No. 21-3418

In the

United States Court of Appeals

For the Sixth Circuit

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION

TRAVIS ABBOTT; JULIE ABBOTT,

Plaintiffs-Appellees

v.

E. I. DU PONT DE NEMOURS AND COMPANY,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Ohio
Case Nos. 2:17-cv-00998 & 2:13-md-02433

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT E. I. DU PONT DE NEMOURS AND COMPANY

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amicus makes the following disclosure under Sixth Circuit Rule 26.1:

1. Is amicus a subsidiary or affiliate of a publicly owned corporation?

No. The Chamber is a nonprofit corporation organized under the laws of the District of Columbia.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?

None known.

/s/ Brian D. Schmalzbach
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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

Members of the Chamber and their subsidiaries include product designers, manufacturers, and retailers, some who have litigated as defendants in mass tort litigation. The Chamber's members and their subsidiaries also include other American businesses subject to MDL proceedings. The Chamber thus is familiar with mass tort litigation and MDL proceedings generally, both from the perspective of individual defendants in mass litigation proceedings and from a more global perspective across MDLs. In particular, the Chamber's Institute for Legal Reform has produced in-depth analysis of the scope and burdens of MDL proceedings. *See,*

[1] No counsel for a party authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund this brief or its submission. No person other than amicus, its members, or its counsel contributed money to the preparation or submission of this brief.

e.g., Beisner, *Trials and Tribulations*, https://bit.ly/ILRLink (Oct. 21, 2019). The Chamber has a significant interest in this case because DuPont's appeal of the district court's application of non-mutual offensive collateral estoppel raises an issue of immense significance not only within the Sixth Circuit but also for American businesses in MDLs nationwide.

Counsel for all parties consented to the filing of this brief. This Court granted the Chamber's motion to file an amicus brief in support of DuPont's mandamus petition on this same issue at an earlier stage of this case. *See* Dkt. 18-2, No. 19-4226.

INTRODUCTION

The district court prohibited a defendant from litigating key issues in a mass-tort MDL by imposing nonmutual offensive collateral estoppel based on *three* early trials. That decision flouted clear-as-day instructions from this Court and the Supreme Court: "In *Parklane Hosiery* [*Co. v. Shore*, 439 U.S. 322 (1979)], the Supreme Court explicitly stated that offensive collateral estoppel *could not be used in mass tort litigation*." *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (emphasis added). And the district court's deployment of that doctrine in the name of administrative efficiency continued the troubling trend of misconceived MDL exceptionality this Court has sought to halt. *See In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841 (6th Cir. 2020) ("[A]n MDL court's

determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone.").

When DuPont sought mandamus review, this Court recognized that DuPont "made a vigorous and perhaps compelling argument that the district court erred as a matter of law." Dkt. 23-2 at 5, No. 19-4226. But the Court deferred a ruling on the merits with an invitation to raise that argument in an "appeal after trial." *Id.* at 4. Now is the time to reverse the district court's unprecedented application of nonmutual offensive collateral estoppel.

The district court's refusal to follow binding law will distort the resolution of this MDL. But its ruling threatens far worse. If not nipped in the bud here, the district court's approach would usher in an MDL system that tilts the playing field against all defendants. Here, three early trials—representing less than *one percent* of cases brought or transferred in this MDL—ended in plaintiff verdicts. No court would deny the thousands of other claimants who appeared in this MDL their day in court just because the first few juries found no duty or no causation as to the first few plaintiffs. And justly so: estopping the plaintiffs in those other cases because *other* plaintiffs had tried and failed would strip them of foundational constitutional trial rights. But the district court saw no problem with stripping a *defendant* of those rights. That approach puts all the risk on mass tort defendants, and pushes all the reward to mass tort claimants.

That approach is not only unfair to MDL defendants—it is bad for the MDL system as a whole. Informational bellwethers are a critical tool for managing the massive federal MDL docket. They facilitate settlement and reduce litigation costs by helping parties value cases and understand the risks on both sides. But American businesses cannot accept the risk of the "heads I win, tails you lose" rule for bellwethers applied here. The district court's shortsighted ruling thus would discourage one of the most effective docket-management tools available for mass tort litigation. And it would cripple the efficiency of the MDL system by coercing defendants to litigate each case as if it would bind them on every issue forevermore. For these reasons, the Court should reverse the judgment based on the district court's unprecedented Preclusion Order, MDL R.5285, PageID128531, and remand to ensure each party in each case gets its day in court.

ARGUMENT

I. Applying nonmutual offensive collateral estoppel to bellwether trials—especially in mass tort cases—violates the constitutional rights of American businesses.

The Constitution forbids the sort of nonmutual offensive collateral estoppel applied against the defendant here. This Court should correct the unprecedented misapplication of that doctrine. *See generally* 4 Newberg on Class Actions § 11:20 (5th ed. 2019) (citing cases holding that "bellwether trials do not bind the other cases in the pool" absent agreement).

First, "estop[ping] a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff" raises important due process concerns. *Parklane Hosiery Co.*, 439 U.S. at 329; *see also Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (noting "that extreme applications of the doctrine of res judicata may be inconsistent with" the U.S. Constitution). Procedural due process is concerned with a lack of "safeguards designed to ensure that the [non-tried] claims against [the defendant] . . . are determined in a proceeding"—the bellwether trial—"that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997). Even if nonmutual offensive collateral estoppel could ever be used in mass torts, *but see In re Bendectin*, 749 F.2d at 305 n.11, procedural due process would require at a minimum that any preclusive bellwether be "a randomly selected, statistically significant sample" to adequately represent the other claims. *Id.* at 1021. Anything less would infringe defendants' fundamental due process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotations omitted); *see also Fayerweather v. Ritch*, 195 U.S. 276, 298-99 (1904) (recognizing a constitutional right to a "judicial determination of the fact upon which" a deprivation of property rests).

Second, substantive due process concerns arise "based on the lack of fundamental fairness contained in a system that permits the extinguishment of claims

or the imposition of liability in nearly 3,000 cases based upon results" of a handful of bellwether trials. *In re Chevron,* 109 F.3d at 1020. That is, "[e]ssential to due process for [all] litigants" in mass tort litigation "is their right to the opportunity for an individual assessment of liability and damages in each case." *Id.* at 1023 (Jones, J., specially concurring).

And third, Seventh Amendment right-to-jury principles are threatened when a litigant loses his day in court just because some other jury already decided another's claims based on other evidence. *See, e.g.*, *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-20 (5th Cir. 1998) (reversing damages judgments extrapolated from earlier bellwethers on Seventh Amendment grounds because "there was neither any sort of trial determination, let alone a jury determination, nor even any evidence, of damages" specifically for those extrapolated judgments).[2]

[2] The district court's expansion of nonmutual offensive collateral estoppel also appears to exceed the equitable powers of federal courts as an original matter. *See FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 288 (6th Cir. 2018) (collateral estoppel is "founded on . . . equitable principles"); *Nations v. Sun Oil Co.,* 705 F.2d 742, 745 (5th Cir. 1983) (application of collateral estoppel "is controlled by the principles of equity"). "It is a principle of general elementary law that the estoppel of a judgment must be mutual." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *see also Montana v. United States*, 440 U.S. 147, 153 (1979) (describing collateral estoppel's mutuality requirement as part of a "fundamental precept of common-law adjudication"). The mutuality requirement obtained "[u]ntil relatively recently." *Parklane Hosiery*, 439 U.S. at 326. Further departures from that requirement rest on increasingly shaky constitutional ground. *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power [], we ought to be reluctant to

Thus, the "general rule" is that nonmutual offensive collateral estoppel is impermissible when it "would be unfair to a defendant." *Parklane Hosiery*, 439 U.S. at 331. As this Court recognized, that general rule "curtail[ed] the use of offensive collateral estoppel." *In re Bendectin*, 749 F.2d at 305 (describing *Parklane Hosiery*). And in mass tort litigation specifically, nonmutual offensive collateral estoppel is foreclosed altogether. *Id.* at 305 n.11 ("In *Parklane Hosiery,* the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation.").

That mass tort litigation rule makes good sense. On a long enough timeline, mass tort litigation *will* produce inconsistent trial verdicts. *See, e.g.*, *Setter v. A.H. Robins Co., Inc.*, 748 F.2d 1328, 1330 (8th Cir. 1984) (affirming denial of nonmutual offensive collateral estoppel in mass tort litigation given the history of both plaintiff and defense verdicts over 21 trials); *Harrison v. Celotex Corp.*, 583 F. Supp. 1497, 1503 (E.D. Tenn. 1984) (refusing to apply nonmutual offensive collateral estoppel in asbestos litigation given the prior inconsistent judgments against the defendant over 30 trials). But it's not just the fifth or twenty-fifth verdict that might be aberrational. Defendants risk an "aberrational judgment" even in the first few trials,

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approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions.").

particularly when counsel can push initial "case[s] in which the factors exciting sympathy for the plaintiff are very strong" or where "the opportunity to present an effective defense is subject to maximum handicaps." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 288-89 (1957). So, for example, "the first plaintiff may have been selected to be the most sympathetic by plaintiffs' counsel," or the first "plaintiff[s] may have particularly egregious damages, making the jury more likely to find liability," or initial verdicts "may have been a compromise verdict of liability in favor of reduced damages." Stier, *Another Jackpot (In)justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 740 (2009).

Mass tort litigation thus risks an aberrational verdict even in the first bellwether. That risk of attaching preclusive effect to an aberrational verdict is precisely the type of unfairness that the Supreme Court identified as foreclosing offensive collateral estoppel. *Parklane Hosiery*, 439 U.S. at 330-31 & n.14 (citing "Professor Currie's familiar example" of inconsistent results in mass tort litigation over railroad collision injuries as an example of disqualifying unfairness). That is why "*Parklane Hosiery* . . . was plainly hostile to the idea of applying its estoppel doctrine in a setting like the modern MDL, where an individual trial takes place with hundreds or even thousands of claimants waiting in the wings." Gilles,

Rediscovering the Issue Class in Mass Tort MDLs, 53 GA. L. REV. 1305, 1310 (2019).

Constitutional safeguards therefore prohibit the use of tempting docket management shortcuts for "streamlining litigation proceedings." Preclusion Order, MDL R.5285, PageID128558. That means, as this Court already recognizes, that "a party's rights in one case" may not "be impinged to create efficiencies in the MDL generally." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 845; *see also Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000) ("[We must] focus on what was actually litigated and who should be bound and benefit from those results. That concern must override arguments about inconsistent results and time-consuming relitigation of the same issue."); *Cimino*, 151 F.3d at 321 (5th Cir. 1998) (reversing judgments in asbestos "extrapolation case[s]," based on results of prior bellwether trials, while acknowledging "the asbestos crises" of clogged dockets); *In re Chevron*, 109 F.3d at 1023 (Jones, J., specially concurring) ("Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.").[3] This Court's intervention is necessary to prevent those

[3] As explained in DuPont's brief, there was no consent to applying preclusive force to the informational bellwethers here. *See* DuPont Brief 4-5; *see also Dodge*, 203 F.3d at 1200 ("If the parties intended to bind subsequent litigation with the results of prior test trials, the record must clearly memorialize that agreement. Their failure to do that here leaves important substantive rights at the mercy of trial tactics.").

constitutional safeguards from being sacrificed on the altar of purported administrative expediency.

II. The district court's approach threatens the bellwether system that is critical to managing the massive federal MDL docket and controlling litigation costs for American businesses.

The district court's approach to bellwethers is not merely unconstitutional; it would discourage one of the most important docket management tools available to judges with the enormous responsibility of supervising MDLs.

MDLs are a big deal for the federal judiciary. As of last year, 327,204 actions were pending in MDL proceedings. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *Statistical Analysis of Multidistrict Litigation* (2020), https://bit.ly/MDLAnalysis. Just a year ago, it was 134,462 actions. *Id*. That's over half of the entire federal civil caseload. *See* Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket* (Feb. 19, 2020), https://bit.ly/MDLDocket. So bellwether trials are an essential management tool that MDL courts "often schedule." Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017, 2027 (2017). MDL courts use bellwethers "frequently . . . rather than remand the cases to the forums from whence they came." Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 400 (2013).

As a result, bellwether trials have "achieved general acceptance by both bench and bar" as a means to avoid hundreds or thousands of trials in mass tort MDLs by

facilitating settlement evaluation. *In re Chevron*, 109 F.3d at 1019. The bellwether model envisions juries resolving "a small number of selected cases"—the bellwether trials—"to give the parties a sense of how the legal and factual issues play out in different cases." Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 696 (2006). Bellwethers "allo[w] a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action." *In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007).

Bellwethers thus are an essential tool to facilitate settlement of sprawling mass tort litigation. *See id.* ("[R]esolution of these [crucial] issues [in bellwether trials] often facilitates settlement of the remaining claims."). "The idea of a bellwether is guidance." *Rediscovering the Issue Class*, 53 GA. L. REV. at 1311. By litigating a handful of claims representative of the "large[r] group of claimants," bellwethers "may provide a basis for enhancing prospects of settlement." *In re Chevron*, 109 F.3d at 1019. "By selecting for trial a handful of cases that represent a cross-section of all the various actions filed in the MDL, the object is to establish non-binding benchmark parameters that will help guide the parties in the settlement process." *Rediscovering the Issue Class*, 53 GA. L. REV. at 1311.

"[B]ellwether trials discharge this function reasonably well, by all accounts." *Id*. "[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated." *Segmenting Aggregate Litigation*, 25 REV. LITIG. at 697. Bellwethers "provide a vehicle for putting litigation theories into practice," allowing counsel and clients to "evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with litigation." Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2337-38 (2008); 4 Newberg on Class Actions § 11:11 (5th ed. 2019) ("[S]o valuable does [the informational approach] prove to be, that most MDL courts regularly engage in bellwethers in appropriate cases.").

Appellate courts have thus been deeply "skeptical" of treating bellwether trials as preclusive, "recogniz[ing] that the results of bellwether trials are not properly binding on related claimants unless those claimants expressly agree to be bound by the bellwether proceedings." *Bellwether Trials*, 82 TUL. L. REV. at 2331 n.27. There is "good reason" for this skepticism. *Id.* at 2331. For if courts can retroactively make informational bellwethers preclusive, the bellwether model is finished. No defendant would agree to participate in such a bellwether scheme. Even ostensibly informational bellwethers would be subject to the flip of a switch, in the name of a court's claimed "significant federal interest in administering its

docket," Preclusion Order, MDL R.5285, PageID128558, making preclusive what was once informational. No defendant would be able to accurately assess that risk from MDL court to MDL court, and so could not rationally accept that unknown risk.

Coercing defendants into such preclusive "bellwethers" would also undercut the intended efficiency benefits of MDLs. *See* 28 U.S.C. § 1407 (providing for transferring certain actions to MDL courts to "promote the just and efficient conduct of" MDLs). Defendants in informational bellwethers can use the process to assess the risks of further litigation and explore multi-plaintiff settlements without the need to litigate each case to the bitter end. *See supra* at 11-12. But defendants facing preclusive regimes like this district court's would have to exhaust every avenue of reconsideration and appeal for each litigated individual action because such defendants may be bound on each issue forever after in all remaining actions. Even though those resources may be better spent exploring settlement, the risk of preclusion would make settlement too often too costly.[4]

American businesses (the typical mass tort defendants) would bear the brunt of the preclusive regime the district court concocted here. Had the informational

[4] Indeed, the district court here assigned offensive collateral estoppel in part as a "consequenc[e]" of "DuPont['s] ch[oice] to settle" an earlier case in the same MDL rather than fight an appeal all the way to judgment. Preclusion Order, MDL R.5285, PageID128559-60.

bellwethers here ended with defense verdicts—say, a finding of no duty—no court would retroactively decide that those bellwethers foreclose other MDL claims. *See, e.g.*, *Auchard v. Tennessee Valley Auth.*, 2011 WL 444845, at *2 (E.D. Tenn. Feb. 1, 2011) ("The Court recognizes that bellwether trials must bind only those persons who take part in the trial in order to assure that each Plaintiff is afforded his or her constitutional rights."). Thus, the risks of the district court's approach would threaten American businesses with ruinous liability, but with none of the party-neutral benefits achieved from informational bellwethers. *See, e.g.*, de Villiers, *Technology Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J.L. & PUB. POL'Y 523, 524 (2000) ("Liberal application of collateral estoppel in product liability . . . has been criticized for putting the survival of entire industries at risk based on a single, possibly erroneous, judgment."); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1080 (1986) ("[E]xploitation of [offensive collateral estoppel] burdens defendants with additional litigation, thereby increasing the volume of litigation."). That is neither constitutional, nor good MDL management.

CONCLUSION

For these reasons and those in DuPont's brief, the Court should reverse this unconstitutional, unprecedented, and unwise application of nonmutual offensive collateral estoppel and remand for a trial including the improperly estopped issues.

Respectfully submitted,

/s/ Brian D. Schmalzbach

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,397 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 6th Circuit Rule 32(b)(1).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point size.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2021 the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

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