No. 19-4226

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

From the United States District Court for the Southern District of Ohio
Eastern Division, Case No. 2:13-md-02433
Hon. Edmund A. Sargus

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF E. I. DU PONT DE NEMOURS AND COMPANY'S PETITION FOR WRIT OF MANDAMUS

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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 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
Brian D. Schmalzbach

Under Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America respectfully moves for leave to file a brief as amicus curiae in support of Petitioner E. I. du Pont de Nemours and Company. The proposed brief accompanies this motion. Petitioner consented to the filing of this brief. The Chamber sought consent from plaintiffs-respondents, who refused to consent.

The Chamber is the world's largest business federation. The Chamber represents 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 before the courts. To that end, the Chamber often files amicus curiae briefs in cases that raise issues of vital concern to the Nation's business community.

Under the governing rules, motions for leave to file amicus briefs must state "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). The Chamber's members have a strong interest in the proper resolution of this mandamus petition arising from a mass tort multidistrict litigation proceeding. Members of the Chamber and their subsidiaries include product designers, manufacturers, and retailers, some who have litigated as defendants in mass tort

cases. The Chamber's members also include other American businesses and their subsidiaries subject to MDL proceedings. The Chamber thus is familiar with mass tort litigation and MDL proceedings more generally, both from the perspective of individual defendants in mass tort proceedings and from a more global perspective across MDLs. The Chamber has an interest here because DuPont's mandamus petition seeks review of an issue of immense significance within the Sixth Circuit and for American businesses in MDLs nationwide. As the Chamber's Institute for Legal Reform has noted, "While there are certainly benefits to the bellwether trial process in certain scenarios, there are significant policy concerns associated with conducting MDL trials in order to facilitate settlement of a litigation." Beisner, *Trials and Tribulations* 4 (Oct. 21, 2019), available at http://bit.ly/InstituteLink.

Mindful of the role of amicus curiae, the Chamber's amicus brief does not duplicate the parties' arguments. The Chamber instead seeks to provide the Court with a broader perspective of the district court's ruling, particularly as contextualized by the use of preclusive-versus-informational bellwether trials in mass tort MDLs nationwide. That broader perspective reflects the interests of the Chamber's members while also assisting the Court in resolving this mandamus petition.

Amicus briefs by the Chamber have been regularly accepted by federal courts of appeals and the United States Supreme Court. The Chamber recently filed certiorari-stage amicus briefs in the Supreme Court on the proper scope of issue

preclusion. *See R.J. Reynolds Tobacco Co. v.* Searcy (No. 18-649); *Philip Morris USA Inc. v. Boatright* (No. 18-654). And just two months ago the Chamber filed an amicus brief in this Court supporting mandamus in a complex MDL. *See In re State of Ohio*, No. 19-3827 (6th Cir. Oct. 10, 2019) (Dkt. 32-2 – granting leave to file). Other recent cases where this Court has agreed to accept an amicus brief from the Chamber include *Goodman v. J.P. Morgan Investment Management, Inc.*, No. 18-3238 (6th Cir. Nov. 28, 2018) (Dkt. 45 – order granting motion by U.S. Chamber to file an amicus brief); *Tennessee Valley Authority v. Tennessee Clean Water Network*, No. 17-6155 (6th Cir. June 6, 2018) (Dkt. 87 – order granting motion by U.S. Chamber to file an amicus brief); *Reese v. CNH Industrial N.V.*, No. 15-2382 (6th Cir. July 11, 2017) (Dkt. 67 – order granting motion by U.S. Chamber to file an amicus brief on rehearing); *Bartlett v. E.I. DuPont Nemours & Co.*, No. 16-3310 (6th Cir. Oct. 5, 2016) (Dkt. 32 – order granting motion by U.S. Chamber to file an amicus brief).

For these reasons, the Chamber respectfully asks this Court to grant this motion and permit the filing of the attached amicus brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 674 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and 6th Circuit Rule 32(b)(1).

2. This motion complies with the typeface and type-style requirements of Federal Rules 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 December 20, 2019, 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
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 the courts. To that end, the Chamber regularly files amicus briefs in cases that, like this one, 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 more 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

[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.

proceedings. *See, e.g.*, Beisner, *Trials and Tribulations*, http://bit.ly/InstituteLink (Oct. 21, 2019). The Chamber has a significant interest in this case because DuPont's mandamus petition seeks review of an issue of immense significance not only within the Sixth Circuit but also for American businesses in MDLs nationwide.

Counsel for DuPont consented to the filing of this brief. Counsel for plaintiffs-respondents refused to consent. The Chamber files this brief together with a motion for leave to file under Federal Rule of Appellate Procedure 29(a)(4)(D).

INTRODUCTION

In this mass tort MDL, the district court prohibited a defendant from litigating key issues in an entire MDL of cases 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 Prods. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (emphasis added).

The district court's refusal to follow that binding law will distort the resolution of this sprawling MDL. But that unprecedented application of nonmutual offensive collateral estoppel 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 bellwether trials—representing less than *one*

percent of cases in this MDL—ended in plaintiff verdicts. No court would deny the thousands of other claimants 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 on the ground that *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.

And 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. For these reasons and the others in DuPont's petition, this case presents otherwise unreviewable "questions of unusual importance necessary to the economical and efficient administration of justice" that require this Court's mandamus review. *In re Dow Corning Corp.*, 113 F.3d 565, 569 (6th Cir. 1997).

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 grant the writ and 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., Inc. v. Shore*, 439 U.S. 322, 329 (1979); *see also Richards v. Jefferson County*, 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). At minimum, then, procedural due process requires any preclusive bellwether to be "a randomly selected, statistically significant sample" to adequately represent the other claims.

Id. at 1021. Defendants possess a 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. *Id*. 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 merely because some other jury already decided another's claims based on other evidence. *See, e.g.*, *Cimino v. Raymark Industries, 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).

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, 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 aberrational verdicts even in the first bellwether. That risk of attaching a 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 331 & 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 like the one the district court employed here. *See 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 (5th Cir. 1998) (reversing judgments in asbestos "extrapolation cases," based on results of prior bellwether trials, while acknowledging "the asbestos crises" of clogged asbestos 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.").[2] This Court's intervention is necessary to prevent those constitutional safeguards from being sacrificed on the altar of purported administrative expediency.

Indeed, mandamus is generally "available as a matter of course to protect the right to jury trial against orders that explicitly deny jury trial." Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3935.1 (3d ed. 2019). According to the Supreme Court, "the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959). As a result, "some courts, relying principally on *Beacon Theatres*, have held" that the normally stringent "preconditions" for mandamus do not apply "[w]here the constitutional right to a jury trial is involved." *Golden v. Kelsey-Hayes Co.*, 73 F.3d

[2] As explained in DuPont's petition, there was no consent to applying preclusive force to the informational bellwethers here. *See* Petition 14-18; *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.").

648, 658 (6th Cir. 1996); *see also Black v. Boyd*, 248 F.2d 156, 160–61 (6th Cir. 1957) (holding that "exceptional circumstances" justifying "the issuance of the writ" of mandamus can be "the deprivation of the constitutional right of trial by jury"). "Thus, the writ may issue where the interlocutory order at issue deprives the parties of a trial before the court on the basic issues involved in the litigation." *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987); *see* 16 Fed. Prac. & Proc. Juris. § 3935.1 ("[T]he right to jury trial may be protected [by mandamus] even though the law surrounding the jury trial question may be difficult or uncertain.").

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 September 2019, 134,462 actions were pending in MDL proceedings. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *Statistical Analysis of Multidistrict Litigation* (2019), http://bit.ly/JPML2019Stats. Just a year ago, it was 156,511 actions. *Id*. That's over half of the entire federal civil caseload. *See* Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload* (March 14, 2019), http://bit.ly/Law360MajorityMDLs. 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 form 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" to avoid hundreds or thousands of trials in mass tort MDLs. *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) Products*, 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, *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 231. 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 docket management, 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.

American businesses (the typical mass tort defendants) would bear the brunt of that problem. 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 Authority*, 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.").

CONCLUSION

For these reasons and those in DuPont's petition, the Court should grant the petition for writ of mandamus to correct this unconstitutional, unprecedented, and unwise application of nonmutual offensive collateral estoppel.

Respectfully submitted,

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