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Collateral Estoppel and the Right to a Jury Trial: *Shore v. Parklane Hosiery Co.*, 565 F.2d 815 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3674-75 (U.S. May 2, 1978) (No. 77-1305)

Charles L. Finke
University of Nebraska College of Law, finke.charles@pbgc.gov

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Note

Collateral Estoppel and the Right to a Jury Trial

Shore v. Parklane Hosiery Co., 565 F.2d 815 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3674-75 (U.S. May 2, 1978) (No. 77-1305).

I. INTRODUCTION

Determining when the United States Constitution requires a jury trial in civil actions involves the analysis of various policy considerations. Relying on Supreme Court decisions of the past two decades[1] concerning the seventh amendment,[2] federal courts have, when faced with this issue, markedly favored a policy of allowing jury trials in civil cases. Also, with the vast increase in cases on the federal dockets in recent years, interest in judicial economy, finality, and avoidance of inconsistent results has increased. In futherance of these policies, the use of the doctrine of collateral estoppel has also expanded in federal court cases.

These two considerations—a party's right to a jury trial, and the use of collateral estoppel—have seemingly clashed in two federal courts of appeals decisions. In 1971, the United States Court of Appeals for the Fifth Circuit, in *Rachal v. Hill*,[3] was faced with the issue of whether corporate officers who had issues of fact determined against them in a non-jury trial of a Securities and Exchange Commission suit for injunctive relief are collaterally estopped from relitigating those issues before a jury in a subsequent class and derivative action for damages brought by shareholders. The court held that collateral estoppel did not apply to a non-jury decision when it would interfere with the right of the defendant to a jury trial in a subsequent action

1. *E.g.*, Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

2. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

3. 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

at law.[4] Five years later this same issue was presented to the United States Court of Appeals for the Second Circuit. In *Shore v. Parklane Hosiery Co.*,[5] the court found the reasoning in *Rachal* unpersuasive and held that collateral estoppel prohibited relitigation of those issues earlier decided. This note will concern itself with the holding in *Shore*, and discuss the reasons the second circuit felt *Rachal* was wrongly decided. Finally, the effect of these two decisions on various policy considerations of both procedure and the security laws will be examined.

II. THE FACTS

The class action in *Shore* was commenced in November 1974, on behalf of stockholders of the Parklane Hosiery Company (Parklane) against the corporation and various officers, directors, and shareholders. Plaintiff alleged that the defendants issued a false and misleading proxy statement violating sections 10(b),[6] 13(a),[7] 14(a),[8] and 20(a)[9] of the Securities and Exchange Act of 1934, and the rules and regulations promulgated thereunder. The individual defendants controlled over seventy percent of the corporation's outstanding stock, and the proxy statement was in furtherance of a proposed merger to convert Parklane from a publicly-held corporation to a privately-owned company controlled entirely by the defendants. The merger was completed and the minority shareholders, including the plaintiff, were offered two dollars per share for their holdings, subject to dissenter's appraisal rights, which were allegedly inadequate because of the misleading proxy.

In May, 1976, the Securities and Exchange Commission brought suit against the defendants[10] alleging, *inter alia*, violations of sections 10(b), 13(a), and 14(a) of the Securities and Exchange Act of 1934.[11] The allegations of a false and misleading proxy statement were essentially the same as those brought in the shareholder action. However, the Securities and Exchange Commission sought injunctive relief. The federal dis-

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4. The non-jury trial, being equitable, does not come within the seventh amendment which is limited to "suits at common law." U.S. CONST. amend. VII. *See* note 2 *supra*.
5. 565 F.2d 815 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3674-75 (U.S. May 2, 1978) (No. 77-1305).
6. 15 U.S.C. § 78j(b) (1976).
7. *Id.* § 78m(a).
8. *Id.* § 78n(a).
9. *Id.* § 78t(a).
10. The defendants in the SEC suit were the corporation and Somekh, its president. 565 F.2d at 817.
11. *See* notes 6-8, *supra*.

trict court judge, sitting without a jury in the equitable action, found violations of section 14(a) of the 1934 Act but limited relief to amending the prior filing to correct the misstatements and nondisclosures, and filing a Form 10-K for 1975.[12] The decision was affirmed on appeal.[13]

On the basis of this decision, the plaintiff in the shareholder action moved for summary judgment contending that the prior findings of fact collaterally estopped the defendants from asserting that any genuine issues of material fact regarding liability remained for trial. The district court denied the motion stating the following: " 'The within motion is denied. *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970). So ordered.' "[14]

III. THE DECISION OF THE COURT OF APPEALS

In reversing the district court, the second circuit was immediately faced with stating why *Rachal* was wrongly decided, as it admitted it could not distinguish that decision.[15] Still, the court sought to reinforce its decision by looking to the particular facts of *Shore*:

> Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting . . . that the issues in the SEC case be tried by a jury or before an advisory jury.[16]

This statement does not really distinguish the case from *Rachal*, for the defendants in *Rachal* also did not actively pursue their jury trial right, and had to rely on the plaintiffs' demand for their jury trial.[17] The court in *Shore* made it clear that it was not distinguishing *Rachal* but disagreeing with the case by citing prior decisions of the second circuit which questioned the correctness of the decision in *Rachal*.[18] For these reasons it may

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12. *See* SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976).
13. 558 F.2d 1083 (2d Cir. 1977).
14. 565 F.2d at 818.
15. "In *Rachal* the Fifth Circuit was faced with the question before us . . . ." *Id.*
16. *Id.* at 821-22.
17. Rachal v. Hill, 435 F.2d at 63 n.4. That court pointed out that the defendants were entitled to rely on this demand under FED. R. CIV. P. 38.
18. The court mentioned Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973). *Crane* was not concerned with non-mutual estoppel but stated "we are not at all sure that *Rachal* was correctly decided." 490 F.2d at 343 n.15 (citing Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971)). Also

be assumed that *Shore* would have reached the same result even if the defendants had done everything within their power to preserve their seventh amendment rights but were unable to do so.[19]

A. Rachal v. Hill

In the opening discussion of *Rachal*, the fifth circuit aligned itself with those cases not requiring mutuality of parties to apply collateral estoppel.[20] In doing so it apparently chose not to decide the case on the grounds of nonmutuality.[21]

Finding no case directly on point,[22] the court in *Rachal* turned to *Beacon Theatres v. Westover*[23] for guidance. The plaintiff in *Beacon Theatres* sought an injunction to prevent the defendants from bringing a treble damage suit and the defendant asserted a compulsory counterclaim[24] for damages and demanded a jury trial. The Supreme Court held that, except under the most compelling circumstances, it was an abuse of discretion for a court to deprive a litigant of his jury trial by deciding the equitable claim first.[25] In light of the respect the Supreme Court has shown for the preservation of the right to jury trial in *Beacon Theatres* and other cases,[26] the court in *Rachal* extended those decisions to reach the fact situation presented to it.

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mentioned was Goldman, Sachs, & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974), in which an action in which a jury trial had been demanded was ordered to be tried first to prevent collateral estoppel from denying the parties' right to a jury trial. This would not have been necessary if the analysis in *Rachal* had been applicable. *See also* SEC v. Everest Management Corp., 475 F.2d 1236, 1240 n.5 (2d Cir. 1972) (court refused to be persuaded by *Rachal* and instead determined that a private party would not be allowed to intervene in an SEC injunctive action).

19. *But see* Goldman, Sachs, & Co. v. Edelstein, 494 F.2d 76, 78 (2d Cir. 1974) (Oaks, J., dissenting). Judge Oakes believed that if timely steps were taken to preserve the right to a jury trial, under such circumstances collateral estoppel effect should not be given to a prior non-jury trial.
20. The court in *Rachal* cited B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967), and in a footnote discussed the leading case of Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), in which Justice Traynor dispensed with mutuality, seeing no rational reason for its continuance. 435 F.2d at 61 n.3.
21. *But see* note 50 and accompanying test *infra*.
22. 435 F.2d at 63.
23. 359 U.S. 500 (1959).
24. *See* FED. R. CIV. P. 13(a).
25. 359 U.S. at 508.
26. *Rachal* also relied on Dairy Queen v. Wood, 369 U.S. 469 (1962), in which the Supreme Court held a jury trial under the seventh amendment is not lost because legal issues are joined or are incidental to equitable issues. 435 F.2d at 64.

The court in *Shore* pointed out that not only is *Beacon Theatres* not precedent for the situations in *Rachal* and *Shore*, but that

> *Beacon Theatres* implicitly confirms the long-accepted principle that a non-jury adjudication of issues asserted in an equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim. Had it not been for that basic assumption the Supreme Court would not have been concerned about the order in which the legal and equitable claims were to be tried, since the defendant would then have been guaranteed a jury trial of the counterclaim regardless of the outcome of the equitable claim.[27]

The *Shore* court noted that this underlying suspicion was confirmed in *Katchen v. Landy*,[28] in which the Supreme Court upheld the right of a bankruptcy trustee to recover a preference through summary judgment over the objection that this would deny the claimant his right to a jury trial under the seventh amendment.[29] The second circuit, therefore, felt that *Rachal's* reliance on *Beacon Theatres* was unfounded.

B. The Policy Grounds.

After noting "the limited scope of the Supreme Court's decision in *Beacon Theatres*,"[30] *Shore* looked to various policy considerations to support its conclusion. The second circuit said the defendants knew the private action was pending, and even if it were not, the nature of a Securities and Exchange Commission injunctive suit makes such private actions foreseeable. The court, therefore, concluded there was no support for the proposition that the defendants did not or would not defend the Securities and Exchange Commission suit with full vigor.[31]

The court also emphasized that the defendants had "fully

27. 565 F.2d at 820-21.
28. 382 U.S. 323 (1966).
29. The court in *Shore* pointed out that whereas *Beacon Theatres* only speculated as to what "might" be the collateral estoppel effect, *Katchen* spoke more conclusively. "For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled." 565 F.2d at 821 (quoting Katchen v. Landy, 382 U.S. at 339-40).
30. 565 F.2d at 821. The narrow scope of that decision might be questioned in light of the Supreme Court's broad language in concluding that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Beacon Theatres v. Westover, 359 U.S. 500, 510-11 (1959).
31. *See* Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions*—Rachal v. Hill, 71 COLUM. L. REV. 1329, 1338-39 (1971) (quoted favorably in Shore v. Parklane Hosiery Co., 565 F.2d at 822 n.7).

and fairly adjudicated in a prior proceeding"[32] those issues in question, and the seventh amendment applies only when genuine issues of material fact exist. It is for this very reason that "the court may, without violating Seventh Amendment rights, grant summary judgment[33] . . . [or] withdraw a case from the jury and order the entry of a directed verdict[34] where the evidence . . . would not be sufficient to support a verdict in that party's favor."[35] Because of these analogous situations in which a jury trial is denied, the court in *Shore* felt the prior Securities and Exchange Commission adjudication called for the same result by the use of collateral estoppel.

The *Shore* opinion then concluded that to hold that the seventh amendment provided for a second trial of the same issues "would violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the 'just, speedy and inexpensive determination of every action.' "[36]

However the court recognized that a doctrine of judicial convenience must give way to a constitutional mandate. Accordingly, it undertook to determine if the right to jury trial under the seventh amendment must be preserved on historical grounds in this instance.

C. The Historical Grounds.

The court in *Shore* recognized that the seventh amendment does not create new jury trial rights, but by its terms simply "preserves" the right to a jury trial as it existed in 1791.[37] On this basis the defendants asserted that because principles of non-mutual estoppel did not exist in 1791, there would have been no collateral estoppel effect in 1791 and, therefore, they would have had a right to a jury trial if this "suit at common law"[38] would have arisen at that time. Since the amendment preserves a jury trial right, the defendants logically argued their jury right would be intact today. The second circuit disagreed with this assessment of the history and stated that "[s]uch a strict histor-

32. 565 F.2d at 819.
33. *See* FED. R. CIV. P. 56.
34. *See* FED. R. CIV. P. 50.
35. 565 F.2d at 819.
36. *Id.* at 821 (quoting Fed. R. Civ. P. 1).
37. 565 F.2d at 822. The seventh amendment became part of the United States Constitution in 1791; therefore, it is the common law on that date which is looked to in order to see if a jury trial right which then existed has been preserved.
38. The court pointed out that the term did not embrace equitable claims. *Id.*

ical approach to the Seventh Amendment, which would freeze the jury trial at its 1791 level—no more, no less—has been somewhat weakened by recent pronouncements."[39]

The court could find no eighteenth century analogue or counterpart to a Securities and Exchange Commission injunctive suit or a shareholder suit based on fraud in violation of the securities laws. Consequently, it could not "determine what jury trial and collateral estoppel rules would have been developed or applied" in 1791.[40] Noting that law courts in 1791 were willing to respect decrees in equity,[41] and considering the limitations upon historical inquiry, the court stated, "[w]e should not be confined to a rigid strait-jacket merely because of the lack of a common law analogue and the absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case."[42]

IV. ANALYSIS

While *Shore* appears correct in much of its criticism and resulting disagreement with the *reasoning* in *Rachal*, the *outcome* of *Rachal* is not as obviously incorrect. Despite the criticism of *Rachal* by some commentators,[43] its outcome had been approved by nearly every other state and federal court which had decided the same or similar issues,[44] including the definite

39. *Id.*. The court then quoted from Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), in which the Supreme Court found that because of the "extensive and possibly abstruse historical inquiry" involved in historical approaches, such approaches are "most difficult to apply." Commentators have observed that this inquiry was further complicated by the merger of law and equity early in the twentieth century. *See, e.g.*, Note, *Right to Twelve-Man Jury; Constitutionality of Pretrial Prosecutorial Discovery*, 84 HARV. L. REV. 165, 175-76 (1969); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1 (1967) (both cited in *Shore*). *See also* F. JAMES & G. HAZARD, CIVIL PROCEDURE 8.1 to .11 (2d ed. 1977); C. WRIGHT, FEDERAL COURTS 92 (2d ed. 1970); Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 448-49 (1971).

40. 565 F.2d at 823.

41. *See* Shapiro & Coquillette, *supra* note 39, at 450-54 (full analysis of the legal treatises of the period and conclusion that as a rule equitable decrees were binding on the same parties in subsequent actions in courts at law). *Accord*, RESTATEMENT OF JUDGMENTS § 68, Comment j (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment d (Tent. Draft No. 1, 1973).

42. 565 F.2d at 823.

43. Most notably Shapiro & Coquillette, *supra* note 39. *See also* McWilliams, *Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 MISS. L.J. 1 (1977). The author criticizes *Rachal's* effect in the antitrust area, and takes the position advocated by Shapiro and Coquillette.

44. *E.g.*, Allegheny Airlines, Inc. v. United States, 504 F.2d 104, 111 n.7 (7th Cir.

approval of a federal district court in the second circuit.[45] The *Restatement of Judgments*[46] also took *Rachal* into account in revising its sections on issue preclusion. While adhering generally to the proposition that other persons not a party to the first judgment are nevertheless precluded from relitigating the issue the same as parties to the judgment are precluded, the *Restatement* lists seven circumstances in which that may not be the result. One such circumstance is applicable to *Rachal*: "The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined."[47] The comment specifically mentions the right to a jury trial as such an opportunity.[48] Additionally, there are several policy considerations, either not mentioned or

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1974) (approved *Rachal* in holding a judge's decision for the defendant United States would not have collateral estoppel effect for the other defendants because it would short circuit the plaintiffs' right to a jury trial); Lyne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1182, 1184 (3d Cir. 1972) (arbitration award declared not final, one reason being *Rachal* would not allow deprivation of a jury trial, which would have been the result if the arbitration award was given collateral estoppel effect); SEC v. Standard Life Corp., 413 F. Supp. 84 (W.D. Okla. 1976) (request for jury trial in SEC injunctive suit not granted because *Rachal* would give a jury trial in any later private actions); McCook v. Standard Oil Co., 393 F. Supp. 256 (C.D. Cal. 1975) (followed *Rachal* to allow jury trial and deny collateral estoppel effect to a prior government civil antitrust case in equity); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561-62 n.9 (S.D. Fla. 1973) (dictum) (collateral estoppel effect not given where the first case was in admirality); Delta Airlines, Inc. v. Woods, 137 Ga. App. 693, 224 S.E.2d 763 (1976) (approved *Rachal* in holding state constitutional right to jury trial prohibited collateral estoppel effect of a decision of the Georgia State Workmen's Compensation Board).

McCook v. Standard Oil Co., 393 F. Supp. 256 (C.D. Cal. 1975), though strongly relying on *Rachal*, differs because § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1976), provides that civil and criminal antitrust cases brought by the government will be considered *prima facie* evidence in later private actions. This result was criticized in McWilliams, *supra* note 43, at 22-28.

45. Cannon v. Texas Gulf Sulfur Co., 323 F. Supp. 990, 993-94 (S.D.N.Y. 1971). The district court found *Rachal* controlling on nearly the exact fact pattern. *See also* Essex Systems Co. v. Steinberg, 335 F. Supp. 298, 302 (S.D.N.Y. 1971) (dictum). Apparently the only cases to seriously question the correctness of *Rachal* were those second circuit decisions discussed in note 18 *supra*.
46. RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2 1975).
47. *Id.*
48. *Id.* Comment d. *See also id.*, Explanatory Notes § 88, Comment d at 100, which cites *Rachal* when stating that "[t]he differences between the procedures available in the first and second actions, while not sufficient to deny issue preclusion between the same parties, may warrant a refusal to carry over preclusion to an action involving another party." *Id.*

not fully discussed in *Rachal*, which raise some questions about the result in *Shore*. There are also considerations which reinforce the *Shore* decision, and all these factors must be weighed in an attempt to determine which is the more desirable result.

The first holding of *Rachal* agreed with those decisions which had dispensed with the requirement of mutuality in the application of collateral estoppel.[49] But it then used non-mutuality to distinguish at least one other case which would otherwise have been on point.[50] Thus, there appears to be some question as to what, if any, reliance was put on non-mutuality in the *Rachal* opinion. Similarly, *Shore* dispensed with mutuality by citing prior decisions[51] and maintaining that whatever doubt there might have been on the issue was resolved by the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[52] However, this appears to be an oversimplification by *Shore*, for mutuality is still considered a requirement for collateral estoppel by many courts in some circumstances.

For example, it has been suggested[53] that courts might best serve the parties' interests by distinguishing between the offensive and defensive use of collateral estoppel. It is generally agreed that mutuality should not be required for defensive use,[54] and indeed *Bernhard v. Bank of America National Trust & Savings Association*,[55] the landmark California Supreme Court case in which Justice Traynor first dispensed with mutuality, was a defensive use of collateral estoppel.[56] So too was *Blonder-Tongue*,[57] and as a result some federal courts have

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49. *See* note 20 and accompanying text *supra*.
50. 435 F.2d at 63 n.5. Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969), was the case *Rachal* distinguished by stating that the parties were the same in the second action. A second reason given in the footnote for distinguishing the case was that the jury trial issue was not raised. The seemingly inconsistent treatment of the mutuality issue is mentioned in Comment, *supra* note 31, at 1334.
51. Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964); Bernard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).
52. 402 U.S. 313 (1971).
53. *See, e.g.*, Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).
54. *Id.* at 1019-26.
55. 19 Cal. 2d 807, 122 P.2d 892 (1942).
56. That Justice Traynor had in mind limiting the doctrine of non-mutuality to cases of defensive use is not apparent from his opinion, however.
57. "But the case before us involves neither due process nor 'offensive use' questions." 402 U.S. at 330. The Supreme Court in that case held that a determination of patent invalidity against a party suing as a plaintiff in an infringement action was binding when it subsequently sued to enforce the patent against others.

kept alive the requirement of mutuality in certain situations in which collateral estoppel is used offensively. Such an example is *McCook v. Standard Oil of California*.[58] In *McCook*, the court refused to apply collateral estoppel offensively without mutuality of parties because to do so would have denied the defendant a jury trial when one was unavailable in the first action. This is similar to the *Shore* situation[59] and, not surprisingly, the *McCook* court relied heavily on *Rachal*. Despite the fact that some courts have done away with the requirement of mutuality both offensively and defensively,[60] it is surprising that *Rachal* did not mention this distinction in its puzzling discussion of mutuality,[61] and that the second circuit in *Shore* felt that the matter was so conclusively decided.

Rachal did not rely on a historical analysis of the seventh amendment for its decision. In fact, it did not mention anything about historical inquiry. *Shore* found that the history of the amendment did not mandate a jury trial, relying on critics of the *Rachal* decision.[62] But at least one court in similar circumstances has stated that it was not the seventh amendment which compelled the jury trial in *Rachal*, but rather "the public policy in favor of jury trials growing out of the Seventh Amendment"[63]

58. 393 F. Supp. 256 (C.D. Cal. 1975).
59. But *McCook* does differ in that it is based on § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1976). *See* note 44 *supra*.
60. *E.g.*, B.R. DeWitt v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).
61. *See* note 50 *supra*.
62. *See* Shapiro & Coquillette, *supra* note 39.
63. McCook v. Standard Oil, 393 F. Supp. 256, 259 (C.D. Cal. 1975). *McCook's* analysis is an interesting one:

> While *Rachal* seemingly bases its conclusion on the Seventh Amendment, it is just as appropriate to read the case as authority for the proposition that (1) collateral estoppel applies only when the doctrine "will not result in injustice to the party against whom it is asserted under the particular circumstances of the case," . . . and (2) this "injustice" results when the doctrine interferes with the "great respect" our tribunals have afforded the public policy favoring jury trials. . . . If this interpretation is correct, then the case would not be contrary to the conclusion reached in The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442 (1971), that the Seventh Amendment does not preclude a defendant in a subsequent civil action at law from being collaterally estopped by a prior action in equity.

Id.

The historical analysis of Shapiro & Coquillette, *supra* note 39, is strongly criticized in Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 648-49 n.33 (1973):

> The obvious implication, which other portions of the article in question make clear, is that the seventh amendment jury in civil cases is such a drag on efficient judicial administration . . . and results in such inflated damage awards, . . . that it should be avoided (here, in favor of the undefended values of collateral estoppel)

which made denying the collateral estoppel effect of the non-jury trial the proper decision in this situation. That court thought that "[b]y carving this small exception into the offensive use of collateral estoppel, the court slightly compromises the policy favoring an end to litigation and preserves the strong policy favoring jury trial."[64]

Shore was correct in observing that it is unlikely that the use of collateral estoppel would be unfair or that it would work a particular hardship on the defendant, given the circumstances. First, as previously mentioned,[65] the private action was pending at the time of the Securities and Exchange Commission's injunctive suit, so the defendant knew the likely consequences of that equitable action. And if the private action had not commenced until after the completion of the injunctive suit, any unfairness to Parklane would have been minimal because the nature of Securities and Exchange Commission suits for injunctive relief makes private shareholder actions foreseeable.[66]

Second, there is little reason to believe that the defendants in either *Shore* or *Rachal* would gain anything by a jury trial in their second suits. In neither case did the defendants initially seek a jury trial,[67] and only after the collateral estoppel question appeared did they actively demand their right. This might be because juries appear more likely than a judge to be unfavorable to large corporations and their officers and directors accused of fraud against minority shareholders. Though only a hypothesis, this should be no surprise since jurors, who are small investors, if investors at all, would tend to identify with the minority shareholders who were allegedly defrauded.

The effects of the decisions in *Shore* and *Rachal* on the functions of the Securities and Exchange Commission and the enforcement of the federal securities laws were not discussed by either court. Although receiving a set back in recent Supreme Court cases limiting the effect of rule 10b-5 in private

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> except where the seventh amendment, rather narrowly conceived, compels otherwise.
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> . . . It is submitted that this is, at the least, rather unusual constitutionalism. The idea of rejecting the underlying value of a constitutional guarantee, or of viewing the guarantee as burdensome and thus to be restricted—if applied to other portions of the Bill of Rights—would certainly be rejected.

Id.

64. *McCook*, 393 F. Supp. 256, 258 (C.D. Cal. 1975). *See also* notes 44, 48, and 63 *supra*.
65. *See* text accompanying note 16 *supra*.
66. *See* note 31 and accompanying text *supra*.
67. *See* notes 16-17 and accompanying text *supra*.

suits,[68] the Commission has made efforts to further enforcement of the federal securities laws through encouraging private litigation.[69] It appears that by giving collateral estoppel effect to the Securities and Exchange Commission's suit, the result in *Shore* is encouraging private litigation by allowing injured shareholders to take advantage of the expertise and budget of the Securities and Exchange Commission in their own suit. However there are other ways this might be accomplished and still preserve the defendant's right to a jury trial.[70]

Intertwined with the Commission's efforts to enforce the security laws through private enforcement has been a major effort to obtain some type of restitution as ancillary relief in the Commission's injunctive actions. The federal courts, in asserting broad equitable powers, have granted such supplemental relief and the practice is becoming increasingly common.[71]

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68. Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
69. This is because of the sometimes limited effect of after-the-fact injunctive decrees in one-time-only occurrences. *See, e.g.*, Comment, *supra* note 31, at 1336-37.
70. One alternative is to ask for an advisory jury pursuant to FED. R. CIV. P. 39(c). However, a federal district court recently denied that this was a viable alternative in SEC v. Wills [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,321 (D.D.C. Feb. 11, 1978). That court stated that such an advisory jury would not satisfy the defendant's "perceived constitutional right to jury trial." *Id.*

    In addition, under FED. R. CIV. P. 39(b), a jury by consent of the parties might have the same effect as a jury by right. It would appear that if the SEC consented to a jury trial and the defendant did not, it might be considered a waiver of his jury trial right and the problem would be solved. *Contra*, Cannon v. Texas Gulf Sulfur Co., 323 F. Supp. 990, 993-94 (S.D.N.Y. 1971).

    Another alternative is considering the prior SEC case as *prima facie* evidence, but rebuttable, in the subsequent private litigation, similar to the rule in antitrust cases. Both the jury trial right and the use of the SEC expertise and resources are accomplished by this alternative. *See* McCook v. Standard Oil, 393 F. Supp. 256 (C.D. Cal. 1975); notes 44 and 59 *supra*.

    The SEC could also intervene on behalf of the private plaintiffs in a case like *Shore*. Like many of the alternatives this would strain the SEC's limited resources. Or private claimants could intervene in the SEC injunctive suit, but resulting problems such as the increased difficulty in obtaining consent decrees has made the SEC generally opposed to this. *See generally* Comment, *supra* note 31, at 1340-43.
71. *See* Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L. J. 641, 642 n.4 (1977). The author says some sort of restitution was sought in approximately 32 percent of those injunctive actions alleging fraud in 1975. An argument that these disgorgement suits by the SEC are in fact legal in nature, and therefore entitle the defendant to a jury trial, was recently rejected by the second circuit in SEC v. Commonwealth Chem. Sec., Inc. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,351 at 93,193 (2d Cir. Mar. 3, 1978).

While the mechanics of this "disgorgement" are often complex, generally the defendants place the disgorged funds in an escrow account, with a court appointed trustee, or make some similar arrangement, and the funds are then distributed to the injured private claimants.[72]

Given the result of *Rachal*, such a fund may allow private claimants to recover their damages much more easily than going through an entire litigation on the claim, though the exact procedures are far from clear.[73] If *Shore* becomes the accepted rule, however, the Securities and Exchange Commission may feel the collateral estoppel effect of their own suit will sufficiently encourage private litigants so that the Commission will be able to expend less of its limited resources on this type of ancillary relief than it has in recent years.[74] Private plaintiffs would also not be limited to the escrow fund in their recovery, as they might be when the Commission obtains disgorgement ancillary to their injunctive relief.[75]

Certainly the decision in *Shore* tends to give more power to the Securities and Exchange Commission in its dealings with alleged violators of the federal security laws. An unfavorable judgment in an injunctive suit brought by the Commission will collaterally estop the defendants from litigating the issue in a private action. Consequently a consent agreement between the Commission and the alleged violator, which may have no collateral estoppel effect on later private actions, is more likely. Therefore, it would appear *Shore* puts the Commission in a position to drive a harder bargain, gaining concessions it might otherwise have been unable to obtain.

This likely increase in settlements might reduce the number of Security and Exchange Commission injunctive suits actually reaching litigation, but the real concern of the courts in giving

72. *See* Ellsworth, *supra* note 71, at 666-69.
73. *Id. See also* Comment, *supra* note 31, at 1343.
74. The collateral estoppel effect of SEC injunctive suits based on Rule 10b-5 (like *Rachal*) is unclear in light of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). There the Supreme Court required scienter to prove rule 10b-5 infractions brought by private claimants. It did not decide if scienter was required in SEC injunctive suits, and some federal courts have since held it is not required in such actions, *e.g.*, SEC v. World Radio Mission, 544 F.2d 535 (1st Cir. 1976). However, it would appear that if the SEC wanted its decisions to have meaningful collateral estoppel effect, assuming the adoption of *Shore*, it would be forced to prove scienter in its injunctive action anyway. This observation is supported in recent dicta by Judge Friendly. SEC v. Commonwealth Chem. Sec., Inc. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96, 351 at 93,194 n.4 (2d Cir. Mar. 3, 1978).
75. *See* note 73 and accompanying text *supra*.

collateral estoppel effect to these suits was the judicial convenience of reducing the backlog on jury trial dockets.[76] Since these settlements will not have collateral estoppel effect, the number of jury trials may well remain largely unaffected by the decision in *Shore*.

V. CONCLUSION

This note has demonstrated that there is a question whether *Shore* corrected the deficient outcome in *Rachal*, or instead failed to properly interpret the right to a jury trial preserved by the seventh amendment. Depending upon one's point of view, the opinion lends itself to either conclusion. What is clear, however, is that the split in authority among the circuits must be resolved. Not only will it be unlikely that consistent case law can now develop in the area,[77] it also seems that the Security and Exchange Commission is faced with needless uncertainty. The Commission will have great difficulty maintaining a coherent policy of enforcement and it will not know which, if any, alternatives[78] to consider if the effect to be given its injunctive suits is unknown.

Charles L. Finke '79

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76. *See, e.g.*, Shapiro & Coquillette, *supra* note 39, at 457-58; Comment, *supra* note 31, at 1341.

77. An example of problems that can result from the conflict among the circuits is seen in a case decided after *Shore*, SEC v. Wills [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,321 (D.D.C. Feb. 11, 1978). In that case the trial court denied the defendant's request for a jury trial, which had been asked for specifically because of the *Shore* decision. The court noted the conflict among the circuits but pointedly refused to rule on "the complex collateral estoppel issues involved." *Id.* The litigation also has many private actions pending in different courts; the anomalous result might well be that some courts will give collateral estoppel effect to the SEC injunctive suit, and others will not.

See also SEC v. Commonwealth Chem. Sec., Inc. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 96,351 (2d Cir. Mar. 3, 1978). The second circuit ruled, *inter alia*, that although *Shore* gave the SEC suit collateral estoppel effect in subsequent private actions, the defendants were not entitled to a jury trial in the injunctive suit.

78. *See* note 70 *supra*.