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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It 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 court. 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 a broad array of businesses that have litigated as defendants in MDL proceedings and mass tort litigation. 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. *See, e.g.*, U.S. Chamber, Institute for Legal Reform, *Trials and Tribulations*, https://bit.ly/ILRLink (Oct. 21, 2019). The Chamber has a significant interest in this case because the panel's novel expansion of non-mutual offensive collateral estoppel raises an issue of exceptional importance not only within this Circuit but also for

[1] No counsel for any party authored this brief in whole or in part. No entity or person, other than amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

businesses in MDLs nationwide.

The Chamber files this brief with a motion for leave to file under Federal Rule of Appellate Procedure 29(b)(2). 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

This divided panel approved an unprecedented prohibition on a defendant litigating key issues in a mass-tort MDL based on the nonmutual offensive collateral estoppel consequences of *three* early trials. Op. 18. That decision contradicts 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 Prods. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (emphasis added); *see also* Op. 10-11 (refusing to follow *Bendectin*). And the majority's blessing of that doctrine in the name of administrative efficiency advanced the troubling trend of misconceived MDL exceptionality that 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."); *see also* Op. 37 (Batchelder, J. dissenting) ("The district court's

concern for efficiency, while understandable, does not outweigh these overarching due-process concerns.").

Rehearing is needed to maintain the unity of this Court's decisions. 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. Yet the majority brushed off the constitutional red flags presented by the district court's application of nonmutual collateral estoppel and cast aside this Court's *Bendectin* precedent.

Rehearing is also warranted because the divided panel erred on this exceptionally important question. If not corrected, the majority opinion will distort this significant MDL. But it threatens far worse. If allowed here, that approach would foster an MDL system that tilts the playing field against all defendants. Here, three early trials—less than *one percent* of cases in this MDL—ended in plaintiff verdicts. No court would deny the thousands of other MDL claimants their day in court just because the first few juries found no duty or causation as to the first few plaintiffs. And justly so: estopping the plaintiffs in those other cases because *other* plaintiffs had failed would strip them of foundational constitutional trial rights. But the panel majority 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 MDL management generally. Informational bellwethers are a critical tool for managing the massive MDL docket. They facilitate settlement and reduce litigation costs by helping parties understand the risks and value cases accordingly. But American businesses cannot accept the risk of the "heads I win, tails you lose" rule for bellwethers applied here. The panel majority's shortsighted ruling thus would discourage one of the most effective docket-management tools for mass tort litigation. And it would cripple the efficiency of the MDL system by coercing defendants to litigate each case as if binding on every issue forevermore. The Court should grant DuPont's petition for rehearing, reverse the district court's Preclusion Order, MDL R.5285, PageID128531, and remand to ensure each party in each case gets its day in court.

ARGUMENT

I. The expansion of nonmutual offensive collateral estoppel to mass tort bellwether trials is a question of exceptional importance.

The majority opinion erred on a question of exceptional importance to American businesses by holding that the Constitution permits nonmutual offensive collateral estoppel here. Op. 15-18. This Court should grant rehearing to correct the unprecedented misapplication of that doctrine. *See generally* 4 Newberg on Class Actions § 11:20 (6th ed. 2022) (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*, 439 U.S. at 329. If such estoppel is even allowed in mass tort cases, *but see Bendectin*, 749 F.2d at 305 n.11, due process requires "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). So to have preclusive effect, a bellwether trial or trials must at least reflect "a randomly selected, statistically significant sample" to adequately represent the other claims. *Id.* at 1021; *see also* Op. 35 (Batchelder, J., dissenting) ("[I]t is fundamentally unfair for a small, non-representative sample of bellwether plaintiffs to bind a defendant in thousands of future cases.").

Second, 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 implicated when litigants lose their 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).

Moreover, the panel majority's expansion of nonmutual offensive collateral estoppel to this MDL appears to exceed the original equitable powers of federal courts. *See FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 288 (6th Cir. 2018) (collateral estoppel is "founded on . . . equitable principles"). "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); *accord Montana v. United States*, 440 U.S. 147, 153 (1979) (collateral estoppel's mutuality requirement is a "fundamental precept of common-law adjudication"). The mutuality requirement applied "[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

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

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." *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 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). But it's not just the fifth or twenty-fifth verdict that might be anomalous. Defendants risk an "aberrational judgment" even in the first few trials, 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).

That risk of attaching preclusive effect to an aberrational verdict exemplifies the unfairness that forecloses collateral estoppel here. *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 shortcuts for "streamlining litigation proceedings." Preclusion Order, MDL R.5285, PageID128558. In short, "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 Cimino*, 151 F.3d at 321 (reversing judgments in asbestos "extrapolation cases," 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."). Rehearing is necessary to prevent those constitutional safeguards from being sacrificed on the altar of purported administrative expediency.

II. The majority opinion threatens the bellwether system that is critical to managing the massive federal MDL docket and controlling litigation costs for American businesses.

The panel majority's approach to bellwethers is not just improper; it would discourage one of the most important MDL docket management tools available.

MDLs are a big deal for the federal judiciary. As of 2021, 391,953 actions were pending in MDL proceedings. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *Statistical Analysis of Multidistrict Litigation* (2021), https://bit.ly/MDLAnalysis2021. Just a year before that, it was 327,204 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/3hNgCdp.

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. That model envisions juries resolving "a small number of selected [bellwethers] 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 critical to facilitating settlement of sprawling mass tort litigation. *See id.* ("[R]esolution of these [crucial] issues [in bellwether trials] often facilitates settlement of the remaining claims."). By litigating a handful of claims representative of the "large[r] group of claimants," bellwethers "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. But *guiding* the parties, by giving them data to inform their settlement positions and strategies, is fundamentally different from *binding* the parties.

Most 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." Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331 n.27 (2008). There is "good reason" for that skepticism. *Id.* at 2331. If courts can retroactively make informational bellwethers

preclusive, the bellwether model is finished. Even ostensibly informational bellwethers would be subject to the flip of a switch, in the name of a court's claimed interest in administrative efficiency, making preclusive what was once informational. Defendants would have no incentive to participate in such a bellwether scheme.

American businesses (the typical mass tort defendants) would bear the brunt of the panel majority's preclusive regime. Had the informational 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 panel's expansion of nonmutual collateral estoppel 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."). That is not constitutional, nor is it good MDL management.

CONCLUSION

The Court should grant DuPont's petition, reverse the panel's unconstitutional, unprecedented, and unwise expansion of nonmutual offensive collateral estoppel, and remand for a trial including the improperly estopped issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,596 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 January 5, 2023, 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.

/s/ Brian D. Schmalzbach
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