IDENTITY OF PRODUCTS PRECLUDES APPLICATION OF OFFENSIVE COLLATERAL ESTOPPEL IN ASBESTOS LITIGATION

I. INTRODUCTION

Asbestos is a naturally occurring fibrous material, mineral in nature. It is mined as a dense rock and when separated from its surrounding materials can be woven or spun much like cotton or wool.[1] Asbestos has been known to man since ancient times[2] and in 1827 was used in clothing worn by firemen.[3] Since 1874 it has been used as an insulation material.[4] Between 1877 and 1967 world production and use of asbestos increased from fifty tons per year to four million tons per year.[5] The increase in demand for asbestos began during World War II.[6] In the United States alone, overall consumption increased by over thirty million tons from 1972 through 1978.[7]

Every major commercial variety of asbestos has been linked to several diseases.[8] Diseases connected with asbestos exposure include: asbestosis, a fibrotic process which occurs in the lungs;[9] lung cancer (brochogenic carcinoma);[10] mesothelioma, a cancer which attacks the lining of the chest, lungs, or abdomen;[11] gastrointestinal cancer;[12] cancer of the larynx; and kidney cancer.[13]

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1. Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 342 (1980).
2. *Id.* at 342 (reference to use of asbestos in fifth century B.C. as lamp wick).
3. *Id.*
4. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 n.3 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).
5. Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 58 (1978).
6. Mehaffy, *supra* note 1, at 342.
7. *Id.*
8. Comment, *supra* note 5, at 58.
9. 4A R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE § 205c.00 (1983). *See also* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973) (medical testimony describing asbestosis), *cert. denied*, 419 U.S. 869 (1974).
10. 4A R. GRAY, *supra* note 9, § 205c.71.
11. *Id.* § 205c.72.
12. *Id.* § 205c.73.
13. *Id.* § 205c.74.

The widespread use of asbestos has made asbestos exposure relatively common.[14] It was recently estimated that approximately three thousand different products in daily use contain asbestos.[15] Obviously, people who work with asbestos, such as insulation workers, are the most susceptible to an asbestos-related disease. However, the effects of asbestos exposure (and the suits arising therefrom) do not stop at the workplace. Families of asbestos workers have been contaminated by dust brought home by the worker.[16] Also, persons working or living near an asbestos factory or industry are subjected to asbestos fibers.[17] A major problem with asbestos-related disease is its latent characteristics. Often, the disease does not appear until approximately fifteen years after exposure and does not become a serious health problem until twenty to thirty-five years after exposure.[18]

This latent aspect of asbestos-related diseases, combined with the serious effects of exposure and the dramatic increase in the use of asbestos, has led to a flood of litigation. It was estimated in 1982 that between 1973[19] and 1982 over twelve thousand products liability suits had been filed against manufacturers of asbestos products.[20] There are potentially two million claims to be litigated in the next thirty years.[21]

It is obvious that with such a large number of cases, costs, in the form of time and money for both the litigants and the judicial process, are at a premium. Collateral estoppel, or issue preclusion, has often been proposed and utilized as a device for controlling the litigation of asbestos claims. This comment will look at past asbestos cases dealing with collateral estoppel and the propriety of collateral estoppel in future asbestos litigation.

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14. *See id.* § 205c.11 (occupational and industrial sources of exposure).

15. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 861 (1980).

16. Comment, *supra* note 5, at 74-75. *See also* 4A R. GRAY *supra* note 9, § 205c.15 (familial exposure).

17. Comment, *supra* note 5, at 59-60, 62.

18. *See* 4A R. GRAY *supra* note 9, §§ 205c.71, 205c.72.

19. This was the year when Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), was decided. *See infra* notes 27-49 and accompanying text. *Borel* was a major decision in the area of asbestos litigation in that, for the first time, strict products liability was applied to a case involving an occupational disease. 493 F.2d at 1103. *Borel* affirmed a judgment for the plaintiff. *Id.*

20. Nat'l L.J., Nov. 8, 1982, at 31, col. 1. Some more liberal estimates place the figure at 20,000 suits. Nat'l L.J., Oct. 19, 1981, at 24, col. 1.

21. Comment, *supra* note 5, at 85 n.180.

II. COLLATERAL ESTOPPEL: CURRENT STATUS IN ASBESTOS LITIGATION

Collateral estoppel prevents relitigation of an identical issue which was adjudicated in a previous suit.[22] The doctrine can be applied both offensively and defensively.[23] Offensive collateral estoppel occurs when the plaintiff seeks to prevent the defendant from relitigating an issue decided against that defendant in a previous suit. In defensive collateral estoppel, the defendant seeks to foreclose the plaintiff from relitigating a previously adjudicated issue.[24]

Because collateral estoppel, in effect, denies a party his right to trial,[25] several requirements based upon fairness have been set forth to determine the applicability of collateral estoppel. First, the party against whom collateral estoppel is asserted must have a full and fair opportunity to litigate the issue in the prior case. Second, application of the doctrine must not create injustice. Third, application of the doctrine must not contravene any overriding public policy. Fourth, parties who are defendants in both suits must be closely scrutinized to avoid unfairness. Fifth, the issue to be concluded must be identical to the one in the prior litigation. Sixth, the issue in the prior action must have been actually litigated. Finally, the issue in the prior action must have been necessary and essential to the resulting judgment.[26]

A. *The Borel Decision: Foundation for Collateral Estoppel?*

The seminal case in asbestos litigation is *Borel v. Fibreboard Paper Products Corp.*[27] Clarence Borel worked as an industrial insulation worker from 1936 until 1969 when he was disabled with

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

23. *See id.* at 326 n.4.

24. *Id.* It is important to distinguish between collateral estoppel and res judicata. While collateral estoppel prevents relitigation of identical issues, res judicata prohibits a second suit based on the same cause of action. *Id.* at 326 n.5. *See also* C. WRIGHT, LAW OF FEDERAL COURTS § 100A, at 680, 682 (1983) (general rules of claim preclusion and issue preclusion).

25. Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

26. Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1189-90 (5th Cir. 1982), *vacated*, 103 S. Ct. 1245 (1983). *See also* James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir.) (threshold requirements of collateral estoppel), *cert. denied*, 404 U.S. 940 (1971).

27. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). This was the first asbestos case to be fully tried and appealed. Mehaffy, *supra* note 1, at 345. Another early

lung disease.[28] Because of the nature of Borel's work he was necessarily exposed to "heavy concentrations" of asbestos dust.[29] As a result of asbestosis and mesothelioma Borel died before his case reached the trial court.[30]

The trial court found four of the six defendants[31] negligent and found Borel to have been contributorily negligent.[32] However, the trial court also found all six defendants to have been strictly liable because of their failure to adequately warn of the foreseeable dangers in their products.[33]

In affirming the trial court's decision,[34] the Fifth Circuit looked at four main issues.[35] Initially, the court considered whether asbestos dust can produce disease. Tracing the medical history and studies of asbestos, the court had no problem in determining that asbestos can indeed cause diseases such as asbestosis and mesothelioma.[36] Second, the court determined that insulation materials containing asbestos may be viewed as "unavoidably unsafe products."[37] Unavoidably unsafe products, the court explained, are those products which in the state of human knowledge cannot be made safe for their ordinary and intended use.[38] Continuing, the court acknowledged that the utility of some products may outweigh the known or foreseeable risks and thus justify marketing the product.[39] The court found insulation containing asbestos to be a product whose utility justifies its marketing.[40] The court, however, was quick to point out that failure to adequately warn the consumer of

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case litigating the liability for asbestosis is Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975).

28. 493 F.2d at 1081.

29. *Id.* In a pretrial deposition Borel testified that at the end of a work day he would blow "dust out of [his] nostrils by the handfuls." *Id.* at 1081-82. Borel further testified that he knew breathing the dust was harmful, but he did not know to what extent. *Id.* at 1082.

30. *Id.* at 1082-83.

31. Borel originally sued eleven defendants; however, four settled prior to trial, and a directed verdict was granted in favor of a fifth. *Id.* at 1086.

32. *Id.*

33. *Id.*

34. *Id.* at 1103.

35. Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 ST. MARY'S L.J. 19, 48 n.175 (1982).

36. 493 F.2d at 1083-85.

37. *Id.* at 1088. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

38. 493 F.2d at 1088.

39. *Id.* at 1089.

40. *Id.*

foreseeable dangers would render the product unreasonably dangerous for which a manufacturer could be held strictly liable.[41]

Next, the court looked at the question of "whether the danger to Borel and other insulation workers was foreseeable at the time the products causing Borel's injury were sold."[42] This issue overlaps with the first issue of whether asbestos dust can cause disease. Referring to its survey of medical studies and literature, the court found that asbestos was recognized as a known cause of disease as early as the 1930s.[43] Additionally, the court found the evidence established that none of the defendants ever tested their products to determine the products' effects on industrial insulation workers.[44] Based on these findings, the court held the jury could reasonably find that the dangers to insulation workers were foreseeable at the time the insulation products causing Borel's injuries were sold.[45]

Finally, on rehearing three defendants contended that warning labels were placed on their products.[46] The Fifth Circuit stated these warnings inadequately advised Borel of "the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers."[47] Additionally, the court found the warnings were not given at a time which would allow Borel to effectively choose whether or not to encounter the risk.[48] The Fifth Circuit emphasized that merely warning the consumer of a foreseeable risk was not sufficient; rather, the warning must adequately convey the

41. *Id.* The court imposed the duty upon a manufacturer to test and inspect its product and to warn the consumer based upon the established risks or foreseeable risks of the product. In determining whether the manufacturer has complied with this duty, the manufacturer is held to "the knowledge and skill" of an expert. *Id.* at 1089-90.

42. *Id.* at 1092.

43. *Id.* at 1093. An expert witness for the defense testified it was common knowledge in the 1930s that asbestos dust was dangerous and a cause of asbestosis. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1103-04. Defendant Johns-Manville claimed warning labels accompanied their products in 1964 while Fibreboard and Ruberoid, also a defendant, claimed to have placed warnings on their products in 1966. Borel filed suit in 1969. *Id.* at 1104.

47. *Id.* All the warnings were substantially the same, reading as follows:

> This product contains asbestos fiber. Inhalation of asbestos in excessive quantities over long periods of time may be harmful. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible wear respirators approved by the U.S. Bureau of Mines for pneumoconiosis producing dusts.

Id. The court referred to parts of this warning as "black humor." *Id.*

48. *Id.* at 1105.

gravity of the risk.[49]

The impact of the *Borel* decision was felt by both the asbestos plaintiff and the asbestos industry. In effect, the *Borel* decision made findings which were essential elements of every asbestos plaintiff's cause of action. First, the court found asbestos dust to be a producing cause of diseases such as asbestosis and mesothelioma. Second, the court found asbestos products to be unavoidably unsafe and imposed a duty upon manufacturers to warn of the foreseeable risks in the use of their products. Third, the court found the risk to Borel was foreseeable and that the defendants failed to provide adequate warnings. Thus, it appeared that the *Borel* decision established a basis for collaterally estopping the defendants, with the only remaining elements required for recovery being proof of cause in fact and damages.

B. *Offensive Collateral Estoppel in Asbestos Litigation: Hardy v. Johns-Manville Sales Corp.*

The application of collateral estoppel was not as clear cut as it may have appeared. After *Borel* the district courts grappled with questions concerning the applicability of collateral estoppel[50] for nearly ten years before *Hardy v. Johns-Manville Sales Corp.*[51] was

49. *Id.* at 1105-06.

50. The following cases have dealt with the preclusive effect of *Borel*: Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 348 (5th Cir. 1982) (reversed application of collateral estoppel to issues of whether asbestos dust can cause disease and whether asbestos products are unreasonably dangerous); Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981) (holding *Borel* was not stare decisis for all other cases); Amader v. Johns-Manville Corp., 541 F. Supp. 1384, 1387 (E.D. Pa. 1982) (estopping litigation of whether "Unibestos" was defective between 1962 and 1968); Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 544-45 (D. Minn. 1982) (granting estoppel on whether asbestos dust can cause disease but denying estoppel on state of the arts and the unreasonably dangerous issue); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1363 (E.D. Tex. 1981) (collaterally estopping relitigation of whether asbestos dust can cause disease and whether asbestos products are unreasonably dangerous), *rev'd*, 681 F.2d 334 (5th Cir. 1982); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 339 (S.D. Miss. 1980) (denying collateral estoppel based on state law requirement of mutuality); Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 332-33 (E.D. Mo. 1980) (denying collateral estoppel on unreasonably dangerous issue); Migues v. Nicolet Indus., Inc., 493 F. Supp. 61 (E.D. Tex. 1980) (preclusion based on stare decisis effect of *Borel*), *rev'd*, 662 F.2d 1182, 1185 (5th Cir. 1981); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980) (collaterally estopping whether cement pipes containing asbestos are defective and unreasonably dangerous); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 250 (E.D. Tex. 1980) (estopping relitigation of whether asbestos products are defective and unreasonably dangerous).

51. 681 F.2d 334 (5th Cir. 1982).

handed down in 1982. *Hardy* was the first appellate opinion dealing with the use of offensive collateral estoppel in asbestos litigation.[52]

Regarding the insulation cases, the *Hardy* trial court held that the non-*Borel* defendants shared the same interests as the *Borel* defendants and thus found collateral estoppel applicable.[53] The court also held that under any theory of privity, collateral estoppel was proper on the issue that asbestos is a competent producing cause of asbestosis and mesothelioma.[54] In the non-insulation cases, however, the court held only the duty question was estopped and evidence regarding the adequacy of the defendant's warning was a jury question and not subject to collateral estoppel.[55]

The district court's preclusion order foreclosed relitigation of two issues: whether products containing asbestos are unreasonably dangerous and whether asbestos dust is a competent producing cause of lung disease.[56] The sole issue on appeal was the validity of this order.[57]

The Fifth Circuit first examined the propriety of estopping the non-*Borel* defendants. While acknowledging "the manipulability of the notion of 'privity,' " the Fifth Circuit quickly rejected the district court's identity of interests theory, stating "[t]he trial court's action stretches 'privity' beyond meaningful limits."[58] The Fifth Circuit explained that the mere fact that the non-*Borel* defendants, like the *Borel* defendants, were engaged in manufacturing products containing asbestos did not create privity.[59] After rejecting the plaintiff's argument of virtual representation,[60] the Fifth Circuit concluded

52. *Hardy* was a consolidation of 57 different cases. The plaintiffs were insulation workers, pipefitters, carpenters, and factory workers. 509 F. Supp. 1353, 1354 (E.D. Tex. 1981).

53. *Id.* at 1361. Some of the defendants in *Hardy* were also parties in *Borel*. *See infra* text accompanying notes 124-25.

54. 509 F. Supp. at 1362. The court argued that the danger of the generic ingredient, asbestos, was the same irrespective of the product. It then seemingly contradicted itself by saying that the degree of danger may vary with the final product. The court somewhat reconciled this inconsistency by characterizing the first statement as the "can it" question and the second statement as the "did it" question. *Id.*

55. *Id.*

56. 681 F.2d at 337.

57. *Id.*

58. *Id.* at 339.

59. *Id.* Additionally, the plaintiffs failed to show that any of the non-*Borel* defendants in *Hardy* had participated in any capacity in the *Borel* litigation. *Id.* at 339-40.

60. *Id.* at 340. A nonparty under the law of res judicata will be bound by a judgment if one of the parties is so closely aligned with the nonparty's interests as to be his virtual

that the non-*Borel* defendants "have . . . been deprived of their day in court by the trial court's omnibus order."[61]

Next, the court focused on the more difficult question of whether the *Borel* defendants could properly be estopped.[62] The appellants argued that *Borel* did not necessarily decide that products containing asbestos were unreasonably dangerous because of failure to warn, and therefore collateral estoppel was not applicable.[63] According to the appellants, *Borel* grounded strict liability on bases of failure to test, unsafeness for intended use, or unsafeness of the product.[64] The court rejected this argument, affirming the duty (imposed by *Borel*) on manufacturers "to warn the users of their products of the long-term dangers attendant upon its use, including the danger of an occupational disease."[65] Nevertheless, the Fifth Circuit concluded that the *Borel* decision could not estop even those defendants who had been a party to the *Borel* suit.[66] The court offered three reasons why collateral estoppel was not appropriate.

First, the court found ambiguities in several "key issues."[67] It found it "impossible to determine what the *Borel* jury decided about *when* a duty to warn attached."[68] A second ambiguity was whether the warnings were otherwise sufficient but never reached the insulator in the field.[69] That is, perhaps the warnings were sufficient for carpenters and pipefitters but not insulators.[70] The Fifth Circuit explained that when the prior judgment is ambivalent, collateral estoppel is not proper[71] because circumstances in the first action may indicate that the issue could reasonably have been determined

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representative. Virtual representation requires the existence of an express or implied legal relationship in which the party to the first suit is accountable to a nonparty who subsequently files a suit raising identical issues. *Id.*

61. *Id.* at 341.

62. *Id.*

63. *Id.* *See* International Assoc. of Mach. & Aerospace Workers v. Nix, 512 F.2d 125, 132 (5th Cir. 1975) (requirement of collateral estoppel that issue in prior action must have been necessary and essential to the resulting judgment).

64. 681 F.2d at 341.

65. *Id.* at 342.

66. *Id.* at 343.

67. *Id.*

68. *Id.* at 344 (emphasis in original).

69. *Id.*

70. *Id.*

71. *Id.* at 343 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment g (1982)).

otherwise if those circumstances were absent.[72] These ambiguities, combined with the jury instruction that "the danger 'must have been reasonably foreseen by the manufacturer,' "[73] led the Fifth Circuit to conclude that the "determination that a particular product is so unreasonably hazardous as to require a warning of its dangers is not an absolute."[74] Rather, this determination is necessarily relative to the scientific knowledge generally known or available to the manufacturer at the time the product was placed in the stream of commerce.[75]

A second reason given by the Fifth Circuit for denying collateral estoppel is the presence of inconsistent verdicts.[76] The court pointed out two aspects of unfairness that result when the judgment relied upon as a basis for collateral estoppel is inconsistent with other judgments. First, the issue preclusion appears arbitrary and, second, it undermines the idea that different juries can reach different verdicts which are equally valid and reasonable.[77]

Finally, the Fifth Circuit held it would be unfair to apply collateral estoppel because the multimillion dollar liability facing the defendants could not have been foreseen based on the $68,000 liability in *Borel*.[78] The court stated that cases like *Borel* "have opened the floodgates to an enormous, unprecedented volume of asbestos litigation"[79] and suggested collateral estoppel had been applied merely for purposes of docket control.[80]

The Fifth Circuit then examined the applicability of collateral estoppel to the issue of whether asbestos is a competent producing cause of asbestosis and mesothelioma. The court first emphasized that because *Borel* found airborne asbestos dust from thermal insulation materials to be hazardous did not mean that all products con-

72. 681 F.2d at 344.

73. *Id.* (quoting Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1090 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)).

74. 681 F.2d at 344. Without expressly saying so, the court seemed to be speaking to identity of issues. *See* International Assoc. of Mach. & Aerospace Workers v. Nix, 512 F.2d 125, 132 (5th Cir. 1975) (identity of issues threshold requirement).

75. 681 F.2d at 345-46.

76. *Id.* at 346.

77. *Id.*

78. *Id.*

79. *Id.* at 347. The court noted recent estimates placed over 3000 asbestos plaintiffs in the Eastern District of Texas alone and between 7500 and 10,000 pending asbestos cases in the United States district courts. *Id.*

80. *Id.*

taining asbestos are hazardous.[81] Recognizing that collateral estoppel on this issue would seem to preclude only the "can it" question, the Fifth Circuit explained the "can it" and "did it" questions[82] are so closely related that they cannot be segregated and collaterally estopped without severely prejudicing the defendants.[83]

The Fifth Circuit, while sympathizing with the district court's efforts to "streamline the enormous asbestos caseload," concluded *Borel* did not stand "for the proposition that, as matters of fact, asbestos products are unreasonably dangerous or that asbestos as a generic element is in all products a competent producing cause of cancer."[84]

III. ANALYSIS

The *Hardy* decision was correct in denying the application of collateral estoppel. However, the Fifth Circuit's analysis was vague and erroneous. The application of collateral estoppel has three prerequisites: the issues must be identical, the issue to be concluded must have been actually litigated in the prior action, and the determination of the issue in the prior action must have been necessary and essential to the resulting judgment.[85] The main difficulty with collateral estoppel in the asbestos cases is the identity of issues requirement. While the Fifth Circuit at times intimated identity of issues was the problem, the court never directly focused on that question. Had the court done so, its analysis would be more clear and have a more general application to the question of whether offensive collateral estoppel is appropriate in asbestos litigation. As it stands now, collateral estoppel is not proper on the basis of *Borel*, but this still leaves unanswered whether collateral estoppel might *ever* be proper in asbestos cases.

81. *Id.* Again, the court seemed to be speaking to the identity of issues requirement.

82. "Can it" refers to medical causation, that is, whether the product is capable of causing disease. "Did it" refers to cause in fact, that is, whether that product was in fact a cause of the plaintiff's injury. *See infra* text accompanying note 122.

83. 681 F.2d at 347. As an alternative to collateral estoppel, the trial court held that judicial notice could be taken of the fact that asbestos dust can cause disease. 509 F. Supp. at 1362-63. However, the Fifth Circuit rejected the use of judicial notice because there is evidence on both sides of the matter, and thus the proposition is not so self evident as to be subject to judicial notice. 681 F.2d at 347-48.

84. 681 F.2d at 348.

85. International Assoc. of Mach. & Aerospace Workers v. Nix, 512 F.2d 125, 132 (5th Cir. 1975).

A. *Identity of Issues*

As stated above, one of the threshold requirements of collateral estoppel is that the issue to be concluded must be identical to the issue determined in the first suit.[86] This requirement of collateral estoppel is generally no problem in the common incident cases such as the crash of a large airliner.[87] In this type of case, there will generally be no claim or defense unique to an individual party because all the plaintiffs have simultaneously suffered their injuries under the same circumstances.[88] Contrary to the common incident type of cases, the identity of issues requirement is an especially difficult problem in litigation of generic products, such as asbestos.[89] This difficulty arises because the plaintiffs usually have been exposed to different asbestos-containing products at different times and under different circumstances, with the physical manifestations of their injuries arising at different times.[90]

The identity of issues requirement in the products liability setting can be broken into two parts: identity of defect and identity of the products involved.[91] The identity of defect in the asbestos cases is easily satisfied. The strict liability aspect of the asbestos cases has been based on a marketing defect—the idea that insulation containing asbestos is an unavoidably unsafe product which becomes unreasonably dangerous only upon the manufacturer's failure to adequately warn of the potential dangers in its products.[92]

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86. *Id.*

87. *See* 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 3:56, at 306 (1978); Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 922 (1982). *See, e.g.*, Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969). "Indeed, in an airplane crash there are absent any of the problems with respect to 'identity of issue' on liability which might arise in other types of accidents involving multiple participants . . . ." 61 Misc. 2d at —, 304 N.Y.S.2d at 812.

88. Schroeder, *supra* note 87, at 922.

89. *Id.* Generic products are identical and fungible products having compositions and properties that do not change significantly from producer to producer. *Id.* at 931-32.

90. *Id.* at 932-33. *See* 4A R. GRAY, *supra* note 9, §§ 205c.71-.72 (latency periods of asbestos related diseases). *See also* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973) (discussing factors making it impossible to tell which exposure to asbestos dust caused the disease), *cert. denied*, 419 U.S. 869 (1974).

91. Erlenbach, *supra* note 35, at 26-29; Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 23-35 (1979).

92. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973) (suit based on manufacturer's failure to warn), *cert. denied*, 419 U.S. 869 (1974); RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) (discussing unavoidably unsafe products).

The identity of products question presents a more difficult question. Because insulation is not the only product containing asbestos and not all plaintiffs claim injuries from asbestos insulation, the question arises whether the findings regarding insulation can be given collateral estoppel effect with respect to non-insulation products or to insulation products produced by a different manufacturer. For example, in *Flatt v. Johns-Manville Sales Corp.*,[93] the plaintiff alleged that the decedent's exposure to cement pipes containing asbestos was a producing cause of decedent's mesothelioma and ultimate death.[94] The plaintiff sought to collaterally estop relitigation of whether the defendants placed in the stream of commerce products containing asbestos, whether products containing asbestos are unreasonably dangerous, and whether asbestos dust is a competent producing cause of mesothelioma.[95] The defendants responded that the product involved here, cement pipe, was different from the insulation in *Borel*, thus raising the question of identity of products.[96] The court rejected this argument, holding that because both products contained asbestos and produced asbestos dust upon use, there was an identity of issues.[97]

The problem with the *Flatt* analysis is that the court focused on asbestos as the product being litigated. Such analysis is unsound because asbestos is merely a component of the cement pipe. Therefore, in looking at the identity of issues question, the court should focus on the product as a whole.[98]

An excellent example supporting the analysis of looking at the product as a whole is the argument of appellant Garlock in *Hardy v. Johns-Manville Sales Corp.*[99] Garlock contended that its products were manufactured in a manner which prevented the release of sig-

93. 488 F. Supp. 836 (E.D. Tex. 1980).

94. *Id.* at 838.

95. *Id.* at 838-39.

96. *Id.* at 840.

97. *Id.*

98. An important factor in looking at each product is whether the "same evidence" is necessary to prove both issues. *See* NLRB v. United Technologies Corp., 706 F.2d 1254, 1259-60 (2d Cir. 1983). RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982) suggests consideration of the following factors as indicating identity of issues. First, is there a substantial overlap with the evidence presented in the first proceeding? Second, does the new evidence involve the same rules of law as were applied in the prior action? Third, could pretrial preparation in the first suit reasonably be expected to embody the subject matter of the second suit? Finally, how closely related are the claims involved in the two proceedings? *Id.*

99. 681 F.2d at 347.

nificant amounts of asbestos dust or fibers into the air.[100] Garlock further asserted that its products had never been shown to be dangerous in installation, use, or removal.[101] Obviously, Garlock's product is distinctly different from the loosely woven thermal insulation materials in *Borel*, which during normal handling emitted large quantities of asbestos dust.[102] It is clear from this example that merely because two products contain common components does not mean those products are identical.

The key to establishing the identity of issues is not that the cases share similar factual circumstances in every respect. Rather, there must be an identity of facts regarding the particular issues for which preclusion is sought.[103]

B. *The Issues*

The first step in analyzing the application of collateral estoppel is to determine what issues were adjudicated in the action upon which estoppel is premised and whether those same issues exist in the present litigation. This is essentially the broad question of identity of issues with more narrow questions of identity of defects and products. Establishing the existence of common issues should pose no real problem in asbestos litigation because the theory of recovery has generally been one of strict liability.[104] Courts hearing these cases have outlined very similar, and often the same, elements necessary to establish a strict liability cause of action. The Fifth Circuit in *Hardy*, relying on *Flatt*, stated the elements as follows:

1. Defendants manufactured, marketed, sold, distributed, or placed in the stream of commerce products containing asbestos.
2. Products containing asbestos are unreasonably dangerous.
3. Asbestos dust is a competent producing cause of mesothelioma.
4. Decedent was exposed to defendant's products.
5. The exposure was sufficient to be a producing cause of mesothelioma.
6. Decedent contracted mesothelioma.

100. Garlock's products were linoleum-type products in which the asbestos was encapsulated in a rubber coating. *Id.*

101. *Id.*

102. *Id.*

103. Weinberger, *supra* note 91, at 25.

104. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

7. Plaintiffs suffered damages.[105]

It is obvious in looking at these elements that only two elements—whether products containing asbestos are unreasonably dangerous and whether asbestos dust is a competent producing cause of mesothelioma—have potential for collateral estoppel application. Determination of the other elements is based on circumstances so unique to either the plaintiff or defendant that identity of issues could not exist and estoppel would be unfair and improper.

1. Products Containing Asbestos are Unreasonably Dangerous

The theory of strict liability under section 402A of the *Restatement* requires the plaintiff to prove the defendant's product is defective, that is, unreasonably dangerous to the user or consumer.[106] The defect relied upon by plaintiffs in asbestos cases is one of marketing, or failure to adequately warn the consumer of dangers the manufacturer knew or reasonably should have known to exist in its products.[107] Collateral estoppel should play a very limited role regarding the defectiveness issue for what is essentially an identity of products problem. Although *Borel* found insulation products containing asbestos to be unreasonably dangerous for failure to adequately warn,[108] *Borel* did not, nor could it have, found all products containing asbestos to be unreasonably dangerous.[109] Strict liability applies "only where the defective condition of the *product* makes it unreasonably dangerous to the user or consumer."[110] Although as-

105. 681 F.2d at 337.

106. RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See* Jack Roach-Bissonnet, Inc. v. Puskar, 417 S.W.2d 262, 278 (Tex. 1967) (essential element of a § 402A claim is proof that the product was in a defective condition when it left the seller's hands); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-89 (Tex. 1967) (cause of action under § 402A); Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 25 (1979).

107. Edgar, *supra* note 106, at 29-32.

108. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1093 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

109. 681 F.2d at 345. The Fifth Circuit explained Starnes v. Johns-Manville Corp., No. 2075122 (E.D. Tenn. 1977), as finding asbestos insulation products not unreasonably dangerous. 681 F.2d at 346. *See supra* notes 99-102 and accompanying text. *But cf.* Migues v. Nicolet Indus., Inc., 662 F.2d 1182, 1187-90 (5th Cir. 1981); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 250 (E.D. Tex. 1980) (all holding *Borel* established as a matter of law products containing asbestos are unreasonably dangerous).

110. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965) (emphasis added). *See* Ross v. Up-Right, Inc., 402 F.2d 943, 946 (5th Cir. 1968) (defective condition and unreasonably dangerous state are two requirements of § 402A claim); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 850 (5th Cir.) (demanding that defect render the product unrea-

bestos is potentially fatal, the mere fact that it is used as a component of a product should not result in that product automatically being labeled unreasonably dangerous.

The dangers associated with asbestos depend on how the asbestos has been incorporated into the final product, the asbestos content, and the concentration of asbestos fibers released by the product.[111] If the dangers connected with asbestos are eliminated through the method used in manufacturing the product, then these dangers become irrelevant.[112]

Under a marketing defect theory the manufacturer has a duty to warn only when it knows or should know of dangers existing in its product.[113] Therefore, if a manufacturer has constructed its product so as to prevent the escape of asbestos fibers, there would be no danger and the manufacturer would not have a duty to warn. Thus, there would be no defect for which the manufacturer could be held strictly liable.

It is clear that finding a product is unreasonably dangerous will depend on the specific characteristics of the product.[114] Unless there is a stringent application of identity of products, it would be patently unfair to deny a defendant the opportunity to present evidence "of the scientific knowledge associated with [its] particular product."[115]

Thus, it would seem that a very strict identity of products requirement would permit estoppel of the unreasonably dangerous issue in very narrow circumstances. This is exemplified in *Amader v. Johns-Manville Corp.*[116] The *Amader* court applied collateral estoppel so as to preclude relitigating whether "Unibestos," a high temperature insulation product, was defective during the years 1962

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sonably dangerous), *cert. denied*, 391 U.S. 913 (1968); Hebert v. Loveless, 474 S.W.2d 732, 737 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (strict liability applies only to defective products).

111. Comment, *An Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307, 1340 (1982). *See, e.g.*, *supra* text accompanying notes 99-102 (asbestos contained in rubber encapsulated linoleum type product).

112. Nat'l L.J. Dec. 13, 1982, at 18, col. 2.

113. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); RESTATEMENT (SECOND) OF TORTS § 402A comments j, k (1965).

114. Comment, *supra* note 111, at 1340.

115. 681 F.2d at 347.

116. 541 F. Supp. 1384 (E.D. Pa. 1982).

through 1968.[117] However, the court refused to estop litigating whether the plaintiff's exposure to "Unibestos" was a substantial factor in his injuries, stating that the causation issue depends on a "myriad of variables."[118]

Despite *Amader* the situations when collateral estoppel would be proper will be relatively rare because of the heavy burden on the plaintiff to show that the product in the prior action is identical in every material respect with the product alleged to have caused the plaintiff's injury. Proof of identity of products is further complicated because the plaintiff often cannot even identify the exact product or manufacturer that caused his injuries.[119]

2. Asbestos is a Competent Producing Cause of Disease

It has been suggested that this issue would be most appropriate for application of collateral estoppel.[120] However, it is irrelevant whether asbestos can cause disease because it is the *product* which is being litigated, not the component asbestos. Admittedly, asbestos is a disease causing agent in products such as insulation and cement pipes, but it is merely a component of the product. The issue should be whether the asbestos *as contained in the defendant's product* can cause disease. Consequently, whether the asbestos fibers of insulation *X* can cause disease is not the same question as whether the asbestos fibers of insulation *Y* can also cause disease. Thus, lack of identity of products should preclude estoppel of whether asbestos can cause disease.[121]

This raises the question of whether estoppel would be proper if the plaintiff can prove an exact identity of products. Assume, for example, in the first suit the jury found insulation *X* can cause disease. In a subsequent suit should the defendant be prevented from

117. *Id.* at 1387.

118. *Id.* Shortly after the Fifth Circuit's *Hardy* decision the trial judge in *Amader*, in an apparently unpublished decision, reversed his earlier ruling which had granted collateral estoppel. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 MISS. L.J. 765, 790 n.125 (1982).

119. Comment, *supra* note 111, at 1340.

120. Comment, *Offensive Collateral Estoppel in Asbestos Litigation:* Hardy v. Johns-Manville Sales Corp., 15 CONN. L. REV. 247, 261 (1983) ("whether asbestos dust is a competent producing cause of asbestos [sic] and mesothelioma seems most well suited for collateral estoppel"); Comment, *supra* note 111, at 1337 ("the issue of medical causation will not vary from case to case, making identity of issues relatively easy to establish").

121. The Garlock example is illustrative of this problem. *See supra* text accompanying notes 99-102.

relitigating whether insulation *X* can cause disease? No. Causation in asbestos can be divided into medical causation, that is, whether it can cause disease; and cause in fact, that is, whether it did in fact cause the plaintiff's injury. As the Fifth Circuit in *Hardy* explained, these two elements are so closely intertwined that they cannot be viewed in the abstract and answered separately.[122] The question of medical causation is really a part of the ultimate cause in fact question. It would be meaningless to answer "yes" to the medical causation issue without looking at the ultimate causation issue of the plaintiff's injury. But, if collateral estoppel is applied without separating the medical causation and cause in fact questions, the defendant is precluded from relitigating the causation element of plaintiff's cause of action—an application of collateral estoppel that is never proper.[123]

Another problem in separating the two questions is jury confusion and prejudice. For example, *Hardy* involved as many as twenty defendants,[124] some having been parties to *Borel* while others were not.[125] If collateral estoppel were applied, the jury would not look at the medical causation issue with respect to the *Borel* defendants, but they would be required to examine this issue regarding the non-*Borel* defendants. From this the jury could assume that because they were not being asked whether the *Borel* defendant's products can cause disease, it is already established they did cause the plaintiff's injury. The obvious solution would be to bifurcate the trial. However, as noted in *Bertrand v. Johns-Manville Sales Corp.*,[126] a bifurcated trial would require "more time and effort than applying collateral estoppel would save."[127]

C. *Policy Considerations*

Generally, the decision of whether or not offensive collateral estoppel is applicable is left to the trial court's broad discretion based upon fairness to the defendants.[128] The courts have considered an array of factors in determining whether a fair application of

122. 681 F.2d at 347.
123. 509 F. Supp. at 1362.
124. 681 F.2d at 336.
125. *Id.* at 339 n.4.
126. 529 F. Supp. 539 (D. Minn. 1982).
127. *Id.* at 545.
128. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979).

offensive collateral estoppel is possible.[129] Included in this consideration is the defendant's incentive to defend the prior suit, the existence of inconsistent judgments, and whether the defendant had a full and fair opportunity to defend in the prior suit.

1. Foreseeability of Future Suits

The Supreme Court, in *Parklane Hosiery Co. v. Shore*,[130] determined that offensive application of collateral estoppel would be unfair to a defendant if there was no incentive to vigorously defend the first suit.[131] This was one of the factors the Fifth Circuit relied upon in striking down the *Hardy* preclusion order.[132] The Fifth Circuit stated that the defendants in *Borel* could not have foreseen that the $68,000 liability in that case would eventually result in a multimillion dollar asbestos liability.[133] However, the disparate dollar amounts in *Hardy* and *Borel* are not conclusive as to the defendants' incentive to vigorously defend the *Borel* suit.[134] This is especially true in the present situation. Based upon the ever increasing use of asbestos[135] and the medical evidence which continued to establish an asbestos-disease relationship,[136] the potential effect of a plaintiff's judgment must surely have been apparent to the *Borel* defendants and their attorneys. This is manifested in the subsequent history of *Borel*. After the *Borel* judgment the defendants appealed to the Fifth Circuit,[137] moved for rehearing,[138] and petitioned for certiorari in the United States Supreme Court.[139] It is obvious the *Borel* defendants had every incentive to, and in fact did, vigorously defend the *Borel* case.

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129. *See supra* notes 25-26 and accompanying text.

130. 439 U.S. 322 (1979).

131. *Id.* at 330.

132. 681 F.2d at 346-47. The trial court's preclusion order involved 58 cases in which plaintiffs were each seeking $2.5 million in damages. *Id.* at 347.

133. *Id.* at 346.

134. Comment, *supra* note 120, at 265.

135. *See supra* text accompanying notes 6-7, 14.

136. Mansfield, *supra* note 15, at 864-65. One pre-*Borel* medical study found that 70% of asbestos workers on the job for more than 20 years had abnormal lung x-rays. Note, *Applying Offensive Collateral Estoppel to Asbestos Cases: A Viable Alternative*, 16 SUFFOLK L. REV. 687, 713 (1982).

137. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973).

138. *Id.* at 1103.

139. Fibreboard Paper Prods. Corp. v. Borel, 419 U.S. 869 (1974).

2. Inconsistent Judgments

A second situation the Supreme Court has identified as being unfair to defendants is when the judgment relied upon as a basis for estoppel is inconsistent with one or more previous judgments.[140] Application of collateral estoppel is an indication of confidence that the decision in the prior action is substantially correct. However, when there are inconsistent resolutions of identical issues that confidence is unwarranted.[141] Inconsistent outcomes of the same issues lead to the inference that the determinations may have been based on equally reasonable bases.[142] It is unfair to simply choose one of these resolutions over the other and give it collateral estoppel effect when the other resolution may be equally valid.

The often used railroad hypothetical illustrates the problem of inconsistent judgments. Assume fifty persons are injured in a railroad collision and all fifty file separate suits. Further assume that the railroad wins the first twenty-five suits, but the twenty-sixth results in a judgment for the plaintiff. In this situation it has been argued that it would be unfair to apply offensive collateral estoppel so as to allow plaintiffs twenty-seven through fifty automatic recovery.[143] The Fifth Circuit found this type of problem and the resulting unfairness to exist in *Hardy*. It found that approximately seventy asbestos cases have been tried as of July 1982, and in approximately one-half the defendants had prevailed.[144] Thus, the Fifth Circuit concluded that inconsistent judgments would make collateral estoppel unfair.[145]

The Fifth Circuit appears, however, to have confused the function of the burden of proof. Obviously, the plaintiff has the burden of proving each element of his cause of action by a preponderance of the evidence. That a verdict is rendered for the defendant does not necessarily establish the negative of the elements of the cause of

140. 439 U.S. at 330. *See also* Standefer v. United States, 447 U.S. 10, 23 n.17 (1980) (inconsistency was reason for not giving preclusive effect).

141. Comment, *supra* note 120, at 265-66; RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment f (1982).

142. RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment f (1982).

143. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281, 285-86 (1957).

144. 681 F.2d at 346. Another survey of 147 asbestos trials revealed: 86 plaintiffs' verdicts, 38 defense verdicts, 19 settlements, 2 mistrials, and 2 unclassifiable verdicts. Gunn, *supra* note 118, at 792 n.135.

145. 681 F.2d at 346.

action. It could mean the plaintiff has failed, in the minds of the fact finders, to produce sufficient evidence to meet his burden of proof. For example, in the asbestos cases when a defendant receives a favorable verdict it does not necessarily mean the product is not unreasonably dangerous; rather, it could mean the plaintiff failed to prove the product is unreasonably dangerous.

The more correct approach to analyzing inconsistent determinations is illustrated by *Mooney v. Fibreboard Corp.*[146] The *Mooney* court rejected the defendant's argument of inconsistent judgments and collaterally estopped relitigating whether asbestos products are defective and unreasonably dangerous.[147] The court explained that the defendants failed to show that the *Borel* determination that asbestos products are defective and unreasonably dangerous is itself inconsistent with another determination.[148] According to the *Mooney* court, the defendant's judgments were based on the plaintiff's failure to adequately prove one or more essential elements of his cause of action.[149] For the defendants' argument to succeed they must show cases "clearly inconsistent" with the *Borel* determination.[150] The mere possibility of an inconsistency should not preclude application of collateral estoppel.[151] The defendants should be required to clearly show that the issue subject to collateral estoppel has been inconsistently determined[152] and cannot be explained on the basis of differences in the underlying trials.[153]

3. The Non-Borel Defendants

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and

146. 485 F. Supp. 242 (E.D. Tex. 1980).

147. *Id.* at 247-48.

148. *Id.* at 247.

149. *Id.* at 247-48.

150. *Id.* at 248.

151. Callen & Kadue, *To Bury Mutuality, Not Praise It: An Analysis of Collateral Estoppel After* Parklane Hosiery Co. v. Shore, 31 HASTINGS L.J. 755, 774 (1980).

152. Comment, *supra* note 120, at 267.

153. Callen & Kadue, *supra* note 151, at 774. An alternative proposal would place the burden on the plaintiff to show (1) that his contentions on the issue sought to be estopped are identical to those contentions made by the plaintiff in the suit on which collateral estoppel is based, and (2) to distinguish his suit from those in which prior plaintiffs lost on the issues sought to be estopped. Upon this showing, the burden would shift to the defendant to refute the plaintiff's contentions and establish why collateral estoppel should not be applied. *Id.* at 775.

> arguments on their claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.[154]

Based upon the above rule the preclusive effect of *Borel* should not extend to the non-*Borel* defendants unless it is shown that they were in privity with a party to the *Borel* suit,[155] sufficient to provide them with a full and fair opportunity to litigate.[156]

a. Privity

Privity refers to a legal conclusion[157] "that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."[158] However, the existence of privity sufficient to collaterally estop a nonparty should not depend on the formal status of the parties. Rather, the underlying facts and circumstances should be examined to determine whether the nonparty was, in effect, given a full and fair opportunity to litigate the issue.[159]

b. Full and Fair Opportunity to Litigate

The crucial question here is the "extent to which the nonparty may be thought to have had a vicarious day in court."[160] This can be separated into two factors: the extent of the nonparty's participation or control in the prior action, and the extent to which the issue in the prior action was litigated in a manner that protects the inter-

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154. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1970); RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982).

155. Gerrard v. Larsen, 517 F.2d 1127, 1133 (8th Cir. 1975). Collateral estoppel orders have often tried to extend *Borel* to non-*Borel* defendants. *See, e.g.*, 681 F.2d at 339 n.4.

156. Rachal v. Hill, 435 F.2d 59, 62 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982).

157. Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

158. Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). One or more of the following relationships has been present in situations where privity has been found to exist: concurrent relationships to the same right of property, successive relationships to the same right of property, or representations of the interests of the same person. TRW, Inc. v. Ellipse Corp., 495 F.2d 314, 317 (7th Cir. 1974). *See also* Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 95 (5th Cir.) (relationships "sufficiently close" to justify preclusion of nonparties), *cert. denied*, 434 U.S. 832 (1977).

159. Gerrard v. Larsen, 517 F.2d 1127, 1135 (8th Cir. 1975).

160. Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1499-1500 (1974).

ests of the nonparty.[161]

Whether a party controlled the earlier litigation is a question of fact[162] on which the party asserting the estoppel has the burden of proof.[163] Factors important in determining the extent of a nonparty's control include "selection and payment of counsel, payment of litigation expenses, a written indemnification agreement, participation in settlement negotiations, and control over the decision to appeal."[164] Another major factor is the extent of the nonparty's participation or control in decisions respecting strategies and legal theories to be presented at the trial.

In analyzing whether a nonparty has adequately had his interests represented in a prior suit, the courts should focus on three factors.[165] First, the courts should look at the degree of authority vested in the sponsor by the nonparty.[166] Second, whether the sponsor had the interest of the nonparty in mind during the prior suit should be analyzed.[167] Finally, the court should consider the factual predicate surrounding the issue in the first suit as compared to the second suit.[168]

Applying this analysis to the asbestos cases, it becomes clear that there is insufficient "privity" to extend the preclusive effect of *Borel* to defendants who were not a party to that suit. The *Hardy* court was correct in finding that extension of *Borel* to non-*Borel* defendants "deprived [the non-*Borel* defendants] of their day in court."[169]

The major problem in extending the preclusive effect of *Borel* to non-*Borel* defendants is identity of products. Each defendant's interest lies in litigating the dangerousness of his product and

161. *Id.* at 1500. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 75 (1964).

162. Del Mar Avionics v. Quinton Instruments Co., 645 F.2d 832, 835 (9th Cir. 1981).

163. Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1038 (3d Cir. 1973).

164. Del Mar Avionics v. Quinton Instruments Co., 645 F.2d 832, 835 (9th Cir. 1981).

165. The broader and dispositive factor, as in all collateral estoppel questions, is the overall fairness. *See, e.g.*, James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461 (5th Cir.) (fairness relied upon to determine applicability of collateral estoppel), *cert. denied*, 404 U.S. 940 (1971).

166. Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1233 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977).

167. *Id.*

168. *Id.* at 1234. The third factor refers to identity of issues.

169. 681 F.2d at 341.

whether his product did in fact cause the plaintiff's injury. The *Borel* defendants had no incentive to defend claims against any products except their own. Thus, lack of identity of products prevents identity of interests and the resulting privity which would permit collateral estoppel of nonparties.

IV. CONCLUSION

Not only did *Borel* open the door to recovery for injured workers and their families, but it literally flooded the courts with thousands of asbestos cases. An obvious response to this deluge of litigation is the use of offensive collateral estoppel.

The main difficulty in establishing a claim of collateral estoppel is in proving the existence of identity of products. Viewed in the abstract, all products can be analyzed, segregated, and then classified according to their common properties and characteristics. In theory, then, it is possible for a plaintiff to establish a valid collateral estoppel claim. However, as a practical matter it will be an arduous task. Pragmatically speaking, it is often impossible for a plaintiff to identify which product allegedly caused his injury, let alone establish that that product is identical to a product litigated in a prior suit.

Consequently, the realities of products containing asbestos combined with considerations of fairness and legal doctrine should preclude the use of offensive collateral estoppel in asbestos litigation.

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