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Civil Procedure/Alternative Dispute Resolution - New Mexico Applies Collateral Estoppel to Issues Fully and Fairly Litigated in Arbitration Proceedings: Rex, Inc. v. Manufactured Housing Committee of New Mexico, Manufactured Housing Division

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CIVIL PROCEDURE/ALTERNATIVE DISPUTE RESOLUTION—New Mexico Applies Collateral Estoppel to Issues Fully and Fairly Litigated In Arbitration Proceedings: *Rex, Inc. v. Manufactured Housing Committee of New Mexico, Manufactured Housing Division*

I. INTRODUCTION

In *Rex, Inc. v. Manufactured Housing Committee of New Mexico, Manufactured Housing Division*,[1] the Supreme Court of New Mexico held that collateral estoppel applies to issues which are fully and fairly litigated in an arbitration. The court's decision establishes clear law regarding the preclusive effect that arbitration decisions may have on subsequent litigation. This Note focuses on the court's decision to apply collateral estoppel to arbitration decisions, provides the historical background leading to the application of collateral estoppel to arbitration decisions, analyzes the court's reasoning in *Rex, Inc.*, and explores some of the implications that *Rex, Inc.* may have on the practice of law in New Mexico.

II. STATEMENT OF THE CASE

Atkins contracted with Rex, Inc. (Rex), a dealer of manufactured homes, to purchase a mobile home for her disabled son.[2] Later, when Atkins was unable to obtain financing for the mobile home, she wrote a letter to Rex demanding that it return her down payment of $15,250. Because Rex was licensed by the state Manufactured Housing Division (MHD), Atkins also forwarded a copy of the letter to the MHD. In response, Rex notified the MHD that it would not refund the down payment and that it intended to enforce the contract for the full purchase price of $54,735. Atkins filed a civil action against Rex seeking a refund of her down payment.

On May 4, 1992, the Manufactured Housing Committee (MHC) issued a notice of contemplated action against Rex for failure to refund Atkins' full deposit, in violation of MHD regulations.[3] The notice stated that there was sufficient evidence to suspend or revoke Rex's dealer's license and to attach Rex's consumer protection bond. Atkins and Rex then settled their lawsuit. The settlement agreement provided that Rex would refund all but ten percent of the purchase price and would pay Atkins'

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1. 119 N.M. 500, 892 P.2d 947 (1995).

2. *Rex, Inc.*, 119 N.M. at 502-04, 892 P.2d at 949-51. Unless otherwise cited, all subsequent references to the facts of this case refer to this citation.

3. Relevant portions of MHD Regulations 207(B) and 207(C) provide that deposits on special ordered units will be refunded in full, less a maximum of ten percent of the selling price to defray dealer expenses, and that such refund shall be provided within one business day, but in no case later than five business days. Deposits, N.M. Manufactured Hous. Div. Reg. 207(B),(C), 2 N.M. Reg. No. 7, 8 (Apr. 15, 1991).

costs and attorney's fees. The parties further agreed to arbitrate the disposition of the remaining ten percent of Atkins' deposit. At arbitration, the arbitrator awarded Rex $3,724.24 to defray Rex's expenses in the aborted sale and awarded the remaining balance of the deposit to Atkins.

After reviewing the arbitrator's decision, the MHC decided to pursue administrative action against Rex. Following a hearing, the MHC issued its ruling that Rex had violated two MHD regulations, ordered Rex to return the remaining $3,724.24 to Atkins, attached Rex's consumer protection bond for that amount, and suspended Rex's dealer's license for thirty days, providing that the suspension would be stayed upon the return of Atkins' money. Additionally, the MHC placed Rex's license on probation for a period of six months.

On appeal, the district court upheld the MHC ruling and order. Rex appealed to the New Mexico Supreme Court, asking for review of the MHC order. The supreme court reversed the MHC's order requiring Rex to pay Atkins $3,724.24, as well as the conditional thirty day suspension of Rex's dealer's license.[4] The court held that collateral estoppel applied to arbitration proceedings and ruled that the MHC was in privity with Atkins to the extent that it was pursuing Atkins' interests.[5] Nevertheless, the supreme court upheld the MHC's order placing Rex's license on probation for six months, holding that an administrative agency could not be collaterally estopped by an arbitration award when the agency was acting on behalf of the broader public interest.[6]

III. HISTORICAL BACKGROUND

In 1925, the federal government passed the Federal Arbitration Act[7] which declared arbitration agreements to be "valid, irrevocable, and enforceable."[8] Following the lead of the federal government, many states began adopting the Uniform Arbitration Act.[9] New Mexico was one of these states, adopting the Uniform Arbitration Act in 1971.[10]

New Mexico public policy favors dispute resolution through arbitration because it allows for the informal, speedy, and inexpensive resolution of disputes.[11] This policy is firmly established in New Mexico common[12] and statutory[13] law and was expressly reaffirmed in *Rex, Inc.*[14] In pursuit of

4. *Rex, Inc.*, 119 N.M. at 513, 892 P.2d at 960.
5. *Id.* at 509, 892 P.2d at 956.
6. *Id.*
7. THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION 105 (1989).
8. Federal Arbitration Act, 9 U.S.C. § 2 (1994).
9. *See generally*, 2 EDWARD A. DAUER, MANUAL OF DISPUTE RESOLUTION, § 2, at 2 (1994).
10. 1971 N.M. Laws ch. 168, § 1. The Uniform Arbitration Act is now embodied in N.M. STAT. ANN. §§ 44-7-1 to -22 (1978).
11. Fernandez v. Farmer's Insurance Co., 115 N.M. 622, 625, 857 P.2d 22, 25 (1993).
12. *Rex, Inc.*, 119 N.M. at 504-05, 892 P.2d at 951-52; *Fernandez*, 115 N.M. at 25, 857 P.2d at 625.
13. *See* N.M. STAT. ANN. § 4-7-1 (1978); United Technology and Resources, Inc. v. Dar Al Islam, 115 N.M. 1, 3, 846 P.2d 307, 309 (1993); Dairyland Insurance Co. v. Rose, 92 N.M. 527, 530, 591 P.2d 281, 284 (1979).
14. *Rex, Inc.*, 119 N.M. at 504-05, 892 P.2d at 951-52.

this policy favoring arbitration, many states, including New Mexico, have decided to apply collateral estoppel to issues decided in an arbitration.[15]

Collateral estoppel, also known as issue preclusion, is a doctrine that promotes judicial economy by preventing the relitigation of ultimate facts or issues actually litigated and necessarily decided in a previous suit.[16] In the past, New Mexico required mutuality of parties before collateral estoppel could apply.[17] However, in *Silva v. State*,[18] the New Mexico Supreme Court discarded the mutuality requirement and allowed the use of offensive or defensive collateral estoppel where the party against whom collateral estoppel is asserted was a party or privy to the original action.[19] With the adoption of non-mutual collateral estoppel, "the Court [has] mov[ed] away from technical definitions and standards for the imposition of . . . collateral estoppel and toward determinations based on a policy of finality that is to be arrived at on a case by case basis."[20]

Several other jurisdictions have decided that non-mutual collateral estoppel applies to issues decided in an arbitration. In cases applying defensive collateral estoppel to arbitration proceedings, the courts have applied the doctrine in much the same way they apply it to issues decided

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15. "Essential to arbitration remaining useful is the elementary principle that . . . collateral estoppel [is] applicable to arbitration awards." Manu-Tronics, Inc. v. Effective Management Sys., Inc., 471 N.W.2d 263, 266 (Wis. Ct. App. 1991). For states applying collateral estoppel to arbitration, *see* Leahy v. Guaranty Nat'l Ins. Co., 907 P.2d 697, 700 (Colo. Ct. App. 1995); Taylor v. Peoples Gas Light & Coke Co., 656 N.E.2d 134, 139 (Ill. App. Ct. 1995); Brougher Agency, Inc. v. United Home Life Ins. Co., 622 N.E.2d 1013, 1018 (Ind. Ct. App. 1993); Cooper v. Yellow Freight Sys., Inc., 589 S.W.2d 643, 645 (Mo. Ct. App. 1979); Aufderhar v. Data Dispatch, Inc., 437 N.W.2d 679, 681 (Minn. Ct. App. 1989), *aff'd*, 452 N.W.2d 648; International Ass'n of Firefighters, Local 1285 v. City of Las Vegas, 823 P.2d 877, 880 (Nev. 1991); Nogue v. Estate of Santiago, 540 A.2d 889, 890 (N.J. Super. Ct. App. Div. 1988); Hilowitz v. Hilowitz, 444 N.Y.S.2d 948 (N.Y. App. Div. 1981); Dunlap v. Wild, 591 P.2d 834, 837 (Wash. Ct. App. 1979); *Manu-Tronics, Inc.*, 471 N.W.2d at 268.

16. *Rex, Inc.*, 119 N.M. at 504, 892 P.2d at 951. Before collateral estoppel may apply, however, the moving party must demonstrate that:

> (1) the [non-movant] was a party (or privy) to the prior proceeding, (2) the cause of action presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, (4) the issue was necessarily determined in the prior adjudication. If the moving party demonstrates each element of this test, the court must then determine whether the non-moving party "had a full and fair opportunity to litigate the issue in prior litigation."

Id.

17. International Paper Co. v. Farrar, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985).

18. 106 N.M. 472, 745 P.2d 380 (1987).

19. *See Silva*, 106 N.M. at 474-76, 745 P.2d at 382-84.

> [D]efensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; . . . offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from [re]litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action.

Id. at 476, 745 P.2d at 384.

20. Local 2839 of Am. Fed'n of State, County and Mun. Employees, AFL-CIO v. Tom Udall, 111 N.M. 432, 437, 806 P.2d 572, 577 (1991).

in judicial proceedings.[21] If all of the elements of collateral estoppel are present, and the parties had a full and fair opportunity to litigate, defensive collateral estoppel is applied.[22] Fewer cases apply offensive collateral estoppel to issues decided in arbitration.[23] While several courts have stated that offensive collateral estoppel could potentially apply to issues decided in an arbitration, few have actually precluded re-litigation of an issue on this basis.[24]

One of the primary conditions that courts have placed on the application of collateral estoppel to arbitration is the requirement that the parties had a "full and fair opportunity" to litigate the issue sought to be precluded.[25] Because the procedures used in arbitrations tend to be less formal than those used in litigation, courts must be careful to ensure that parties have a chance to a full and fair hearing on important issues.[26] Without satisfaction of the "full and fair opportunity" requirement, collateral estoppel based on an arbitration would be a violation of due process.[27]

Factors that courts consider to determine whether parties have had a full and fair opportunity to litigate differ from jurisdiction to jurisdiction.[28] In *Rex, Inc.*, the New Mexico Supreme Court set forth a non-

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21. *See, e.g.*, Wellons v. T.E. Ibberson Co., 869 F.2d 1166, 1170 (8th Cir. 1989); Maidman v. O'Brien, 473 F. Supp. 25, 34 (S.D.N.Y. 1979); Brougher Agency, Inc. v. United Home Life Ins. Co., 622 N.E.2d 1013, 1018 (Ind. Ct. App. 1993); Dunlap v. Wild, 591 P.2d 834, 837-838 (Wash. Ct. App. 1979).

22. *See* cases listed *supra* note 21.

23. *See generally* cases listed *infra* note 24.

24. *See, e.g.*, Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991), in which the Eighth Circuit Court of Appeals affirmed the application of offensive collateral estoppel, but stated that its decision might have been different had the initial decision been made by a district court rather than an arbitrator. *But see* Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1136 (5th Cir. 1992) (declining to apply offensive collateral estoppel where defendants' interests were not adequately represented in the arbitration); Spencer v. Puerto Rico Marine Management, Inc., 644 F. Supp. 172, 174-75 (M.D. Fla. 1986) (declining to apply offensive collateral estoppel where the defendants contested the arbitrator's jurisdiction and thus did not participate in the initial arbitration hearing); United States *ex rel.* Pensacola Constr. Co. v. St. Paul Fire and Marine Ins. Co., 705 F. Supp. 306, 312, n.5 (W.D. La. 1989) ("Since an arbitrator need not base his decisions according to law and since his decisions are basically non-reviewable, it is doubtful that offensive use of collateral estoppel would be permissible."). *See also* United Food and Commercial Workers Int'l Union-Industry Pension Fund v. Bartusch Packing Co., 546 F. Supp. 852, 856 (D. Minn. 1982); Ufheil Constr. Co. v. Town of New Windsor, 478 F. Supp. 766, 769 (S.D.N.Y. 1979), *aff'd*, 636 F.2d 1204 (2d Cir. 1980); Tofany v. NBS Imaging Systems, Inc., 616 N.E.2d 1034, 1036-37 (Ind. 1993).

25. *See* Aufderhar v. Data Dispatch, Inc., 437 N.W.2d 679, 681, (Minn. Ct. App.), *aff'd*, 452 N.W 2d 468 (1989); Taylor v. Peoples Gas Light & Coke Co., 656 N.E.2d 134, 141 (Ill. App. Ct. 1995); Brougher Agency, Inc. v. United Home Life Ins. Co., 622 N.E.2d 1013, 1018 (Ind. Ct. App. 1993); Nogue v. Estate of Santiago, 540 A.2d 889, 891 (N.J. Super Ct. App. Div. 1988); Dunlap v. Wild, 591 P.2d 834, 838 (Wash. Ct. App. 1979).

26. *See* Rex, Inc. v. Manufactured Hous. Comm. of New Mexico, Manufactured Hous. Div., 119 N.M. 500, 505, 892 P.2d 947, 952 (1995); Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1136 (5th Cir. 1992).

27. *Universal American Barge Corp.*, 946 F.2d at 1136. Collateral estoppel generally applies "as long as the party had a procedural, substantive, and evidentiary opportunity to be heard on the issue." Taylor v. Peoples Gas Light & Coke Co., 656 N.E.2d 134, 141 (Ill. App. Ct. 1995).

28. For factors that other jurisdictions have considered when determining a full and fair opportunity to litigate, *see* Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313,

exhaustive list of factors to assist courts in determining whether the "full and fair opportunity" requirement was satisfied:

> whether the non-movant had the incentive to vigorously litigate the prior action, whether procedural differences between the two actions, such as representation by counsel, presentation of evidence, questioning of witnesses, and appellate review, would make preclusion unfair, and whether policy considerations exist to deny any preclusive effect. Additionally, the formality of the proceedings, the scope of the arbitration, and the definiteness of the decision will influence whether an arbitrator's factual findings should be given preclusive effect.[29]

Once the elements of collateral estoppel are established and a court is fully satisfied that parties have had a full and fair opportunity to litigate the issues, collateral estoppel will apply to issues decided in arbitration proceedings.[30]

IV. RATIONALE

The New Mexico Supreme Court in *Rex, Inc.* based its decision to apply collateral estoppel to arbitration on considerations of judicial economy.[31] In coming to its decision, the court considered *Fernandez v. Farmer's Insurance Co.*,[32] which described the degree of judicial review that courts should give to arbitration awards.[33] In *Fernandez*, the court noted New Mexico's strong public policy favoring dispute resolution through arbitration, stating that arbitration "allows for the informal, speedy, and inexpensive final disposition of disputes . . . and also aids in relieving the judiciary's heavily burdened caseload."[34] In *Rex, Inc.*, the court affirmed the importance of arbitration and summarily held that the same judicial economy considerations described in *Fernandez* supported the application of collateral estoppel to arbitration awards.[35]

332-33 (1971) (whether the plaintiff in the prior action chose to litigate at that time and place; whether the party was prepared to litigate against the defendant there involved; whether the court purported to apply the applicable legal standards; failure of the court to grasp the technical subject matter and the issues in suit; whether, without fault of his own, the party was deprived of crucial evidence or witnesses in the prior litigation). *See also* Welch v. Johnson, 907 F.2d 714, 726 (7th Cir. 1990); Sullivan v. American Airlines, Inc., 613 F. Supp. 226, 230 (S.D.N.Y. 1985).

29. *Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952 (citations omitted).

30. *Id.* at 504-05, 892 P.2d at 951-52.

31. *Id.* at 505, 892 P.2d at 952.

32. 115 N.M. 622, 857 P.2d 22 (1993).

33. *Rex, Inc.* 119 N.M. at 504-05, 892 P.2d at 951-52.

34. Fernandez v. Farmer's Ins. Co., 115 N.M. 622, 625, 857 P.2d 22, 25 (1993) (citations omitted).

35. *Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952. The court further supported its holding by citing several other authorities: *In Re* American Ins. Co., 371 N.E.2d 798, 801 (N.Y. 1977) (stating doctrines of res judicata and collateral estoppel apply to arbitration awards as they do to adjudications in judicial proceedings); Neff v. Allstate Ins. Co., 855 P.2d 1223, 1225-26 (Wash. Ct. App. 1993) (noting that an arbitration proceeding can be the basis for collateral estoppel when the parties receive a full and fair opportunity to litigate the issues); Manu-Tronics, Inc. v. Effective Management Sys., Inc., 471 N.W.2d 263, 266 (Wis. Ct. App. 1991) (stating res judicata and collateral estoppel are essential for arbitration to remain useful); RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1980); Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 33-36 (1989).

The key to the *Rex, Inc.* decision was its requirement that lower courts be "particularly vigilant" in examining whether the arbitration proceeding provided parties with a "full and fair opportunity to litigate the issues."[36] Recognizing the procedural informality of most arbitrations, the court conditioned the application of collateral estoppel on the opportunity of the parties "for presentation of evidence and argument substantially similar in form and scope to judicial proceedings . . . ."[37] As an aid to the courts, the supreme court provided a non-exhaustive list of factors for determining whether an arbitration provided adequate procedural safeguards.[38] Only when an arbitration provides sufficient procedural safeguards may collateral estoppel apply to issues decided in an arbitration.[39]

Much of the *Rex, Inc.* decision focused on explaining how the MHC could be collaterally estopped from acting against Rex when the MHC was not a party to the arbitration between Atkins and Rex.[40] Instead of relying on non-mutual collateral estoppel, the court held that the MHC was bound as a privy to Atkins to the extent that it sought relief on Atkins' behalf as an individual claimant seeking individual relief.[41] The court also held, however, that the MHC could not be bound as a privy to an individual when it was acting to vindicate the public interest.[42] Thus, while the MHC was collaterally estopped from trying to recover Atkins' deposit and from suspending Rex for failure to return the deposit,[43] it was not estopped from placing Rex on probation for violation of MHD regulations which protect a broad public interest.[44]

V. ANALYSIS AND IMPLICATIONS

A. "Fully and Fairly Litigated" Requirement

The *Rex, Inc.* "fully and fairly litigated" requirement should prevent unfairness in the application of collateral estoppel if courts apply the standard with the vigilance that the *Rex, Inc.* court recommended.[45] This requirement is particularly important in the context of arbitrations because arbitrations tend to provide fewer procedural safeguards than judicial proceedings.[46] In comparison with judicial litigation, arbitrations limit the

36. *Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.
37. *Id.*
38. *See supra* text accompanying note 29.
39. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.
40. *Id.* at 507-10, 892 P.2d at 954-57.
41. *Id.* at 509, 892 P.2d at 956.
42. *Id.*
43. *Id.* at 513, 892 P.2d at 960.
44. *Id.* at 509, 892 P.2d at 956.
45. *See* 119 N.M. at 505, 892 P.2d at 952.
46. *Id.*

scope of discovery, usually excluding the use of depositions and interrogatories, and do not apply formal rules of evidence.[47] Additionally, arbitrating parties give up the right to appellate review of most aspects of the arbitration award.[48] The courts justify this limitation on the grounds that the parties to an arbitration have voluntarily bargained for the decision of an arbitrator and have assumed the risks of and waived objections to that decision.[49]

Although *Rex, Inc.* did not demand that arbitrations provide *all* of the procedural benefits that judicial proceedings provide,[50] it was appropriate not to do so. Parties benefit from the lack of procedural requirements associated with arbitration and often choose to arbitrate for this very reason.[51] As long as an arbitration presents parties with an opportunity to present "evidence and argument *substantially similar* in form and scope to judicial proceedings," the parties should be sufficiently protected.[52] Additionally, the *Rex, Inc.* court's "non-exhaustive" list of factors[53] provides further equitable protection to arbitrating parties by allowing courts to consider any additional policy factors which may affect the fairness of applying collateral estoppel to a particular case.[54] This approach is in accord with the court's recent trend of evaluating the applicability of collateral estoppel on a case-by-case basis rather than relying solely on technical definitions and standards.[55]

The scope of the meaning of "full and fair opportunity" to litigate in arbitration has been interpreted differently in other jurisdictions. The Illinois Appellate Court stated, "The 'full and fair opportunity' requirement is satisfied even if only a slight amount of evidence was presented

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47. *See, e.g., Typical Features of Litigation and Arbitration*, DISPUTE RESOLUTION CLAUSES: A GUIDE FOR DRAFTERS OF BUSINESS AGREEMENTS (special supplement to ALTERNATIVES) May 1994, at 71.

48. Courts may vacate arbitration awards only under the following circumstances: when the award was procured by corruption, fraud, or other undue means; there was evident partiality, corruption, or misconduct prejudicing the rights of the parties; the arbitrators exceeded their powers; the arbitrator refused to postpone the arbitration for cause or disallowed evidence, causing prejudice to the parties; or there was no arbitration agreement. N.M. STAT. ANN. § 44-7-12(A) (1978). Additionally, an arbitration award may be vacated where an arbitration panel's mistake of fact or law is so gross as to imply misconduct, fraud, or lack of fair and impartial judgment. Fernandez v. Farmer's Insurance Co., 115 N.M. 622, 625, 857 P.2d 22, 25 (1993). The New Mexico Supreme Court has stated that courts do not have the authority to review arbitration awards for legal or factual errors because it would undermine arbitration's goal to provide a fast and inexpensive resolution of disputes. *Id.* at 624, 857 P.2d at 24.

49. Board of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 470, 476, 882 P.2d 511, 517 (1994).

50. *Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952 (collateral estoppel will only apply when arbitrations provide opportunity for the parties to present evidence and argument "*substantially similar* in form and scope to judicial proceedings" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 84 cmt. c (1980))).

51. *See generally Fernandez*, 115 N.M. at 625, 857 P.2d at 25 (stating arbitration "allows for the informal, speedy, and inexpensive final disposition of disputes").

52. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952 (emphasis added).

53. *Id.*

54. *Id.*

55. *Local 2839*, 111 N.M. at 437, 806 P.2d at 577.

on the disputed matter decided in the first suit."[56] In contrast, *Rex, Inc.* seems to require a more rigorous reviewing procedure when it states that courts must be "particularly vigilant" in examining whether the parties had a full and fair opportunity to litigate.[57] Considering the voluntary and the informal nature of arbitration, the *Rex, Inc.* approach provides greater safeguards to ensure that parties had a full and fair hearing on the issues disputed in the arbitration. Basing collateral estoppel on only a slight amount of evidence increases the chance that parties may be bound by an arbitration where the procedures used are not "*substantially similar* in form and scope to [those used in] judicial proceedings."[58] The *Rex, Inc.* approach will therefore provide greater reassurance to the parties that they will be bound only where there has been a full and fair opportunity to litigate the issues.[59]

The primary problem with the "fully and fairly litigated" requirement is that it provides no firm way to know in advance whether or not collateral estoppel will apply in later litigation. Because *Rex, Inc.*'s list of factors is discretionary,[60] judges may apply collateral estoppel based on any number of different factors they find to be important. As a result, attorneys will have a difficult time providing complete legal advice on the future preclusive effect of arbitration. Additionally, the "full and fair opportunity" standard leaves attorneys and clients with little guidance to determine the level of resources they must expend to ensure that arbitration procedures are sufficient to provide for collateral estoppel.

B. Effect of Collateral Estoppel on Judicial Economy

Although the *Rex, Inc.* court justified the application of collateral estoppel to arbitration awards on the basis of judicial economy, collateral estoppel may impact judicial economy in conflicting ways. First, applying collateral estoppel to arbitrations will affect judicial economy positively because it will prevent relitigation of issues already decided in the arbitration. Alternatively, however, collateral estoppel may affect judicial economy negatively if parties perceive that collateral estoppel may preclude litigation of issues where the stakes are much higher than those addressed in an arbitration. *Rex, Inc.* attempts to prevent this result by cautioning courts to consider whether a party had the incentive to vigorously litigate in the arbitration before applying collateral estoppel.[61] This warning, however, may not always produce the result that the client wants. For example, in *Clemens v. Apple*,[62] a defendant who did not participate in an arbitration was able to assert non-mutual defensive collateral estoppel

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56. Taylor v. People's Gas Light & Coke Co., 656 N.E.2d 134, 141 (Ill. App. Ct. 1995). *See supra* note 27 and accompanying text.
57. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.
58. *See id.* (emphasis added).
59. *See id.*
60. *Id.*
61. *See id.*
62. 477 N.Y.S.2d 774, 776 (N.Y. App. Div. 1984).

to prevent the plaintiff from bringing a $250,000 lawsuit on the basis of an arbitration where the amount at stake was less than $2,000.[63] In support of its decision, the court stated, "Although the amount at stake in the arbitration proceeding . . . was far less than the damages being sought in this action . . . it [was] not an insignificant amount . . . ."[64] Thus, although arbitration decisions now have greater preclusive effect, fewer parties may choose to arbitrate, knowing that they may be bound in later, more significant litigation.[65]

In cases involving offensive collateral estoppel, parties are afforded greater protection against preclusion in cases with third parties. Relying on *Parklane Hosiery Co. v. Shore*, the New Mexico Supreme Court in *Silva v. State* warned against the use of offensive collateral estoppel in cases:

> where a plaintiff could easily have joined in the earlier action[,] . . . where a defendant had little incentive to defend vigorously in the first suit, where the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant, or where the second action affords the defendant procedural opportunities unavailable in the first action that could have easily caused a different result.[66]

In the context of arbitration, several of these factors are rarely met. First, most arbitrations do not provide an "easy" means for joinder of parties.[67] Second, because of arbitration's informal nature, a defendant will likely be able to employ procedural devices in a judicial proceeding which were not available in the first arbitration action.[68] Based on these criteria, courts should have strong reasons to deny application of offensive collateral estoppel to issues decided in an arbitration.[69] Thus, the *Silva*

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63. *Id.*

64. *Id.*

65. *See* Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84 (1986); DAUER, *supra* note 9, at 24-28.

66. Silva v. State, 106 N.M. 472, 475, 745 P.2d 380, 383 (1987) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979)). *See also* Marcia A. Mobilia, *Offensive Use of Collateral Estoppel Arising Out of Non-Judicial Proceedings*, 50 ALB. L. REV. 305, 317 (1986); RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

67. *See, e.g.*, Jersey City Police Officers Benevolent Ass'n v. City of Jersey City, 607 A.2d 1314, 1318 (N.J. Super. Ct. App. Div. 1992) ("arbitration by its nature does not provide a forum conducive to extensive issue and party joinder . . ."); Curtis G. Testerman Co. v. Buck, 667 A.2d 649 (Md. 1995). For a list of factors that courts have considered in deciding whether a party could have easily joined the earlier action, see Mobilia, *supra* note 66, at 318.

68. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.

69. *Rex, Inc.*, however, did not answer this issue, but rather was concerned only with the basic question of whether collateral estoppel applied to the arbitrating parties themselves. The New Mexico Supreme Court said that the MHC was bound by the arbitration between Atkins and Rex because the MHC stood as a privy to Atkins. *Id.* at 507, 892 P.2d at 954. In spite of the *Parklane Hosiery Co.* factors, "[t]he United States Supreme Court [has] declined to bar [outright] the offensive use of collateral estoppel from arbitration in subsequent federal court litigation . . . ." Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1136 (5th Cir. 1992) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223 (1985)). The decision of whether to apply offensive collateral estoppel depends on the totality of the circumstances and is up to the discretion of the judge. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

factors provide greater protection to arbitrating parties and may positively affect judicial economy by encouraging them to arbitrate.

Although the *Rex, Inc.* and *Silva* factors help to eliminate unfairness in the application of collateral estoppel to arbitration decisions, the discretionary nature of collateral estoppel in the arbitration context adds an element of unpredictability to the decision to arbitrate. Parties may become wary of arbitrating if they perceive that arbitration of small conflicts may bind them in more significant litigation.[70] Applied carefully, however, the *Rex, Inc.* and *Silva* factors will protect parties against unfairness, encourage arbitration of disputes, and continue to enhance collateral estoppel's goal of judicial economy.

C. *Limiting Collateral Estoppel in the Arbitration Agreement*

An interesting question which *Rex, Inc.* did not address is whether parties may limit the preclusive effect of an arbitration decision by contract. Case law from other jurisdictions indicates that attorneys may be able to limit preclusion in the arbitration agreement.[71] For example, in *Muse v. Cermak*,[72] the court held that an agreement between two parties to limit the binding effect of an award in a later proceeding must be honored.[73] Other jurisdictions, however, indicate that parties may limit preclusion as between the contracting parties, but that they cannot bind non-contracting third parties.[74]

In contrast with *Muse*, other courts have held that parties may not contractually determine the preclusive effect of an arbitration agreement. In *Amalgamated Transit Union Local Union 313 v. Rock Island County Metropolitan Mass Transit District*,[75] one party argued that collateral estoppel could not apply to issues decided in their arbitration because the arbitration agreement did not specify that collateral estoppel was to apply.[76] The court disagreed, explaining: "Parties do not have the power to alter the applicability of th[is] judicially created doctrine . . . ."[77] Thus,

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70. DAUER, *supra* note 9, at 24-28.

71. *See, e.g.*, Muse v. Cermak, 630 A.2d 891, 893 (Pa. Super. Ct. 1993); Kerins v. Prudential Property & Casualty Ins. Co., 585 N.Y.S.2d 637, 639 (N.Y. App. Div. 1992); RESTATEMENT (SECOND) OF JUDGMENTS § 84(4) (1982).

72. 630 A.2d 891 (Pa. Super. Ct. 1993).

73. *Id.* at 893; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 84 cmt. h (1982) ("limitations on preclusion should normally be given effect under principles of contract law, for the parties are under no obligation to submit themselves to arbitration with broader effects than may be agreed upon"). *Muse* was a personal injury action in which one insured sued the other insured. 630 A.2d at 892, 893. Interestingly, the agreement to limit collateral estoppel, which limited the preclusive effect of the arbitration on the same or similar issues in companion claims, was between two insurance companies. *Id.* at 893. Thus, the court denied preclusion even though the disputing parties in *Muse* were not parties to the arbitration agreement. *Id.* at 892. Due to the facts of the case, the court did not address whether parties may also contract in the arbitration agreement to ensure that collateral estoppel *does* apply. *See id.*

74. *In re* American Ins. Co. v. Messinger, 371 N.E.2d 798, 804 (N.Y. 1977).

75. 551 N.E.2d 650 (Ill. App. Ct. 1990).

76. *Id.* at 653.

77. *Id.*

collateral estoppel is not rendered inapplicable by the parties' failure to provide for it in their contract.

Although courts disagree about whether parties may contractually determine the applicability of collateral estoppel, New Mexico should allow parties to contractually determine the applicability of collateral estoppel among themselves. As in *Muse*, there are likely to be situations in which parties will choose to seek a preliminary determination of rights through arbitration, but prefer to litigate further disputes in judicial proceedings. Although this approach creates the potential for inconsistent results, the parties would bear the potential benefits and risks of this result just as in any other agreement they have bargained for. Allowing parties to contract preclusion among themselves will enhance the predictability of arbitration, encourage more parties to submit their claims to arbitration, and further augment judicial economy.[78]

D. Sculpting Arbitration to Promote or Prevent Collateral Estoppel

Attorneys representing clients in an arbitration may also have the chance to influence preclusion at the time of arbitration. If, upon entering an arbitration, a party foresees that collateral estoppel may affect later judicial litigation, the party may be able to use the factors in *Rex, Inc.* to design an arbitration decision that either will or will not meet the requirements needed to establish collateral estoppel. However, this may be a high risk plan if the parties expect that collateral estoppel will not apply, but a court later disagrees. This approach may be most useful for parties who are already bound to go to arbitration, and would like a last attempt to try to prevent collateral estoppel from applying.

If the party wants to ensure that collateral estoppel will apply to issues decided in an arbitration, the party should provide the opposing party with as many procedural safeguards as possible.[79] Additionally, the party should request that the issues be decided individually so that the courts can determine which issues were actually litigated and necessarily decided in the arbitration.[80] If, however, a party believes that collateral estoppel will negatively affect future litigation, the party should seek a simple arbitration with few procedural safeguards and no way to determine which issues were necessary to the arbitration decision.[81] Crafting such procedures will not invalidate the decision in the initial arbitration because arbitration decisions may be vacated only upon the limited circumstances set forth in the Uniform Arbitration Act.[82] Instead, crafting protective procedures will only make it easier or more difficult to apply collateral estoppel in subsequent arbitral or judicial proceedings.

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78. *See* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 674 (1988).

79. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.

80. *See id.*; DAUER, *supra* note 9, at 24.

81. *See Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952.

82. N.M. STAT. ANN. § 44-7-12 (1978).

VII. CONCLUSION

In *Rex, Inc.*, the New Mexico Supreme Court held that collateral estoppel applies when parties have had a full and fair opportunity to litigate the issues in arbitration. If courts are particularly vigilant in ensuring that parties have a full and fair opportunity to litigate their disputes before collateral estoppel applies, then more parties are likely to submit their disputes to arbitration. If, however, courts apply collateral estoppel so that small arbitrations are binding in later litigation with third parties, then some parties may be discouraged from arbitrating their disputes. In either case, parties may be able to limit preclusive effect either by contract or by crafting arbitration procedures so that they will not support collateral estoppel.

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