**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 AND JULIE ABBOTT,
*Plaintiffs-Appellees*,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,
*Defendant-Appellant*.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division
Civil Cases Nos. 2:17-CV-00998; 2:13-md-02433

## BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certifies that it is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

Respectfully submitted this 17th day of September, 2021.

/s/ Jeffrey R. White

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.[1]

This case is of acute interest to AAJ and its members. AAJ is concerned that the suggestion by DuPont and supporting amicus the U.S. Chamber of Commerce, that nonmutual offensive collateral estoppel be categorically prohibited in mass tort litigation, would deprive injured plaintiffs of their access to the courts.

## SUMMARY OF ARGUMENT

AAJ urges this Court to reject the radical proposal that nonmutual offensive collateral estoppel be categorically prohibited in mass tort litigation.

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

1. The application of nonmutual offensive collateral estoppel does not violate the constitutional rights of American businesses, who are frequent defendants in mass tort litigation. This longstanding common-law rule serves the vital public policy imperative of efficient use of judicial resources, *especially* where courts are faced with a flood of claims presenting similar issues. Defendants who have had their day in court and lost must not be allowed to waste the resources of the courts and other litigants by relitigating the same issue over and over in subsequent proceedings, for no discernible purpose other than to make access to justice more expensive for those seeking legal redress.

Collateral estoppel does not violate a defendant's due process rights for the simple reason that it was widely accepted by common law courts at the time the Due Process Clause was adopted. It is true that courts historically required that a party could not be estopped from relitigating an issue unless the opposing party could have been estopped if the prior decision had gone the other way. But mutuality of estoppel is not essential to due process. The impact or the fairness of issue preclusion to the defendant does not vary when the adversary changes. No satisfactory justification for requiring mutuality has ever been shown, and the courts of most jurisdictions have rejected it.

For similar reasons, it does not violate a defendant's constitutional right to trial by jury. The Seventh Amendment protects the jury right as it existed in 1791,

when collateral estoppel was settled common law. The absence of mutuality does not alter the impact on the defendant's jury right.

2. The Supreme Court upheld the use of nonmutual offensive collateral estoppel in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), a class action case, subject to the broad discretion of district court to avoid unfairness. This Court has agreed with that reading of *Parklane Hosiery*, its dicta disapproving such estoppel in mass tort litigation notwithstanding. Consequently, district courts have frequently applied nonmutual collateral estoppel in mass tort litigation, including in multi-district litigation (MDLs).

3. The assertion that fear of such estoppel will force defendants in mass tort cases to agree to "blackmail" settlements is wholly without foundation. Resolving common issues in a single proceeding, whether through an issue class action or application of offensive collateral estoppel, does not impose undue pressure on the defendant to agree to settle the underlying claims. Individual claimants must still prevail in individual trials on issues specific to those plaintiffs. Public policy favors dispute resolution by settlement, and the pretrial settlement calculus facing the defendant in each of those individual proceedings remains the same.

Additionally, the "blackmail" settlement effect finds no support in empirical data. Certification of class actions, where the outcome of a single trial could be a huge damages award, does not appear to cause defendants to settle any more often

than they settle individual tort actions. The filing by defendants of dispositive motions post-certification suggests that settlements tend to be driven by assessment of the merits, not by fear of being liable on meritless claims.

4. Nor will making the results of bellwether trials preclusive undermine their usefulness in multi-district litigation. District courts currently apply nonmutual offensive collateral estoppel in MDLs with no evidence of adverse impact. Attaching preclusive effect to bellwether trials is unlikely to cause defendants to engage in greater discovery or motions practice; they already "pull out all the stops" in bellwethers. Finally, unlike the typical application of nonmutual offensive collateral estoppel, the initial court can tailor the conduct of the trial, with parties' consent, to ensure that the parties are fully on notice of which issues will have preclusive effect and avoid unfairness to the precluded party.

## ARGUMENT

### I. NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL IN MASS TORT LITIGATION DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF AMERICAN BUSINESSES.

AAJ addresses this Court specifically to address the contention pressed by the U.S. Chamber that "[a]pplying nonmutual offensive collateral estoppel to bellwether trials—especially in mass tort cases—violates the constitutional rights of American businesses." Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant 4 ["Chamber Br."]. The U.S. Chamber contends

that, as a matter of constitutional law, "in mass tort litigation specifically, nonmutual offensive collateral estoppel [should be] foreclosed altogether." *Id.* at 7.

AAJ submits that such a radical effort to burden access to the courts—federal and state courts if the U.S. Chamber's due process argument is accepted—is contrary to both the historical foundation of the due process guarantee and to public policy imperatives that are vital to the administration of justice.

### A. Nonmutual Collateral Estoppel Serves Important Public Policy, Especially in Mass Tort Litigation.

The district court in this MDL action held that DuPont would be estopped in future actions from relitigating issues of duty, breach of duty, and foreseeability that were decided adversely to DuPont in two bellwether jury trials and one individual jury trial. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. CV 2:13-MD-2433, 2019 WL 6310731, at *28 (S.D. Ohio Nov. 25, 2019). In each of those prior proceedings, the jury found that du Pont owed a duty of due care to residents of the communities surrounding its Washington Works plant, that DuPont was negligent in allowing its C-8 chemical to contaminate surrounding air and water, and that it was foreseeable to DuPont that its alleged negligence would likely result in injury. *See* Response Brief of Plaintiffs-Appellees 25-26.

AAJ does not repeat the arguments of Plaintiffs in support of the decision below. Rather, AAJ addresses the U.S. Chamber's argument that American businesses, as "typical mass tort defendants," Chamber Br. 13, are constitutionally

entitled to relitigate the same common issues repeatedly to obtain "an individual assessment of liability and damages in each case." *Id.* at 6 (quoting *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1023 (5th Cir. 1997) (Jones, J., specially concurring)).

Collateral estoppel, or issue preclusion, is a longstanding common-law rule that allows a second court ["F2"] to preclude a party from relitigating an issue that has previously been decided against that party by another court ["F1"]. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The requirements for the application of collateral estoppel are well-settled:

> (1) the precise issue must have been raised and actually litigated in the prior proceedings; (2) the determination of the issue must have been necessary to the outcome of the prior proceedings; (3) the prior proceedings must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

*Karst Robbins Coal Co. v. Dir., Off. of Workers' Comp. Programs*, 969 F.3d 316, 324-25 (6th Cir. 2020) (citation omitted). *See also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4416 (2d ed. 2002).

As the district court recognized, collateral estoppel serves an important public policy imperative: One litigant must not waste the court's time and resources, and those of other litigants, by demanding to be allowed to relitigate an issue that has already been decided. *In re E. I. du Pont*, 2019 WL 6310731, at *29. The first Justice Harlan declared:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order.

*Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897). *See also Fayerweather v. Ritch*, 195 U.S. 276, 299 (1904) ("Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction . . . be considered as finally settled and conclusive upon the parties.").

Clearly the societal necessity for the prompt and efficient administration of justice is greatest in the context of mass tort litigation. A prime example is the floodtide of claims brought by victims of asbestos. Thirty years ago the Judicial Conference called the backlog of cases "a disaster of major proportions" that was "getting worse." Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the United States: Ad Hoc Committee on Asbestos Litigation 2 (1991). One cause of increasing transaction costs, the report stated, was that collateral estoppel did not prevent defendants from relitigating the question of general causation in every case, despite the "overwhelming medical evidence" that asbestos caused the types of injuries involved in the massive litigation. *Id.* at 33. It was the recommendation of the Judicial Conference that Congress authorize a determination of general causation that would be binding in all asbestos cases. *Id.* at 33-34.

The U.S. Chamber's proposed blanket in mass tort litigation would force courts facing such mass tort challenges to squander resources in order to allow defendants to relitigate the same common issues over and over for no discernible purpose other than to make access to justice costlier for those with meritorious claims.

### B. Nonmutual Offensive Collateral Estoppel Does Not Violate Due Process.

#### 1. *Because collateral estoppel was widely accepted at common law when the Due Process Clause was adopted, it satisfies the guarantee of due process of law.*

Due process is not measured by judges' subjective notions of fairness, in the manner of the maligned "Chancellor's foot." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332-33 (1999) (Scalia, J.) (quoting Joseph Story, 1 Commentaries on Equity Jurisprudence § 19). Rather, the guarantee of due process *of law* refers "to those settled usages and modes of proceeding existing in the common and statute law" when the constitutional guarantee was adopted. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). That is, "a process of law, which is not otherwise forbidden [by the constitution], must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country." *Hurtado v. People of State of Cal.*, 110 U.S. 516, 528 (1884). A rule "that dates back to the adoption of [the Due Process Clause] and is still generally observed unquestionably meets that standard"

of "traditional notions of fair play and substantial justice." *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 622 (1990) (plurality opinion) (quotation and citation marks omitted).

For example, the Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), determined that the traditional procedure giving broad discretion in awarding punitive damages to properly instructed juries does not offend procedural due process. "[T]he common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted." *Haslip*, 499 U.S. at 17. Despite complaints from businesses that this method of awarding punitive damages was unfair to businesses, it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Id.* at 28 (Scalia, J., concurring).

The rule "that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction—predates the Republic." *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 336 (2005). Collateral estoppel is most frequently traced to the decision in *The Duchess of Kingston's Case*, 20 Howell's State Trials 538 (House of Lords 1776). *See* Note, *Collateral Estoppel by Judgment*, 52 Colum. L. Rev. 647, 660 (1952); Comment, *Res Judicata and Estoppel*, 13 Yale L.J. 245, 246 (1904). The rule as stated in that case was "universally adopted in England and America." J.C. Wells, *A Treatise on*

*the Doctrines of Res Adjudicata and Stare Decicis* 173 (1878). The Supreme Court very early took note of the "general rule, that a fact which has been directly tried, and decided by a Court of competent jurisdiction, cannot be contested again between the same parties." *Hopkins v. Lee*, 19 U.S. 109, 113 (1821).

*2. The mutuality requirement is not essential to due process.*

That "same parties" qualification, of course, reflected the traditional requirement of mutuality:

> No party is as a general rule bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way. The operation of estoppels must be mutual.

*Meeker v. Mettler*, 97 P. 507, 509 (Wash. 1908) (quoting Freeman on Judgments § 159 (4th Ed. 1892) (internal quotation marks omitted). It is the elimination of this mutuality requirement that the U.S. Chamber claims is a violation of the due process rights of businesses in mass tort litigation. Chamber Br. 5.

But, although courts at one time insisted upon mutuality as a limitation on the application of collateral estoppel, it did not appear to serve any useful purpose in assuring fairness to the party precluded. As early as 1827, jurist and philosopher Jeremy Bentham ridiculed the rule as more appropriate for the gaming tables than for the courts. 7 *Bentham's Works* 171 (Bowring's ed. 1843). *See also* 3 John H. Wigmore, Evidence § 1388 (2d ed. 1923) (quoting Bentham and condemning the mutuality requirement as "fallacious").

As the Supreme Court has made clear, the constitutional guarantee of due process "does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). By the early twentieth century, state courts decisions were beginning "to establish the rule, that one who has had his day in court and has lost, cannot reopen identical issues by merely switching adversaries." Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 Yale L.J. 607, 610 (1926). In what has become the leading state court decision, California Chief Justice Roger Traynor stated, "No satisfactory rationalization has been advanced for the requirement of mutuality." *Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942). The "courts of most jurisdictions" had already discarded the mutuality requirement or had "accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity." *Bernhard*, 122 P.2d at 895. By 1967, the New York Court of Appeals could declare: "[T]he 'doctrine of mutuality' is a dead letter." *B. R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195, 198 (N.Y. 1967).

The mutuality requirement seems to have survived as long as it did simply on a vague good-for-the-gander notion of fairness that the Supreme Court has firmly rejected. Due process looks for "the achievement of substantial justice rather than symmetry." *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 325 (1971). The requirement that "the party against whom an estoppel is asserted

had a full and fair opportunity to litigate" is itself the "most significant safeguard" of fundamental fairness. *Parklane Hosiery*, 439 U.S. at 328 (quoting *Blonder-Tongue Labs.*, 402 U.S. at 329). But due process is not an entitlement to unlimited do-overs.

Even the U.S. Chamber, which asserts the right of a business defendant to relitigate the same issue over and over in mass tort litigation, fails to explain how mutuality is essential to that right. If it is fundamentally unfair to deprive a mass tort defendant of the right to relitigate a question that it lost in F1, why should it matter whether the plaintiff in F2 was a party in F1, was in privity with a party in F1, or was not present in F1 at all?

Significantly, the U.S. Chamber appears to give no thought to the fact that businesses on occasion seek to invoke nonmutual *defensive* collateral estoppel, which bars a plaintiff from relitigating a question they lost in a prior action against a different defendant. *E.g.*, *Otworth v. Fifth Third Bank*, No. 20-1286, 2020 WL 9211025, at *3 (6th Cir. Oct. 27, 2020). The Supreme Court upheld collateral estoppel in that situation, regardless of the absence of mutuality. *See Blonder-Tongue Labs.*, 402 U.S. at 325 ("[N]o unfairness results here from estoppel which is not mutual."). Adoption of the U.S. Chamber's novel view that mutuality is mandated by the Due Process Clause would require overturning both *Blonder-Tongue* and *Parklane Hosiery*, at least in mass tort litigation, and allowing both

plaintiffs and defendants to relitigate decided questions—in precisely the circumstance where efficient use of judicial resources is most needed.

Clearly the requirement of mutuality of estoppel is not the valuable and essential safeguard of fundamental fairness the U.S. Chamber claims it to be. It was never satisfactorily justified, it has long been the object of widespread criticism, and it has been cast aside by most federal and state courts, including the Supreme Court of the United States. In the words of Professor Currie, whose work the U.S. Chamber cites, *see* Chamber Br. 8,

> I trust it is abundantly clear that in this Article I have come, like the California Supreme Court [in *Bernhard*], to bury the [mutuality] requirement, not to praise it. . . . [A]s a principle of justice it has been shown to be a tinkling cymbal, an empty and fatuous formula productive of more harm than good.

Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 322 (1957).

### C. Nonmutual Offensive Collateral Estoppel Does Not Violate the Right to Trial By Jury.

For similar reasons, offensive collateral does not violate the Seventh Amendment, which exists "to preserve the substance of the common-law [jury trial] right as it existed in 1791." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1200 (2021) (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996)).

As with due process, the mutuality requirement is not an essential feature of the right to trial by jury. Collateral estoppel as it existed in 1791 served to preclude

a defendant from repeatedly relitigating a question that he had previously litigated and lost. Mutuality was not essential to that purpose. As the *Parklane Hosiery* Court pointed out, an estopped defendant is "deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party." 439 U.S. at 335. Because the bar against such relitigation was accepted at common law in 1791, there is no Seventh Amendment violation.

## II. THE SUPREME COURT HAS UPHELD NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL IN MASS TORT LITIGATION WITHIN THE BROAD DISCRETION OF THE DISTRICT COURT TO AVOID UNFAIRNESS IN A SPECIFIC CASE.

### A. The Supreme Court Has Upheld Nonmutual Offensive Collateral Estoppel.

The sole authority relied upon by the U.S. Chamber in support of categorically prohibiting nonmutual offensive collateral estoppel is a dictum issued by this Court. The U.S. Chamber asserts that the district court "flouted clear-as-day instructions from this Court and the Supreme Court: 'In *Parklane Hosiery*, the Supreme Court explicitly stated that offensive collateral estoppel *could not be used in mass tort litigation.*'" Chamber Br. 2 (quoting *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (emphasis added by U.S. Chamber)). *See also id.* at 7 ("And in mass tort litigation specifically, nonmutual offensive collateral estoppel is foreclosed altogether") (citing *In re Bendectin*). DuPont makes essentially the same assertion without elaboration. *See* Brief of Defendant-Appellant 19.

The U.S. Chamber points to Justice Stewart's caution in the *Parklane Hosiery* majority opinion that "estop[ping] a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff" raises important due process concerns. Chamber Br. 5 (quoting *Parklane Hosiery Co.*, 439 U.S. at 329).

But the Court answered those concerns, and it was not by categorically banning nonmutual estoppel, even in mass tort cases:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

*Parklane Hosiery*, 439 U.S. at 331.

*Parklane Hosiery* was itself a shareholder class action. *See id.* at 324. In view of the Supreme Court's clear approval of nonmutual collateral estoppel, subject to the broad discretion of the district courts, the dicta in this Court's *Bendectin* opinion has "puzzled" at least one other district court. *See In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987*, 791 F. Supp. 1204, 1215 (E.D. Mich. 1992), *aff'd sub nom. In re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996).

This Court's reading of *Parklane Hosiery* is more accurately reflected in an opinion handed down a few months before *Bendectin* in which the district court's application of collateral estoppel was directly at issue. Judge Wellford there stated:

"The nub of the holding [of *Parklane Hosiery*] however, was that the decision whether or not to apply collateral estoppel was left to the *broad discretion* of the district judge under the applicable circumstances." *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1165 (6th Cir. 1984) (emphasis in original).

Judge Boyce F. Martin, who wrote the opinion in *Bendectin*, dissented in *City of Cleveland*. But he agreed with the majority's view that in *Parklane Hosiery* "where there is no mutuality between the parties, . . . [t]he Court's solution to [possible unfairness] was to give the trial judge broad latitude in considering whether to apply the doctrine in a given case." *City of Cleveland*, 734 F.2d at 1172 n.1 (Martin, J., dissenting).

The district court's holding in this case was faithful to this Court's sensible interpretation of U.S. Supreme Court precedent in *City of Cleveland*.

### B. District Courts Apply Nonmutual Offensive Collateral Estoppel in Mass Tort Litigation Where Appropriate.

Application of nonmutual offensive collateral estoppel is far from "unprecedented" as the U.S. Chamber asserts, *see* Chamber Br. 4 & 14, even in the context of mass torts. In asbestos litigation, for example, "considerations of judicial economy in deciding mass torts, persuade this Court to rule in favor of the offensive use of collateral estoppel" based on prior jury verdicts. *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 248 (E.D. Tex. 1980); *see also Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 841 (E.D. Tex. 1980) (manufacturers of cement pipes containing

asbestos were collaterally estopped from relitigating whether products containing asbestos lacked warnings and were unreasonably dangerous to users); *Raytech Corp. v. White*, 54 F.3d 187, 189 (3d Cir. 1995) (Raytech was collaterally estopped "from relitigating the issue of its successor liability for Raymark [Industries]'s asbestos liabilities.").

In a mass tort litigation by residents and businesses alleging chemical contamination of their water supply, a district court ruled that after a defendant has "lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent [that defendant] from litigating the issue." *Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 297 (S.D.W.V. 2015).

District courts have also applied collateral estoppel in the MDL context. One commentator has ventured that the "value of allowing bellwether trials to have *Parklane* issue preclusive effect is best illustrated by" the MTBE multi-district litigation. Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439, 457 (2013). In that case, cities, municipal corporations, and water providers brought suit against various gasoline refiners, distributors, and retailers alleging that defendants' improper handling of MBTE, a gasoline additive, contaminated drinking water. The MDL Panel consolidated the claims before the southern district court, and ten bellwether cases were selected for trial in the transferee court. *In re Methyl Tertiary*

*Butyl Ether ("MTBE") Prods.*, No. 1:00-1898, 2007 WL 1791258, at *1 (S.D.N.Y. June 15, 2007).

On plaintiffs' motion to proceed with the trials, the court ruled that the jury in the representative cases will be asked to respond on special verdict forms to questions regarding whether there were feasible alternatives to MBTE, whether defendants knew of the dangers, whether they provided adequate warnings, and whether water contamination was foreseeable. "The jury's findings on general liability will . . . have preclusive effect in subsequent trials." *MTBE Prods.*, 2007 WL 1791258, at *4.

Nonmutual offensive collateral estoppel was also applied in the Chinese Drywall mass tort multi-district litigation. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2014 WL 4809520, at *12-13 (E.D. La. Sept. 24, 2014). In none of these cases have the adverse consequences forecast by PLAC and the U.S. Chamber come to pass.

## III. THE NOTION THAT NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL IN MASS TORT LITIGATION WILL FORCE DEFENDANTS INTO "BLACKMAIL" SETTLEMENTS IS ENTIRELY BASELESS.

Amicus Product Liability Advisory Council contends that the district court's invocation of collateral estoppel in mass tort cases "will create the risk of unfair settlement pressure, leading to . . . 'blackmail settlements.'" Amicus Curiae Brief of

Product Liability Advisory Council, Inc. in Support of Defendant-Appellant and Reversal 24 ["PLAC Br."].

At the outset, it is worth asking what kinds of settlements PLAC refers to and whether they exist at all in the real world. The two cases PLAC points to are not helpful in this regard. *In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293, 1294 (7th Cir. 1995), was a nationwide class action brought on behalf of hemophiliacs who became infected by the AIDS virus, fatal at that time, as a consequence of using blood solids produced by defendants using HIV-contaminated blood. The district court certified a nationwide issue class under Fed. R. Civ. P. 23(c)(4), in which a jury would determine by special verdict whether defendants were negligent in failing to screen blood donors or take other steps to protect blood supplies. *In re Rhone-Poulenc*, 51 F.3d at 1296. The Seventh Circuit, in an opinion by Judge Posner, ordered the class decertified, finding it improper to require defendants to "stake their companies on the outcome of a single jury trial." *Id.* at 1299. The preferable course of action, in Judge Posner's view, would be to allow a "final, authoritative determination of [defendants'] liability . . . to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions." *Id.*

Aside from its stunning recommendation to expend considerable resources to try the same issue in numerous individual trials, Judge Posner's prescription is also

irrelevant to PLAC's point. The nationwide issue class that the Seventh Circuit decertified was not a Rule 23(b)(3) class action that might have resulted in a huge damages verdict. The Rule 23(c)(4) issue class action was intended to reach a decision on negligence that would have been binding on plaintiffs and defendants mutually in subsequent trials on individual causation and damages. *Id.* at 1297. Certification would not add to the pressure to settle; the time for settlement would remain pretrial for each individual case. In fact, nowhere in the defendants' briefing did they even suggest that certifying the issue class would make it more likely that they would settle. *Id.* at 1306 (Rovner, J., dissenting). In short, the *Rhone-Poulenc* decision casts no light on either the issue of "blackmail" settlements or of nonmutual offensive collateral estoppel.

Even less can be learned from *AT & T Mobility LLC v. Smith*, No. 11-CV-5157, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011), which PLAC cites for the proposition that so-called "blackmail" settlements are a "very real problem." PLAC Br. 24. In that case, there was no settlement, no mass litigation, no collateral estoppel, or even any lawsuit. AT&T requires its customers to agree to arbitrate all disputes they have with the company. Customer Smith filed an arbitration demand to halt a proposed merger with T-Mobile. *AT & T Mobility*, 2011 WL 5924460, at *1-2. The district court held that her individual arbitration became, in substance, a "class arbitration" because it was identical to 1,109 other individual arbitration

claims. *Id.* at *6. The court's off-hand reference to "blackmail" settlements, *id.* at *7, had no relevance to the issue before that court. Plaintiff's dispute was certainly not meritless—the Department of Justice, the FCC, and various state agencies were all reviewing the proposed merger. *Id.* at *6. Nor is there any indication that Smith was at all interested in a settlement; it was AT&T that argued for aggregating the shareholders' claims.

It is simply not enough to raise the tort reformers' familiar battle-cry that making it less expensive for wrongfully harmed plaintiffs to seek legal redress "forces defendants to settle." Without doubt, every company that is potentially liable to a large number of people due to its conduct toward them may feel intense pressure to settle. But compromise resolution for certainty, but less than full redress, is the essence of dispute resolution in our civil justice system. As this Court has repeatedly stated, "Public policy strongly favors settlement of disputes without litigation." *Borror Prop. Mgmt., LLC v. Oro Karric N., LLC*, 979 F.3d 491, 496 (6th Cir. 2020) (quoting *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976)).

"Blackmail" settlements, in PLAC's lexicon, does not refer to innocent defendants pressured to pay off baseless claims. PLAC instead objects to denying defendants the advantage of forcing each claimant they have harmed to prove the entirety of their case from scratch, including those common questions that the defendant has already disputed and lost. If a defendant who may have wrongfully

harmed many people can deal with each on a one-at-a-time basis and in isolation, fewer cases will be economically feasible to pursue, resulting in far fewer cases to settle. Allowing courts and litigants to resolve large numbers of similar, sometimes small claims more efficiently does not give claimants an unfair advantage. It helps open the courthouse doors. "The fact is," the Ninth Circuit has noted, Congress has put to rest the "sociological merits" of allowing small claimants access to federal courts by authorizing Rule 23(b)(3). *In re Sugar Antitrust Litig.*, 559 F.2d 481, 484 n.1 (9th Cir. 1977). Nonmutual offensive collateral estoppel brings the same policy advantages.

The Ninth Circuit also added that "the soundness of the [pressure-to-settle] argument has been disputed on empirical grounds." *In re Sugar*, 559 F.2d at 484 n.1. Although there is much for researchers to learn concerning class action settlements, it is well known that "the assertion that the risks of class actions are so great that they force defendants to settle non-meritorious claims—so called 'blackmail settlements'—rest[s] on empirical assumptions . . . which have also gone largely untested." Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 165 U. Pa. L. Rev. 1599, 1604 (2017).

In fact, "the most striking finding" from a survey of empirical studies of federal class actions was the relatively low percentage of class actions that settle after receiving the green light of certification, contradicting "conventional wisdom"

that certification "forces the defendant to settle." Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. Cin. L. Rev. 315, 324 (2011). Professor Charles Silver points out that a study by the Federal Judicial Center found that about 73 percent of certified class actions ended in settlement, which is about the same rate at which individual tort cases settle. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1399-1402 (2003).

That most cases settle, including cases where a single loss would result in large damages, is hardly problematic. Every plaintiff's offer to settle for less than the complaint's demand is not a ransom note; it is an invitation to take a realistic look at the strength of one's case. As Professor Silver points out, fear of an adverse verdict at trial "is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced." *Id.* at 1366. This is confirmed by an earlier study, again conducted for the Federal Judicial Center. It found that more than two-thirds of certified class actions had rulings on dispositive defense motions to dismiss or for summary judgment, which "greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements." Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report To the Advisory Committee on Civil Rules*, Federal Judicial Center 61 (1996).

The "blackmail" argument holds even less water in the collateral estoppel context. The issues actually litigated and decided in F1, which the defendant is precluded from relitigating in F2, are necessarily common issues. For example, in this case, the parties litigated whether it was reasonably foreseeable that negligence in disposing of C-8 would likely result in injury in nearby communities. An adverse decision does not expose the defendant to catastrophic damages if that question cannot be relitigated in subsequent actions. Even armed with a favorable decision on this issue, follow-on plaintiffs must still persuade the finder of fact on issues of specific causation and damages in individual cases. Each of those individual actions presents the defendant with the same settlement calculus. Collateral estoppel does not put a defendant in the position of staking the company on the outcome of a single trial.

Professor Silver pointedly concludes, "Given the sad state of the duress theory, judges hardly are justified in using it at all, let alone in employing incendiary phrases like legalized blackmail." Silver, *supra* at 1430.

## IV. APPLICATION OF NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL TO MDL BELLWETHER CASES WILL NOT UNDERMINE THE USEFULNESS OF BELLWETHER TRIALS.

The U.S. Chamber acknowledges that "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."

Chamber Br. 10 (quoting *In re Chevron*, 109 F.3d at 1019), and they can be "an essential tool to facilitate settlement of sprawling mass tort litigation." *Id.* at 11. Yet, the U.S. Chamber warns, if district courts make bellwether trial decisions preclusive, "the bellwether model is finished. No defendant would agree to participate." *Id*. at 12. *See also* PLAC Br. at 15 ("Many defendants may just oppose the entire bellwether process."). Or, alternatively, fear of estoppel "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." Chamber Brief 4. PLAC suggests that defendants would engage in more vigorous discovery, deposition, and motion practice to amass ammunition to oppose the application of collateral estoppel in subsequent proceedings. PLAC Br. 9-12.

Such breathless warnings seem overblown. As noted in Part II(B) above, MDL courts currently apply collateral estoppel to common issues decided by bellwether trials. Additionally, even when purely informational, bellwether trials "are often exponentially more expensive for the litigants and attorneys than a normal trial. . . . as coordinating counsel often pull out all the stops." Judge Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2366 (2008). "[G]iven the potentially enormous implications of bellwether trials on settlement negotiations, parties tend to heavily litigate all motions in the bellwether trial, making them highly expensive and time consuming for all of the parties and

the court." 4 Newberg on Class Actions § 11:12 (5th ed.). For that reason, "structuring litigation to make issue preclusion possible seems unlikely to significantly alter defendants' calculus in mass tort cases, as their incentive is already to litigate these trials as vigorously as possible. Savage, *supra* at 460-61.

Finally, application of offensive collateral estoppel in bellwether cases in the MDL context affords defendants more-than-adequate safeguards of their due process rights. Due process demands only that a party who is precluded in F2 on the basis of the decision in F1 be afforded "notice and opportunity to be heard" in both litigations. *Hansberry*, 311 U.S. at 40 (1940). Typically, the F2 court makes a determination whether the decision in F1 meets the requirements for issue preclusion and, invoking the discretion allowed by *Parklane Hosiery*, whether estoppel in that circumstance would be unfair. By contrast, in an MDL, the F1 court (the transferee court or the bellwether trial court) can also determine the preclusive effect that will attach. That court can precisely define the issues that will be actually litigated and decided in F1, providing more than adequate notice and minimizing the chance that the defendant will fail to devote the appropriate effort to litigating that issue. Conversely, some issues might be stipulated for trial purposes and not actually litigated, thus precluding collateral estoppel as to those issues.

In short, the lack of mutuality does not render the long settled and accepted common law rule of collateral estoppel categorically unfair to business defendants in mass tort litigation. A broad prohibition would require courts and litigants to squander time, effort and resources. Nor does nonmutual offensive collateral estoppel impose undue settlement pressure. Prohibition is particularly uncalled-for in multi-district litigation, which offers sufficient notice and opportunity for defendants to be heard and to safeguard against any unfair issue preclusion.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court below.

Respectfully submitted,

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Date: September 17, 2021

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,468 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: September 17, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE

## CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on September 17, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
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