app. A at 19-20, app. B at 46-49; Brief for Respondent Franklin at 3, 10-11.

The *Goldman* court did not speculate as to the reasons for the waiver, but it went to considerable lengths in its opinion to demonstrate that the parties assumed "from the outset" that *Welch* would be the first case to go to trial. 494 F.2d at 77. Since *Franklin* was filed more than three months after *Welch*, the court might reasonably have inferred that Goldmau, Sachs waived a jury in *Franklin* only because it assumed that the issue of its liability would first be tried to a jury in *Welch*. The court's repeated emphasis on "the anticipated order of trials" suggests that just such an inference was drawn. *Id.* at 78.

10. 494 F.2d at 77.

the court of appeals for a writ of mandamus directing the lower court to stay its order for the non-jury trial of *Franklin* until the completion of the jury trial of *Welch*. Agreeing with the petitioners that "for the district court to proceed with the non-jury trial of *Franklin* threatens destruction of Goldman, Sachs' important collateral right to a jury trial,"[11] the Second Circuit directed the district court either to proceed first with the trial of *Welch* or, in the alternative, to consolidate *Welch* and *Franklin* for simultaneous trial.[12]

The decision in *Goldman* to grant mandamus[13] was not unanimous. While all three circuit judges agreed that mandamus is warranted where necessary to protect the constitutional right to trial by jury,[14] the court divided over the question of whether Goldman, Sachs'

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11. *Id.* at 78.

12. *Id.* There were four plaintiffs in *Welch*. One plaintiff eventually settled his claim in July, 1974, and the balance of the *Welch* case went to trial in the Southern District of New York on September 9, 1974. *Franklin* was stayed indefinitely, pending completion of the *Welch* trial. Telephone Interview with Robert S. Stitt, Thacher, Proffitt & Wood, counsel for Franklin Savings Bank, in New York City, Sept. 4, 1974. Goldman, Sachs eventually lost a jury verdict in *Welch*, and judgment was entered against it on October 17, 1974. Welch Foods, Inc. v. Goldman, Sachs & Co., Civil No. 70-4811 (S.D.N.Y., Oct. 17, 1974). To the suggestion that the jury loss would make it more difficult for Goldman, Sachs to defend other damage actions pending against it, one company official reportedly asserted that Goldman, Sachs would fight the *Welch* verdict and that, in any event, every case was different. The official was quoted as declaring, "That's one case, there are 35 to go." BUSINESS WEEK, Oct. 19, 1974, at 50.

Apparently, none of the parties in *Goldman* wanted *Welch* and *Franklin* consolidated for trial. Telephone Interview with Robert S. Stitt, *supra*. The jury trial of *Welch* was expected to take at least twice as long as the non-jury trial of *Franklin*, Brief for Petitioners, app. A at 26, 34; Brief for Respondent Franklin at 5, so consolidation would have put the plaintiffs in *Franklin* to considerable additional expense. In his dissent in *Goldman*, Judge Oakes also suggested that evidence adduced in *Franklin* might have prejudiced the *Welch* plaintiffs and that consolidation might have made the judge's instructions more confusing to the jury as well as more difficult to draft. 494 F.2d at 79.

13. Mandamus is an extraordinary remedy appropriate "only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power.'" Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). *See* Pet Milk Co. v. Ritter, 323 F.2d 586 (10th Cir. 1963), where the Tenth Circuit refused to order a stay of proceedings in an antitrust action while appeals were pending from an earlier judgment in a virtually identical case. The *Pet* court noted, however, that mandamus has been used on some occasions to facilitate review of a district court's refusal to stay proceedings, *id.* at 588, *citing* La Buy v. Howes Leather Co., 352 U.S. 249 (1952). *Cf.* Schlagenhauf v. Holder, 379 U.S. 104 (1964) (power of circuit court of appeals to review on a petition for mandamus the construction and application of a new rule of procedure).

14. *See* 494 F.2d at 78-79. The *Goldman* majority relied on Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). In that case the Supreme Court implied that it was the duty of federal courts of appeals to grant mandamus in aid of the right to trial by jury. *Id.* at 472. *See also* Bruce v. Bohanon, 436 F.2d 733, 735 (10th Cir.), *cert. denied*, 403 U.S. 918 (1971); Robine v. Ryan, 310 F.2d 797 (2d Cir. 1962).

rights were actually in danger. As grounds for its conclusion that a threat was present, the majority appealed to dictum appearing in an earlier Second Circuit decision, *Crane Co. v. American Standard, Inc.*,[15] which had suggested that a party in a jury trial could be bound by the non-jury findings of an earlier suit. The *Crane* court, in advancing this suggestion, had challenged the holding of a Fifth Circuit case, *Rachal v. Hill*,[16] which had refused to apply collateral estoppel principles in derogation of the right to jury trial. Thus, by invoking the dictum in *Crane* which had been critical of *Rachal*, the *Goldman* court apparently elected to renew its attack on the Fifth Circuit case in an attempt to expand the scope of collateral estoppel in the Second Circuit.

Under the doctrine of collateral estoppel,[17] a party to a lawsuit may not relitigate those matters which have already been litigated and determined in a previous suit in which it was also a party.[18] The doctrine reflects, in part, a policy interest in judicial economy;[19] but this

15. 490 F.2d 332 (2d Cir. 1973). For a discussion of the *Crane* case, see notes 65-71 *infra* and accompanying text.

16. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). For a discussion of the *Rachal* case, see notes 26-33 *infra* and accompanying text.

17. A standard work on the doctrine of collateral estoppel is Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). Professor Scott established the following minimum requirements that must be met in order for a determination in one suit to preclude relitigation of the same matter in a subsequent suit: The matter must have been litigated in the first action; the matter must have been determined by the judgment in the first action; and this determination must have been essential to the judgment in the first action. *Id.* at 10-11. *See also* Commissioner v. Sunnen, 333 U.S. 591 (1948); Cromwell v. County of Sac, 94 U.S. 351 (1876); Nichols v. Alker, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956); The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); RESTATEMENT OF JUDGMENTS § 68(1) (1942); Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647 (1952).

18. The district court exercised original jurisdiction over the damage actions brought against Goldman, Sachs. See note 2 *supra*. The *Goldman* court was therefore concerned with the doctrine of collateral estoppel only as it had been applied in the federal courts. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971), where the Supreme Court declared that "[i]n federal-question cases, the law applied is federal law. . . '[I]n non-diversity cases, . . . the federal courts will apply their own rule of *res judicata*.'" *Id.* at 324 n.12, *quoting* Heiser v. Woodruff, 327 U.S. 726, 733 (1946). *See* Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 954-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Fink v. Coates, 323 F. Supp. 988, 989 (S.D.N.Y. 1971); *cf.* Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1184 (3d Cir. 1972).

19. *See* Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Moore v. United States, 360 F.2d 353, 356 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967). The doctrine of collateral estoppel "constitutes a powerful instrument for the expeditious and economical handling of massive litigation . . . affecting large numbers of people." Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 36 (1965). *But cf.* Pollasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 219-22 (1954). See generally Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM.

interest has always yielded where precluding the relitigation of issues would be unfair to the party resisting estoppel.[20] It was in the interests of fairness, for example, that federal courts in the past refused to bind a litigant to the findings of an earlier suit unless its opponent would also have been bound.[21] However, this judge-made rule[22] that estoppel must be mutual has been widely repudiated in recent years.[23] Accompanying the erosion of the mutuality rule has been a growing realization that, while considerations of justice and fairness to the parties may restrict the application of collateral estoppel principles in a given case, justice also requires that a litigant ordinarily be limited to a single, "full and fair opportunity" to be heard on a given issue.[24] By abro-

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L. REV. 1457 (1968), where liberalized rules of joinder are recommended as an alternative to collateral estoppel for the efficient resolution of multiparty controversies.

20. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 328 (1971); Ritchie v. Landau, 475 F.2d 151, 155 n.2 (2d Cir. 1973); RESTATEMENT OF JUDGMENTS § 70 (1942).

21. *See, e.g.*, Triplett v. Lowell, 297 U.S. 638, 642-46 (1936); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); *cf.* Adriaanse v. United States, 184 F.2d 968, 969-70 (2d Cir. 1950), *cert. denied*, 340 U.S. 932 (1951). For general discussions of the mutuality rule at common law, as well as its traditional justifications, see Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Seavy, *Res Judicata with Reference to Persons Neither Parties nor Privities—Two California Cases*, 57 HARV. L. REV. 98 (1943); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

22. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 320 (1971).

23. *See, e.g.*, Cheramie v. Tucker, 493 F.2d 586, 589 n.10 (5th Cir. 1974); Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 1970 (1974), Cardillo v. Zyla, 486 F.2d 473, 475 (1st Cir. 1973); Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1187 (7th Cir. 1973); Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir.). *cert. denied*, 377 U.S. 934 (1964). A leading case in the moderu trend away from the mutuality requirement is Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). For some early reservations as to the requirement's unqualified abrogation, see Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957). Professor Currie repudiated his reservations, for the most part, in Currie, *supra* note 19.

24. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 328-29, 333, 347 (1971); Brightheart v. McKay, 420 F.2d 242, 245 n.4 (D.C. Cir. 1969); United States v. Weber, 396 F.2d 381, 389-90 (3d Cir. 1968); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 303-04 (D. Md. 1967); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 960 (1969).

The court in United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd as to res judicata and mutuality sub nom.* United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), was one of the first to recognize that considerations of justice, rather than economy, constitute the principal reason for limiting the number of times that a party may litigate an issue. United Airlines was defendant in numerous damage actions arising out of a mid-air collision between one of its passenger carriers and a military transport. After it had lost a jury verdict in one action brought in California, the airline company was estopped "in the interests of justice" from contesting

gating the requirement of mutuality, courts have concluded, in effect, that whether the opportunity afforded a litigant in a prior adjudication was "full and fair" no longer depends on whether the party asserting estoppel also participated in the earlier suit. Where mutuality is lacking, courts now tend to focus on the particular facts of a given case in order to determine whether the application of collateral estoppel principles would work an injustice.[25]

In *Rachal v. Hill*[26] the Fifth Circuit considered the equities of allowing a plaintiff in a jury trial to bind his opponent to the non-jury findings of an earlier suit in which the plaintiff had not participated. The Securities and Exchange Commission (SEC) had brought an injunction action against defendants Rachal and Hunnicutt in which it was determined that they had violated the federal securities laws. This action carried no right to a jury trial. Once judgment had been entered, Hill brought a private action against Rachal and Hunnicutt for damages arising out of the same alleged violations. He filed a motion for partial summary judgment as to the issue of liability, and the trial court granted his motion on the ground that the defendants were collaterally estopped by the findings in the earlier suit.[27] The Fifth Circuit reversed, however, authorizing total relitigation before a

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its liability in subsequent actions brought in Washington and Nevada. 216 F. Supp. at 729.

25. One court has observed: "The rule of non-mutuality is not a general one but a limited one to be determined by the facts and circumstances in each case whether or not it should be applied." United States v. United Airlines, Inc., 216 F. Supp. 709, 726 (E.D. Wash. 1962), *aff'd as to res judicata and mutuality sub nom.* United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964). See Currie, *supra* note 19, at 31, where the author declared: "The mutuality rule is deservedly dead, and . . . any reservations about the totality of its demise should rest on particularized inquiry rather than on rules of thumb." *See also* Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 128 (6th Cir. 1971) (no collateral estoppel where its application would contravene public policy or result in manifest injustice).

Many factors have been recognized by federal courts applying the "full and fair opportunity" test as possible grounds for refusing to bind a litigant to the findings of a given case. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 333 (1971) (no opportunity to choose defendant, forum, and time of suit); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461-62 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971) (lack of initiative in bringing suit, defending relatively small claim, no opportunity to choose or change forum); Brightheart v. McKay, 420 F.2d 242, 245 n.4 (D.C. Cir. 1969) (litigating relatively small claim, lack of initiative in bringing suit); Travelers Corp. v. Boyer, 301 F. Supp. 1396, 1403 (D. Md. 1969) (inadequate representation of counsel). For examples of the test's application in the Second Circuit, see note 85 *infra*.

26. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

27. 435 F.2d at 61.

jury of issues which were identical to those that had been resolved in the SEC action.[28]

The *Rachal* court first acknowledged that federal courts no longer require mutuality as a precondition of collateral estoppel.[29] It noted, however, that under *Beacon Theatres, Inc. v. Westover*,[30] a litigant is entitled to have its legal claims tried before a jury in an action where legal and equitable claims are joined;[31] thus, defendants Rachal and Hunnicutt would have received a jury trial on the issue of liability if Hill had been a party plaintiff in the SEC action seeking an injunction.[32] The court reasoned that, viewed from this perspective, it would be "anomalous" to deprive the defendants of their right to trial by jury simply because the equitable and legal claims against them were brought in successive actions.[33]

The Fifth Circuit's use of the *Beacon Theatres* case has been criticized.[34] Furthermore, the rule which *Rachal* announced[35] has en-

28. *Id.* at 64-65.

29. *Id.* at 61-62. While apparently repudiating the mutuality requirement, the Fifth Circuit nevertheless asserted that "special considerations [are] required to insure justice in cases where mutuality of parties is lacking." *Id.* at 63 n.5. The court did not elaborate as to the nature of these considerations.

30. 359 U.S. 500 (1959).

31. *Beacon Theatres* involved a dispute between two movie theatre operators, Fox and Beacon, over "first run" exclusivity rights which Fox enjoyed as a result of contracts between himself and several movie distributors. Anticipating that Beacon would bring an action against him for damages under the federal antitrust laws, Fox sued Beacon for a declaratory judgment that would have settled many aspects of their dispute. *Id.* at 502-03. Beacon subsequently made his antitrust allegations in a counterclaim against Fox. Although Beacon demanded a jury trial of the issues that his counterclaim raised, the district judge ordered an initial trial, without a jury, of those issues common to the equitable claim and legal counterclaim. *Id.* at 503-04. Beacon filed a petition for mandamus which was denied by the court of appeals, but the Supreme Court reversed, directing that a jury trial of the counterclaim precede any resolution of issues by the court. *Id.* at 506-08.

32. 435 F.2d at 63-64.

33. *Id.* at 64.

34. *See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971). The authors challenged the Fifth Circuit's use of the *Beacon Theatres* case. They pointed out that in reversing the denial of mandamus, the Supreme Court assumed that if the district judge were to proceed first with the trial of Fox's equitable claim, then the principles of collateral estoppel "might" bar a jury resolution of many of the issues raised by Beacon's counterclaim. 359 U.S. at 504. It was in order to avoid such foreclosure, according to the authors, that the Supreme Court directed that the legal counterclaim be tried first. Shapiro & Coquillette, *supra*, at 446. They insisted that, contrary to the Fifth Circuit's reading of the case, the Supreme Court never implied that jury trial considerations should limit the application of collateral estoppel principles. *Id.* at 446-47. Thus, the authors found nothing "anomalous" about binding Rachal and Hunnicutt to the findings in the SEC injunction action, preferring instead to limit *Beacon Theatres* to the proposition that "a jury trial

joyed only limited support among the circuits. While several federal courts have cited the Fifth Circuit's threshold repudiation of the mutuality rule with approval,[36] only four courts outside of the Second Circuit have referred to *Rachal* in the course of balancing collateral estoppel principles against the right to trial by jury.[37] Two of the latter cases simply found comparison to *Rachal* instructive;[38] and in another, a district court in the Fifth Circuit merely speculated that under *Rachal*, a defendant who suffers an adverse judgment by a court sitting in admiralty might overcome collateral estoppel should he subsequently be sued on a legal claim.[39]

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must be given on an issue not yet adjudicated, but . . . an issue need not be *relitigated* once it has been decided by the court sitting alone." *Id.* at 447 (emphasis in original).

Having distinguished the implications of *Beacon Theatres* from the holding in *Rachal*, Shapiro and Coquillette undertook a brief historical inquiry into the right to trial by jury at common law. They concluded that "in the late eighteenth and early nineteenth centuries, determinations in equity were thought to have as much force as determinations at law, and . . . the possible impact on jury trial rights was not viewed with concern." *Id.* at 455-56. The authors were consequently persuaded that "[i]f collateral estoppel is otherwise warranted, the jury trial question should not stand in the way." *Id.* at 456; *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment *d* at 150-51 (Tent. Draft No. 1, 1973) (jury trial question should not stand in the way of collateral estoppel where mutuality is present).

35. In framing the question before it, the *Rachal* court emphasized that the defendants' "present adversary was not a party" in the earlier SEC injunction action. 435 F.2d at 63. Since the court also displayed some reluctance in its repudiation of the mutuality requirement, *id.* at 63 n.5, the *Rachal* rule may be formulated in the following terms: A party in a jury trial is not bound by the non-jury findings of an earlier suit if those findings are not binding on its opponent as well.

36. *See* Cheramie v. Tucker, 493 F.2d 587, 589 n.10 (5th Cir. 1974); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 61 (S.D. Ohio 1974); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 n.9 (S.D. Fla. 1974); *In re* Yarn Processing Patent Validity Litigation, 360 F. Supp. 74, 82 (S.D. Fla. 1973).

37. The Fifth Circuit could find no case directly on point with *Rachal*; thus it turned to the "plethora of analogous cases" holding that a right to trial by jury exists where equitable and legal claims are joined in a single action. 435 F.2d at 63. If courts are indeed rarely called upon to give preclusive effect to the findings of a judge sitting in equity when the defendant there is subsequently sued by a different plaintiff on a legal claim, this fact may explain why the *Rachal* case has generated so little response since it was decided.

38. SEC v. Crofters, Inc., 351 F. Supp. 236, 261 (S.D. Ohio 1972), *rev'd*, 493 F.2d 1304 (6th Cir. 1974) (no requirement that the SEC, once admitted to a bankruptcy action, must try its injunction suit in that forum); Ochoa v. American Oil Co., 338 F. Supp. 914, 921 (S.D. Tex. 1972) (presence of both equitable and legal claims cannot defeat the right to a jury trial of the latter).

39. Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561-62 n.9 (S.D. Fla. 1974). *Hernandez* involved an effort on the part of six ship passengers to have their case against a shipowner certified as a class action. One reason the court gave for granting certification was its fear that if the passengers were to prosecute separate ac-

Only the Third Circuit, in *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*,[40] has voiced support for the *Rachal* holding to any significant degree. A buyer of printed cloth had refused to pay for the goods on the grounds that they were "defective," and the seller sought arbitration pursuant to a provision in the contract for sale. The arbitrators determined that the cloth was not "defective" and ordered an award for the purchase price. The buyer subsequently sued the manufacturer for damages, claiming that the cloth was "not fit for its intended purpose." Despite the earlier findings in the arbitration proceeding,[41] the Third Circuit held that the buyer was not collaterally estopped from arguing its case against the manufacturer to a jury. In reaching this conclusion, the *Lynne* court approvingly offered the following version of the *Rachal* holding: "[*B*]*ecause* a jury trial was unavailable to the defendants in the first action, . . . the plaintiff could not deprive defendant of that right in a damage suit by invoking collateral estoppel."[42]

The initial reaction to *Rachal* within the Second Circuit was also favorable. At the time the decision was issued the Second Circuit was in the throes of the *Texas Gulf Sulphur* litigation.[43] An action had been brought by the SEC against the Texas Gulf Sulphur Company (TGS) in the Southern District of New York, charging that TGS had violated the federal securities laws by issuing a press release which discussed the company's exploratory activities in Canada but failed to mention the presence of valuable ore deposits discovered there.[44] All parties waived their right to a jury trial. After several years of litigation, it was ul-

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tions, the shipowner would be required to defend against one plaintiff after another until a judgment was obtained. Then, by raising this judgment, all subsequent plaintiffs could collaterally estop the shipowner from denying its liability. *Id.* at 561. The court suggested, however, that as to any subsequent actions against the shipowner which did not lie in admiralty, and where the right to trial by jury would therefore obtain, there would be no collateral estoppel effect. *Id.* at 561-62 n.9.

40. 453 F.2d 1177 (3d Cir. 1972).

41. The *Lynne* court was inclined to distinguish the issue whether the cloth was "defective" from whether it was "not fit for its intended purpose." *Id.* at 1183.

42. *Id.* at 1184 (emphasis added). An important similarity between *Rachal* and *Lynne* is that there was no right to a jury trial in the first proceeding of either case. Goldman, Sachs, on the other hand, was entitled to a jury trial in *Franklin* but waived its right. See note 9 *supra*. For a discussion of how this waiver distinguishes *Goldman* from *Rachal* (and *Lynne*), see text accompanying notes 81-85 *infra*.

43. *See* SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971). For a helpful summary of the Texas Gulf Sulphur controvery and its adjudication in the courts, see Note, *Texas Gulf Sulphur: Its Holding and Implications*, 22 VAND. L. REV. 359 (1969).

44. The SEC brought its action under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1970), against both the company and several of its officers.

timately determined that the press release was misleading to the reasonable investor using due care and that the framers of the release failed to exercise due diligence in its issuance.[45] Most of the former shareholders with claims against TGS for damages arising out of the press release controversy brought their suits before the same New York district judge who heard the original SEC action. There they raised the earlier findings of the court in an effort to estop TGS from relitigating the issue of its liability, but in *Cannon v. Texas Gulf Sulphur Co.*[46] the district court refused to bind TGS.[47]

The *Cannon* court suggested that TGS might not have waived a jury trial in the SEC action if the shareholders had also been parties plaintiff there, and on this basis it refused to deprive the defendants of a jury trial where the private claims had been brought separately.[48] While this conclusion was ostensibly reached "in the light" of the *Rachal* case,[49] it is not certain that by invoking *Rachal* the district court intended to endorse unreservedly the Fifth Circuit rule limiting the application of collateral estoppel principles.[50] This aspect of the Texas

45. SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 86 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S 1005 (1971).

46. 323 F. Supp. 990 (S.D.N.Y. 1971).

47. Prior to the filing of any damage actions in New York, four former shareholders who claimed that they had sold their stock prematurely in reliance upon the press release brought suit against TGS in Utah. In Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 548 (D. Utah 1970), *modified sub nom.* Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971), 405 U.S. 918 (1972), the Utah district court held TGS liable for compeusatory damages on the grounds that the press release was misleading and intentionally deceptive. While *Reynolds* was still on appeal to the Tenth Circuit, several former shareholders who were engaged in similar actions in New York attempted to biud TGS to the findings of the Utah district court. Iu Fink v. Coates, 323 F. Supp. 988 (S.D.N.Y. 1971), the New York district court refused to collaterally estop TGS. The *Fink* court noted that TGS had unsuccessfully sought to transfer the Utah actions to New York, where most of the stockholder claims had been filed, and that the claims involved iu *Reynolds* were for relatively small amouuts. The court also questioned whether the evidence presented in *Reynolds* supported the conclusions of the Utah district judge. *Id.* at 990.

48. 323 F. Supp. at 993-94. It is not clear whether the court considered it *likely* that TGS would not have waived a jury. See note 50 *infra.*

49. *Id.* at 994.

50. For a suggested formulation of the Fifth Circuit rule, see note 35 *supra.* The *Cannon* opinion does not compel the conclusiou that this rule was accepted by the New York district court since *Rachal* and *Cannon* are distinguishable on their facts. Whereas the original action brought by the SEC against defendants Rachal and Hunnicutt carried no right to a jury trial, TGS was entitled to a jury but waived its right. It could be that the *Cannon* court refused to collaterally estop TGS on the basis that if the shareholders had been parties plaintiff in the first action, TGS probably would not have waived its right. Having presided over both cases, the New York district judge was in the best position to reach such a conclusion.

Under an analysis of *Cannon* which emphasizes TGS's waiver in the SEC actiou,

Gulf Sulphur litigation was never clarified by the Second Circuit, however, since a settlement was eventually reached on the claims involved in the *Cannon* case.[51]

Essex Systems Co. v. Steinberg[52] is the only other case from the Second Circuit in which a court has indicated some approval of *Rachal.* At issue in *Essex* was a contract for the sale of securities. As the result of a dispute over the purchase price, the buyer refused to attend the closing, and the seller brought suit for specific performance in New Jersey state court. The buyer eventually counterclaimed in New Jersey for rescission and for damages,[53] but he then filed his own suit, also seeking rescission and damages, in the District Court for the Southern District of New York.[54] At filing, he requested an injunction staying the New Jersey proceedings pending resolution of his federal action,[55] but the district court denied this request.

Arguing in the district court for an injunction, the buyer contended that if the New Jersey court were to reach judgment first, any adverse findings there would be binding on him in federal court. He feared that he might consequently be deprived of his right to trial by jury.[56] Agreeing with the buyer that some prejudice was possible,[57] the district court conceded that "the purpose of the seventh amendment would best be served by limiting the collateral estoppel or *res judicata* effect of the state decree so as not to foreclose an independent determination of the claim or claims triable by jury."[58] The court cited *Rachal* as

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the *Rachal* rule may not have been necessary to the holding of the court. For a discussion of jury waiver as a possible ground for allowing a party to relitigate an issue under the "full and fair opportunity" test, see note 85 *infra* and accompanying text. It should be noted, however, that as in *Rachal,* nothing in the *Cannon* opinion indicates that joinder of the SEC and private damage claims was actually considered.

51. *See* Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308 (S.D.N.Y. 1972).

52. 335 F. Supp. 298 (S.D.N.Y.), *aff'd mem.,* 447 F.2d 1405 (2d Cir. 1971).

53. The buyer unsuccessfully attempted to have a New York state court settle the dispute. After the seller had instituted suit in New Jersey, the buyer brought an action for rescission and damages in New York. However, the seller obtained an order from the New Jersey court restraining the buyer from proceeding with his suit. 335 F. Supp. at 300.

54. The buyer's federal action was brought under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1970).

55. An injunction was sought under 28 U.S.C. § 2283 (1970).

56. The *Essex* court referred to the New Jersey action in which the buyer was the defendant as "clearly equitable." 335 F. Supp. at 301. But the court did not indicate whether the buyer had demanded a jury trial of the issues raised by his counterclaim in New Jersey. If the counterclaim asserted a legal claim (a question left unanswered by the court), then the buyer was entitled to a jury trial in the state suit. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

57. 335 F. Supp. at 302.

58. *Id.*

authority for this proposition[59] but then promptly declined to balance the requirements of full faith and credit against the right to trial by jury "in the absence of demonstrated necessity for doing so."[60] Whether the *Essex* court actually approved the result in *Rachal* was cast in further doubt by its subsequent observation that "if estoppel should eventuate, that would not be any hardship in the absence of a showing of improper trying of the facts in New Jersey, which of course is not even alleged."[61]

In a memorandum opinion affirming the order of the trial judge in *Essex*,[62] the court of appeals did not address the collateral estoppel issues raised below. Thus, it is not clear whether the appellate court intended to approve the district court's ambivalent expressions of support for *Rachal*. The Second Circuit did, however, on two subsequent occasions indicate skepticism with respect to the *Rachal* holding. In *SEC v. Everest Management Corp.*,[63] the court refused to allow victims of an alleged securities fraud to intervene in an SEC enforcement action. The proposed intervenors had argued that under *Rachal*, findings in the SEC action would not have any collateral estoppel effect in subsequent private actions based on the same transactions. Consequently, they feared that total relitigation of the issues would be required unless intervention were allowed; but the *Everest* court, clearly unimpressed by this argument, preferred not to have the SEC action "bogged down" by the introduction of additional parties.[64]

The disinclination of the Second Circuit to follow *Rachal* was again apparent in *Crane Co. v. American Standard, Inc.*[65] *Crane* involved the efforts of two competitors in the plumbing industry (Standard and Crane) to take over a publicly-held company (Air Brake). The directors of Air Brake had agreed to merge with Standard, but stockholder approval of the agreement was necessary in order for the merger to be consummated. In anticipation of a vote on the merger question, both Standard and Crane proceeded to buy up all available shares of Air Brake stock. Crane eventually brought an action against

59. *Id.*

60. *Id.*

61. *Id.* It is not clear from this remark whether the *Essex* court intended to suggest that issue resolution by the New Jersey court would be "proper" for purposes of sustaining a plea of collateral estoppel in federal court. If so, the district judge's concern for the buyer's right to trial by jury was hardly consistent with the spirit of the *Rachal* decision.

62. Essex Sys. Co. v. Steinberg, 447 F.2d 1405 (2d Cir. 1971) (mem.).

63. 475 F.2d 1236 (2d Cir. 1972).

64. *Id.* at 1240 n.5.

65. 490 F.2d 332 (2d Cir. 1973).

Standard, alleging that Standard had violated the federal securities laws in a series of open market cash purchases. It sought to enjoin Standard both from voting its Air Brake stock on the question of the proposed merger and from actually merging with the Air Brake Company.[66] Hearing the case without a jury, the district court dismissed Crane's complaint, and the merger of Air Brake and Standard was consummated within a few days. However, the Second Circuit reversed the dismissal on appeal and remanded the case to the district court for a determination of remedies.[67] Since the merger had already been consummated, there was some question on remand as to what relief would be available to Crane short of divestiture or separation. The Second Circuit held that the district court, sitting without a jury, could award damages as part of any equitable relief to which Crane might be entitled.[68]

The holding in *Crane* was based in part on *Beacon Theatres, Inc. v. Westover*.[69] Referring briefly to the Fifth Circuit's use of that case in *Rachal*, the *Crane* court distinguished *Rachal* on the basis that *Rachal* involved two separate proceedings brought by different plaintiffs.[70] The court went on to observe that it was

> not at all sure that *Rachal* was correctly decided . . . . [E]quity de-

66. Crane's complaint also included a prayer for "such other and further relief as may be just and proper." *Id.* at 335.

67. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970). The court of appeals determined that through its market activities Standard intentionally created the appearance of an extraordinary demand for Air Brake stock, thereby deterring shareholders from tendering to Crane. 419 F.2d at 793.

68. 490 F.2d at 341-43. The Second Circuit emphasized that Crane's injunction action carried no right to a jury trial when it was initially filed. *Id.* at 342-43.

69. 359 U.S. 500 (1959). For a summary of the *Beacon Theatres* case, see note 31 *supra*.

In contesting the propriety of a damage award, Standard had argued that under *Beacon Theatres* damages could only be assessed against a party that had been afforded the opportunity to contest its liability in a jury trial. 490 F.2d at 342. However, the Second Circuit refused to apply *Beacon Theatres* in this manner. It pointed out that whereas the merits of Crane's injunction action had already been tried to a judge sitting in equity, the question of the proper order for trying jury and non-jury issues had been presented to the Supreme Court before any trial had occurred. *Id.* at 341-42. Indeed, the *Crane* court asserted that the "very basis of *Beacon Theatres*" was that a non-jury resolution of an equitable claim might *limit* the issues that a jury could hear in a subsequent trial of an action for money damages. *Id.* at 342.

The Second Circuit credited Shapiro & Coquillette, *supra* note 34, with a proper analysis of the *Beacon Theatres* case. *Id.* at 343.

70. 490 F.2d at 343 n.15. The *Rachal* court repudiated the mutuality requirement, albeit reluctantly. See note 29 *supra* and accompanying text. Thus, it would not appear that the case can be meaningfully distinguished from *Crane* solely on the grounds that it involved successive proceedings with different plaintiffs.

> crees in the eighteenth century had preclusive effect in actions at law, and the erosion of the mutuality requirement for collateral estoppel, . . . arguably should apply to them to the same extent as to judgments at law.[71]

Oddly enough, the majority in *Goldman, Sachs & Co. v. Edelstein*[72] did not mention *Rachal* by name, but made only an oblique reference to the case by citing the passage from *Crane* quoted above.[73] This dictum appearing in *Crane* raised some doubt in the mind of the majority "as to whether a prior non-jury trial of the same issues in one case will estop a jury resolution of them in another."[74] On the basis of this "doubt," the *Goldman* majority concluded that Goldman, Sachs' right to trial by jury was in danger and that mandamus was therefore warranted.[75]

Judge Oakes, dissenting in *Goldman*, argued that the extraordinary remedy of mandamus could not be justified solely on the basis of "doubt" raised by dictum; indeed, Judge Oakes himself felt sufficiently unencumbered by *Crane* to cite *Rachal* for the proposition that "one who timely requests the right to a jury trial will not be collaterally estopped from exercising it by earlier resolution of the issues in a non-jury trial."[76] Oakes suggested that if the majority was intent upon establishing a contrary rule for the Second Circuit, it should have waited until Goldman, Sachs had actually been estopped in *Welch*. Only then, according to Judge Oakes, would the issues raised by *Rachal* and *Crane* have properly been before the court.[77]

The *Goldman* majority did place itself in an awkward position by flirting with the dictum in *Crane* before Goldman, Sachs had become estopped; for while it suggested that Goldman, Sachs' right to a jury trial in *Welch* might not have been so compelling as to overcome the collateral estoppel effect of an adverse judgment in *Franklin*, the court ruled that this right *was* sufficiently compelling to warrant the protection of mandamus. This tension in the *Goldman* decision can be traced to the Second Circuit's earlier analysis of the *Beacon Theatres* case in *Crane*, where the court concluded that the Supreme Court had authorized mandamus because jury trial considerations would not limit the application of collateral estoppel principles.[78] The *Goldman* court

71. *Id.* at 343 n.15.
72. 494 F.2d 76 (2d Cir. 1974).
73. *Id.* at 78. See quotation accompanying note 71 *supra.*
74. *Id.*
75. *Id.*
76. *Id.* at 79.
77. *Id.*
78. See note 69 *supra.* Under the *Crane* analysis, the fate of a litigant's jury rights

feared that under the *Crane* analysis, any adverse findings by a trial judge in *Franklin* might be binding on Goldman, Sachs in subsequent litigation.[79] It was in order to avert this threat to Goldman, Sachs' jury rights that the court of appeals issued a writ of mandamus directing the district court to try *Welch* first.[80]

Another route may have been open to the *Goldman* court in its efforts to safeguard the constitutional right to trial by jury. The Second Circuit could have denied mandamus on the grounds that *Crane* did not require that Goldman, Sachs be collaterally estopped. Rather than invoking the dictum in *Crane* which had been critical of the *Rachal* holding,[81] the Second Circuit could have established some distance between *Crane* and the *Goldman* case by distinguishing *Rachal* on its facts. Whereas *Goldman* involved two successive claims for money damages, neither of which had been adjudicated, the *Rachal* court had to decide whether to bind the defendants in a damage suit to the findings of a prior SEC injunction action. Significantly, this SEC action carried no right to a jury trial,[82] defendants did not waive their jury rights at any point throughout the course of the *Rachal* litigation, and there was apparently no misunderstanding among the parties as to which case would be tried first.[83] In contrast, Goldman, Sachs was

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depends on whether the question of damages arises before or after a trial judge has determined the matter of liability. 490 F.2d at 341-42. If a case is still pending, then mandamus is an appropriate remedy for preserving the right to trial by jury; but once an equitable claim has been adjudicated, collateral estoppel principles may be applied in derogation of that right. *See* Shapiro & Coquillette, *supra* note 34, at 446-47.

79. The dictum in *Crane* raised some "doubt" in the mind of the majority as to whether Goldman, Sachs would be estopped in *Welch*. See text accompanying note 74 *supra*. The majority presumably feared that the district judge might also have his doubts.

Judge Oakes did not consider estoppel in *Welch* likely, since the district judge had already refused to delay *Franklin* upon arguments identical to those presented to the court of appeals. 494 F.2d at 79. Yet in denying Goldman, Sachs' motion for a stay, the district judge had concluded that "by failing to demand a jury trial in *Franklin*, defendants assumed the risk that an adverse decision in *Franklin* might have preclusive effect in a subsequent action." Brief for Petitioners, app. C at 2.

80. As Judge Oakes pointed out, the grant of mandamus did not guarantee Goldman, Sachs the right to issue resolution by a jury in *Welch*. Under the terms of the majority's own analysis, Goldman, Sachs still could have been estopped by an adverse judgment in any of the actions pending against it outside of the Second Circuit. 494 F.2d at 79.

81. While the *Crane* court voiced its reservations as to the *Rachal* holding in dictum, the extent of its disapproval should not be minimized. The cases probably cannot be reconciled. See note 70 *supra*. More importantly, the contrasting interpretations of *Beacon Theatres* by the Second Circuit and the Fifth Circuit will necessarily yield opposite results whenever a court is asked to rule on a plea of collateral estoppel. Compare notes 69 & 78 *supra* with text accompanying notes 30-33 *supra* and note 34 *supra*.

82. *See* Shapiro & Coquillette, *supra* note 34, at 449 n.27.

83. Although the Fifth Circuit suggested that Rachal and Hunnicutt would have re-

entitled to a jury trial in *Franklin* but waived its rights. To the extent that this waiver was made in reliance upon the anticipated order of trials,[84] the Second Circuit could have concluded that findings in *Franklin* adverse to Goldman, Sachs would be tainted for collateral estoppel purposes.[85] The court thereby could have freed Goldman,

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ceived a jury trial on the issue of liability if Hill had been a party plaintiff in the SEC action, nothing in the *Rachal* opinion indicates that joinder of the two claims was actually considered. 435 F.2d at 63-64.

84. See note 9 *supra.*

85. Federal courts have adopted the "full and fair opportunity" test for determining whether a litigant should be bound to the findings of an earlier suit in which it has participated. See note 24 *supra* and accompanying text. In applying this test courts have examined with particularity the facts of a given case, and a wide variety of factors have been recognized as grounds for allowing relitigation of an issue. See note 25 *supra* and accompanying text.

The Second Circuit adopted the case-by-case approach implicit in the "full and fair opportunity" test in Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964). That case involved the proper construction of a written employment contract. After the employer had lost a suit brought by one group of employees, other employees instituted a second suit and sought to bind the employer to findings in the earlier judgment. The *Zdanok* court found that the employer fully expected its rights to be governed by the construction of the contract in the first case, and on this basis the court concluded that there would be no unfairness in estopping the employer from seeking another interpretation. 327 F.2d at 953-56. *See also* Rosenberg v. Martin, 478 F.2d 520, 525-26 (2d Cir.), *cert. denied,* 414 U.S. 872 (1973) (private party defendant in civil action may raise findings of earlier proceeding in which opponent was convicted of criminal violations); Ritchie v. Landau, 475 F.2d 151, 155 n.3 (2d Cir. 1973) (defendant may raise findings of prior arbitration proceeding to which it was not a party, even though the party resisting estoppel did not choose the arbitration forum); United States v. Fabric Garment Co., 366 F.2d 530, 534 (2d Cir. 1966) (government may raise prior criminal conviction in a subsequent civil suit against same party defendant); Kurlan v. Commissioner, 343 F.2d 625, 628-29 n.1 (2d Cir. 1965) (requirement that only final judgments may be given collateral estoppel effect is not inflexible); Fleischer v. Paramount Pictures Corp., 329 F.2d 424, 425 (2d Cir.), *cert. denied,* 379 U.S. 835 (1964) (defendant in federal court may raise findings of previous state adjudication against persons who were parties there); Goldstein v. Doft, 236 F. Supp. 730, 734 (S.D.N.Y. 1964), *aff'd,* 353 F.2d 484 (2d Cir. 1965), *cert. denied,* 383 U.S. 960 (1966) (findings in arbitration proceeding may be given full collateral estoppel effect).

In Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 538-41 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966), the Second Circuit refused to apply collateral estoppel principles on the basis that the first of two actions had not been strenuously litigated. Several actions for damages arising out of a plane crash were brought against defendant airline company. In one action on a claim of $500,000, defendants won a jury verdict. The case was reversed on appeal, however, and upon remand a new jury awarded plaintiffs $35,000. No appeal was taken from the second verdict. In a subsequent action brought by a different plaintiff on a claim of over $7,000,000, the *Berner* court refused to estop defendants from relitigating the issue of liability. The court observed that defendants had good reason for not appealing their ultimate loss in the first action since remand would have made them vulnerable to a larger award by a third jury. 346 F.2d at 540. On this basis the court concluded that the liability issue had not been litigated strenuously enough in the first action, and that the airline company

Sachs to contest its liability in *Welch*, even if it were to suffer an adverse judgment in *Franklin*.

The Second Circuit did not seize upon the fact that Goldman, Sachs' waiver of jury rights distinguished *Goldman* from *Rachal*.[86] It elected instead to renew its attack on the Fifth Circuit case, justifying the extraordinary remedy of mandamus on the basis of dictum in *Crane* which had been critical of the *Rachal* result.[87] Since what little support *Rachal* has generated outside of the Second Circuit has been

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did not evidence an intention to be bound by the findings there in subsequent litigation. *Id.* at 540-41.

The absence of an intention to be bound may have also influenced the inclination of the Second Circuit to discount the likelihood of collateral estoppel in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969). In that case the court held that there would be no violation of due process where a New York long-arm statute asserted jurisdiction over a nonresident motorist to the extent of his coverage under a liability insurance policy issued by a company doing business in New York. In contesting jurisdiction, the defendant had pointed out that the claim against him exceeded the policy limits of his insurance. He feared that if the resident plaintiff were later to acquire personal jurisdiction over him in another state, the plaintiff could bind him to an adverse New York judgment in a subsequent suit for the balance of the claim. However, the Second Circuit declared that such an application of collateral estoppel principles would be unconstitutional. 410 F.2d at 112. *See* Menendez v. Saks & Co., 485 F.2d 1355, 1363-64 (2d Cir. 1973), *petition for cert. filed sub nom.* Republic of Cuba v. Saks & Co., 42 U.S.L.W. 3529 (U.S. Feb. 21, 1974) (Nos. 73-1287, 89) (no collateral estoppel effect to an out-of-court agreement where parties did not evidence an intention to be bound); Fink v. Coates, 323 F. Supp. 988, 990 (S.D.N.Y. 1971) (no collateral estoppel where party opposed forum of first action and defended against relatively small claim); *cf.* Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691, 695 (S.D.N.Y. 1971) (no collateral estoppel where jury verdict was apparently influenced by sympathy for a party); Costello v. Pan Am. World Airways, Inc., 295 F. Supp. 1384, 1389 (S.D.N.Y. 1969) (no collateral estoppel where finding in prior adjudication was not necessary to the judgment there).

The Second Circuit has not yet addressed the question whether an opportunity to be heard remains "full and fair" after a party in Goldman, Sachs' position has waived its jury rights. However, by taking the approach that it did, the *Goldman* court has left open the possibility that future litigants *will* be collaterally estopped under similar circumstances. See note 87 *infra*.

86. In its unsuccessful attempt to have the district court stay *Franklin*, Goldman, Sachs had advanced arguments identical to those that ultimately persuaded the Second Circuit. 494 F.2d at 79. The district court distinguished *Goldman* from *Beacon Theatres*, *Rachal*, *Cannon*, and *Crane* on the basis that Goldman, Sachs had waived its right to a jury trial in *Franklin*, but the court did not speculate as to the reasons for waiver. Brief for Petitioners, app. C at 1-2.

87. See notes 71-74, 78-80 *supra* and accompanying text. The *Goldman* majority was clearly concerned about the jury waiver in *Franklin*. See note 9 *supra*. However, by taking the approach that it did, the court may have provided the basis for estopping future litigants in Goldman, Sachs' position who do not seek mandamus. If a party were to accede to a non-jury trial on the assumption that it would not be bound in subsequent litigation, the fact that it had waived its jury rights may be of no avail once judgment in the non-jury trial has been entered.

limited to situations in which there has been no right to a jury trial in the first of two successive proceedings,[88] it is difficult to gauge what impact *Goldman* will have on other circuits. Within the Second Circuit, however, *Rachal* no doubt stands discredited, as does the notion that a litigant can avoid collateral estoppel whenever its right to trial by jury would be compromised.

Goldman, Sachs clearly appreciated the importance of a timely assertion of the right to jury trial. *See* Brief for Petitioners at 18-19. Thus, after it had lost a jury verdict in *Welch*, see note 12 *supra*, Goldman, Sachs sought to further delay *Franklin* until the completion of every one of the jury cases pending against it in the Southern District of New York. But Judge Edelstein again refused to order a stay. He concluded, upon studying the *Goldman* opinion "in an effort to ascertain the extent of its prohibitions," that to proceed with the trial in *Franklin* would not violate the terms of the Second Circuit's analysis. Franklin Sav. Bank v. Levy, Civil No. 71-882 (DNE) (S.D.N.Y. Oct. 24, 1974). Goldman, Sachs again petitioned the court of appeals for a writ of mandamus, and the Second Circuit granted mandamus for a second time, deferring *Franklin* "until completion of jury trials of common issues in related cases." Goldman, Sachs & Co. v. Edelstein, No. 74-2512 (2d Cir. Dec. 2, 1974). By issuing an order of such broad scope, the Second Circuit further indicated its apparent determination to reject the *Rachal* rule against applying collateral estoppel principles in derogation of the right to jury trial.

88. See notes 37-42 *supra* and accompanying text.