CHAPTER 9

FINALITY AND PRECLUSION IN AGGREGATE LITIGATION

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A. INTRODUCTION

One of the predominant goals of civil litigation is to achieve finality in the determination of disputed issues of law and fact, and to avoid relitigation of decided issues. The principle of preclusion functions to achieve this by enabling courts to rely upon, and litigants to be bound by, determinations of fact that have reached finality, that is, that are no longer susceptible to direct judicial review. Preclusion derives its normative force from the presumed opportunity of interested parties to participate in the initial determination in some manner consistent with due process.

The basics of preclusion were discussed in Chapter 2. This chapter deals with the more complex and thorny problems of preclusion in aggregate litigation.

Preclusion is at a premium in matters involving widely distributed products, common disasters, or disputes regarding common conduct. The forms and mechanisms of aggregation – class actions, consolidation, joinder, and multidistrict centralization – seek to facilitate due process and preclusion by providing a single forum in which the multiple parties affected by the events giving rise to common questions may have their rights and obligations adjudicated. The key to both aggregation, and the finality and preclusion it enables, is commonality.

Justice Scalia articulated the function of commonality in enabling questions decided in class actions to be given preclusive effect: "What matters to class certification is not the raising of common questions--even in droves--but rather, the capacity of a class-wide proceeding to generate common answers apt to drive resolution of litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-132 (2009).

Assuming that there are important recurring questions of law and fact that do, or should, have identical answers, the law's available procedural mechanisms seek to assure that such answers are preclusive, that is, that they bind all who have had an opportunity, consistent with due process, to participate or be adequately represented in their adjudication.

The available aggregation mechanisms studied in this book serve the goal of preclusion by gathering all those who have an interest in such common questions into the same action or proceeding. These mechanisms use different means to achieve the same goals: the avoidance of (1) duplicative relitigation of the same issues and (2) the risk of inconsistent

rulings. The former problem, duplicative relitigation, burdens the limited resources and capacity of the courts, and overtaxes the resources of the litigants themselves. The latter problem, inconsistent determinations, undermines the integrity of and confidence in the judicial institution itself.

When issues are decided within the context of a single action, the judges are normally reluctant to revisit those issues. Invoking the "law of the case" doctrine. *Arizona v. California*, 406 U.S. 605, 618 (1983). Preclusion can also operate across actions: a determination of a question in one proceeding can bind a litigant in another proceeding if the identical question is raised. This section provides both classic and contemporary examples of each of these preclusion seeking procedures within class actions, MDLs, or in other coordinated/aggregative contexts. We will look first at how preclusion operates within a single formal Rule 23 class action. We will then see an example of a binding Rule 42 multi-phase product liability trial upon participants in an MDL. We will also see a federal court give preclusive effect to specific fact-findings made by a jury in a previous state court tobacco class action trial, after that class action had been decertified, and the former class members were left to file their own actions. And we will see an example of traditionally non-binding bellwether trial determinations that were ultimately given preclusive effect in an environmental exposure MDL. These examples illustrate the evolving understanding of how preclusion and finality may and should operate, consistent with due process, in aggregate litigation.

B. CLAIM PRECLUSION IN DAMAGES CLASS ACTIONS

The purpose of a class action is to adjudicate the claims of numerous, similarly situated persons in a single action. Thus, one vital objective of a class action judgment is to foreclose further adjudication of claims that were-or could have been—adjudicated in the class action (claim preclusion), as well as issues that were actually determined in; and were necessary to the adjudication of, the class action (issue preclusion).

Claim preclusion and issue preclusion (in old-school parlance*, res judicata* and collateral estoppel) are two of the most difficult civil procedure doctrines to understand and apply-even in traditional, one-on-one litigation. In the context of class actions and other aggregative proceedings, the preclusion rules have additional wrinkles, which are explored in this section.

The court certifying a class is required by Rule 23(c)(1)(B) to "define the class and the class claims, issues, or defenses." Rule 23(c)(3) requires the judgment in a class action to "include and describe those whom the court finds to be class members." These provisions operate to presumptively bind all class members by the outcome of the certified claims or issues, whether through an adjudication by dismissal, summary judgment, or trial; or is a class settlement that has been given final approval. Some *subsequent* court, however, if the claim or issue is revived there by a party (or class member) actually assesses the preclusive effect of the first court's class action judgment. The following materials involve these subsequent-court assessments, invoked by challenges to preclusion:

MCDOWELL V. BROWN

United States Court of Veterans Appeals, 1993.

5 Vet. App. 401.

Before FARLEY, HOLDAWAY, AND IVERS, JUDGES. FARLEY, JUDGE.

Appellant appeals from a November 4, 1992, decision of the Board of Veterans' Appeals (BVA) which denied entitlement to the resumption of payment of Department of Veterans Affairs (VA) disability compensation which had been discontinued * * *. The BVA determined that appellant had failed to submit a well grounded claim * * * because he met all of the requirements for discontinuance of VA benefits under section 5505: he had been adjudicated incompetent; the value of his estate exceeded $25,000; and he had no spouse, children, or dependent parents.

[The Secretary of Veterans Affairs ("Secretary ") moved to dismiss the appeal to the Court of Veterans Appeals, arguing that McDowell was barred, under the doctrine of *res judicata*, from pursuing his claim because (1) he was a member of the plaintiff class in a class action suit in which the constitutionality of 38 U.S.C.A. § 5505 was adjudicated, *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 783 F. Supp. 187 (S.D.N.Y. 1992), *vacated and remanded*, 962 F.2d 136 (2d Cir. 1992), and (2) he was a party to a settlement agreement that dismissed with prejudice McDowell's challenges to the constitutionality of the statute. But] appellant contends that the class representatives failed to provide fair and adequate representation to the members of the [*Disabled American Veterans*] class and, therefore, he is not bound by the prior class settlement. * * *

I. Background

[After serving in the Navy from 1963 to 1966, McDowell applied for disability benefits. The VA found him] totally disabled due to a service-connected nervous disability since November 1967. In August 1973, appellant was adjudicated incompetent and the Probate Court of Franklin County, Columbus, Ohio, appointed Joseph J. Murphy, Esq., his representative before this Court, as guardian of his estate.

On November 5, 1990, Congress enacted the Omnibus Budget Reconciliation Act of 1990 [(OBRA) 38 U.S.C. § 5505] which provides in relevant part:

In any case in which a veteran having neither spouse, child, nor dependent parent is rated by the Secretary in accordance with regulations as being incompetent and the value of the veteran's estate (excluding the value of the veteran's home) exceeds $25,000, further payment of compensation to which the veteran would otherwise be entitled may not be made until the value of such estate is reduced to less than $10,000.

(The provisions of section 5505 expired on September 30, 1992, and have not been reenacted.)

[Appellant unsuccessfully argued in proceedings below before the regional VA office and the BVA that section 5505 was an *ex post facto* law in violation of Article I, Section IX of the United States Constitution, and

also violated the Fifth Amendment due process and equal protection guarantees.]

Appellant also was a plaintiff in a class action suit, brought under Rule 23(a) and (b)(l) of the Federal Rules of Civil Procedure, where the constitutionality of section 5505 was at issue. In *Disabled American Veterans, supra*, the certified plaintiff class consisted of all veterans with service-connected disabilities who had been or would be denied disability compensation by the VA because of * * * section [5505]. The suit challenged the constitutionality of the new law on the grounds that it denied the class due process and equal protection of the laws and effected an improper taking of private property without just compensation, in violation of the principles contained in or embodied by the Fifth Amendment. *** On March 19, 1992, the Court of Appeals for the Second Circuit held that the legislation was constitutional and that, as a result, the appellant class was not likely to prevail on the merits; accordingly, the Court of Appeals vacated the District Court's order and remanded the matter back to the District Court for a final ruling on the VA's motion for dismissal. Pursuant to a subsequent agreement between the parties, the District Court, by Order dated March 10, 1993, approved a settlement agreement and dismissed the suit with prejudice. In doing so, the District Court considered each of the objections lodged against the settlement, including that of appellant * * *.

The settlement provided that members of the plaintiff class would be allowed to retain compensation payments, or receive a refund of any repayments, made between January 31 and July 1, 1992, the period in which the District Court's injunction was in force. In return, the stipulation provided that "all claims raised by plaintiffs" and "all claims that could have been raised in [the] action" would be dismissed with prejudice. The only exception was that settling class members would not be precluded from claiming in a separate proceeding that their entitlement to disability compensation did not meet the factual prerequisites of section 5505, *i.e.*, that their estate was below $25,000 or that they had dependents, or from requesting that the Secretary waive recoupment of an overpayment of disability compensation made after June 1992 * * *.

* * * [P]rior to the approval of the settlement agreement but subsequent to the Second Circuit decision, appellant filed with this Court a Notice of Appeal of the BVA's November 1992 decision. * * *

II. Analysis

* * * Under the doctrine of *res judicata*, a judgment entered on the merits by a court of competent jurisdiction in a prior suit involving the same parties or their privies settles that cause of action and precludes further claims by the parties or their privies based on the same cause of action, including the issues actually litigated and determined in that suit, as well as those which might have been litigated or adjudicated therein. In discussing the *res judicata* doctrine, the United States Supreme Court has stated:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves

> judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153 (1979).

In class actions brought under Rule 23 of the Federal Rules of Civil Procedure, the *res judicata* effect of a final judgment generally extends to the entire certified class. There are two exceptions to this rule which are both grounded in due process requirements. The first exception applies where the court and/or the parties in the class action failed to provide absent class members with requisite notice including, if warranted, an opportunity to opt out of the class prior to certification. The second applies where the class representatives failed to provide fair and adequate representation in the original suit.

Here, appellant does not dispute that his entitlement to disability compensation meets the factual prerequisites for disallowance under section 5505. As the sole basis of his appeal before this Court, appellant reiterates his constitutional challenges previously raised and adjudicated by the Second Circuit in *Disabled American Veterans*, and raises one additional argument that the statute is an *ex post facto* law under Article I, Section IX of the Constitution. Upon review of the record and the filings of the parties, the Court finds that each of appellant's constitutional claims either was raised by the plaintiff class in *Disabled American Veterans* or could have been raised in that action and, therefore, those claims are encompassed by the March 1993 order of the United States District Court of the Southern District of New York approving the proposed stipulation of settlement and dismissing the class action with prejudice. Accordingly, under the doctrine of *res judicata*, the settlement in *Disabled American Veterans* is binding upon appellant, and this Court is precluded from adjudicating the constitutionality of section 5505 unless appellant establishes either that he was not provided with adequate notice in the prior class action or that the class representatives failed to provide the members of the class with fair and adequate representation.

A. Notice

The method of notice required to be afforded to absent class members depends on the type of class action at issue. * * *

The three types of class actions [under Rule 23(b)] differ in terms of the type of notice which must be afforded to potential class members and the ability of class members to elect not to become members of the class. In a class action maintained under Rule 23(b)(3), the court is required to ensure that potential members of the class receive the best notice practicable under the circumstances, including individual notice to those potential class members who can be identified through reasonable efforts. Fed. R. Civ. P. 23(c)(2). * * *

In a class action maintained under subsections (b)(l) or (b)(2) of Rule 23, however, the representatives are not required to afford potential members with notice of the class action and an opportunity to request exclusion from the class prior to judgment. Instead, the judgment, whether or not it is favorable to the class, must include a designation of those whom the court finds to be members of the class. Fed. R. Civ. P. 23(c)(3). * * * [T]he majority of courts have held that Rule 23 does not require

prejudgment notice in class actions maintained under subsections (b)(l) or (b)(2). Rather, due process is gauged by the adequacy of the representation of absent class members' interests by the class representatives. Because absent members of [(b)(l) and (b)(2) classes] are not afforded the notice and opt-out protections granted to Rule 23(b)(3) class members, courts will more carefully scrutinize the adequacy of representation afforded to absent members of such class actions before determining that they are bound, by *res judicata*, by the final judgment or settlement in the prior class action.

Further, irrespective of the type of class action at issue, a class action may be dismissed or settled only with the approval of the court, and notice of the proposed dismissal or settlement must be provided to all members of the class in the manner directed by the court. Fed. R. Civ. P. 23(e). Accordingly, a subsequent suit by an absent class member will not be banned by *res judicata* if the notice of the prior judgment in the class action was inadequate.

Here, appellant was an absent member of a class of plaintiffs certified under Rule 23(b)(l) in *Disabled American Veterans*. As noted above, because the class was certified under Rule 23(b)(l), the class representatives were not required to provide him with prejudgment notice and an opportunity to opt out of the class; rather, the District Court was required to include a designation of the class in the final judgment and to ensure that the class members received notice of the proposed settlement and dismissal. Fed. R. Civ. P. 23(c)(3) and (e). Appellant has not contended that the District Court failed to provide him with this requisite notice. Upon reviewing the District Court' s orders certifying the plaintiff class under Rules 23(a) and (b)(l) and approving the settlement and dismissing the class action under Rule 23(e), the Court concludes that due process notice requirements were adequately fulfilled.

B. Adequacy of Representation

* * * [I]n his reply to the Secretary's motion to dismiss, appellant asserts that he should not be bound by the prior judgment in *Disabled American Veterans* because the class representatives failed to provide fair and adequate representation. As the basis for this contention, appellant notes that the class representatives settled the litigation rather than petitioning the Supreme Court for a writ of *certiorari* to review the Second Circuit's decision upholding the constitutionality of section 5505. He notes that by settling the litigation, rather than petitioning for Supreme Court review, the class representatives left the judgment binding on the class in the future. * * *

In determining whether class representatives have fairly and adequately represented the entire class so that a final judgment in the class action will bind absent members of the class, reviewing courts must evaluate the prior class action *as a whole*. In *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit set forth a two-part inquiry. First, the reviewing court must look at whether the trial court, in its original determination, was correct in concluding that the named class representatives would adequately represent the class. Second, the reviewing court must focus on whether it appears, after the termination

of the class action, that the class representatives fairly and adequately protected the interests of the absent class members.

In determining whether the trial court correctly determined that the class representatives would protect the interests of the class, the reviewing court must evaluate whether the class representatives had common rather than conflicting interests with the absent class members and whether it appeared that the class representatives would vigorously prosecute the interests of the class through qualified counsel. In *Disabled American Veterans*, Judge Kram entered an order certifying the class after determining that both elements were satisfied * * *. The Court finds no evidence in the record on appeal or the filings of the parties to suggest that Judge Kram erred in her initial certification of the plaintiff class in *Disabled American Veterans*.

In terms of * * * whether, in hindsight, the class representatives failed to represent the class fairly and adequately, courts have focused on whether the class representatives, through qualified counsel, vigorously and tenaciously protected the interests of the class. * * *

In his pleadings, appellant * * * challenges the fairness and adequacy of the class representation based on his bald assertion that class counsel should have sought Supreme Court review of the Second Circuit's decision by filing a petition for a writ *of certiorari*, rather than agreeing to a settlement of the litigation. He opines that "'FAIR AND ADEQUATE REPRESENTATION' means exhausting every appeal, however arduous and time consuming that may be," noting that "[t]hat is the nature of professional advocacy." The Court finds no authority to support appellant's definition of "fair and adequate representation." * * * [T]he determination of whether a particular litigation strategy, including the decision not to appeal an adverse decision, constitutes inadequate representation is fact-specific and must be evaluated on a case-by-case basis. The fairness and adequacy of class counsel must be measured in terms of the best interests of the class as a whole and not simply in terms of the interests of any individual member of that class. As long as the district court ensures that the interests of all members of the class are properly considered, the class counsel has broad authority in negotiating and proposing a class settlement.

Here, appellant has not established that the failure of the class representatives to seek Supreme Court review of the Second Circuit's decision in *Disabled American Veterans* is indicative of inadequate representation. He has not shown that Supreme Court review was in the best interest of the class as a whole or even, for that matter, that the decision to file a petition for a writ of certiorari was supported by a substantial number of the other members of the plaintiff class. On the contrary, in Judge Kram's order approving the settlement and dismissing the class action, she specifically referenced the small number of objections lodged with respect to the proposed settlement and the lack of merit to those objections. Further, the approved settlement treated all class members equally and provided for payment of disability benefits for the five-month period in which the District Court's preliminary injunction was in force. Appellant has not set forth any evidence to establish that the class representatives in *Disabled American Veterans* had conflicting interests

with members of the class, failed to pursue the interests of the class through the use of qualified and competent counsel, or otherwise failed to provide fair and adequate representation. Appellant's mere disagreement with class counsel's litigation strategy does not establish inadequate representation on the part of the class representatives so as to preclude the *res judicata* effect of the final judgment in the prior class action.

III. Conclusion

Upon review of the record and the filings of the parties, the Court holds that, under the doctrine of *res judicata*, appellant is precluded from challenging the constitutionality of section 5505 before this Court. Accordingly, * * * the Secretary's motion to dismiss the appeal is GRANTED.

NOTES AND QUESTIONS

1. According to *McDowell*, what prerequisites are required for *res judicata* to bind a class member in a Rule 23(b)(3) class? What about (b)(l) and (b)(2) class members? Why does Rule 23 treat class members differently depending upon the nature of the class action that was brought?

2. Under the facts presented, should the appellant in McDowell have been permitted to proceed with his individual action? Should he at least have been provided notice of class certification? Is there anything unsettling about the notion that one could be bound by a judgment adjudicated by strangers, without being told in advance, so that one could at least intervene to ensure that the class representatives and class counsel adequately represent the interests at stake in the litigation? In other words, might notice be important even if one does not have the opportunity to opt out of a class action? Indeed, could one argue that the absence of opt-out rights makes notice more important? According to Professor Rutherglen:

> [W]hen exit is not a possibility, the choice between voice and loyalty becomes all the more important. Class members are entitled to notice so that they have an opportunity to object to the class attorney's performance. This form of protest is the only alternative to acquiescence in the decisions of the class attorneys when exit is foreclosed, as it must be in (b)(l) and (b)(2) class actions.
>
> The reason originally given for denying individual notice in these class actions--that the classes are more cohesive than in (b)(3) class actions--simply begs the question at issue. Whether the class is cohesive depends upon the interests of the class members, which can only be ascertained by their response to notice of the class action. Nothing in the present requirements for certification under subdivision (b)(l) or (b)(2) assures any degree of cohesiveness among class members. To the contrary, in one type of class action, for damages against a limited fund under subdivision (b)(l)(B), class members must have antagonistic interests under the terms of the Rule itself. Class actions can be maintained under this subdivision only when the interests of class members are antagonistic, because recovery by one class member would impede the ability of others to recover.

George Rutherglen, *Better Late Than Never: Notice and Opt-Out Rights at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258, 272-73 (1996). How might the drafters of Rule 23 respond to Professor Rutherglen?

3. The 2003 amendments to Rule 23 now specify that a court "may" direct notice of class certification to members of classes certified under (b)(l) and (b)(2). *See* Fed. R. Civ. P. 23(c)(2)(A). Should this amendment change the *res judicata* analysis articulated in *McDowell*? The 2018 amendments to Rule 23(e) now provide much more detailed guidance to the court and the parties in connection with the considerations and finalize requests to the class action settlement approval process. If *McDowell* had been settled in 2019, would the outcome of the preclusions analysis have been any different?

4. What if a (b)(3) class is given notice by mail, but a class member does not actually receive that notice? As described in Chapter [_____], most courts conclude that the class member is bound by the result. Is this fair? Should actual receipt of notice be required to bind a class member?

5. *McDowell* addressed the ordinary case in which a subsequent court finds that the original class representatives were adequate. *Stephenson v. Dow Chemical Co*., 273 F.3d 249 (2d Cir. 2001), *aff'd in relevant part by equally divided Court*, 539 U.S. 111 (2003), addresses the less frequent case of a judgment not being binding because the original class representatives were inadequate.

In the *Stephenson* litigation, Vietnam War veterans Daniel Stephenson and Joe Isaacson alleged that they were injured by exposure to Agent Orange during their military service, and sued the Agent Orange manufacturers. Their lawsuits were transferred by the MDL Panel to Judge Jack B. Weinstein, who had presided twelve years earlier over a class settlement involving virtually identical claims. The class action–-comprised of military personnel exposed to Agent Orange in Vietnam between 1961 and 1972–- had settled in 1984. Judge Weinstein dismissed Stephenson's and Isaacson's lawsuits on the grounds that the prior class settlement barred their claims. Plaintiffs appealed, contending that they were inadequately represented in the original Agent Orange settlement, and therefore should not be barred from pursuing their claims. More specifically, plaintiffs argued that they were not adequately represented because they did not learn of their allegedly Agent-Orange-related injuries until 1994, after the 1984 class settlement had expired. The settlement fund covered all future claims, but provided funds only for claimants whose death or disability occurred before 1994. The settlement fund terminated in 1994. The Second Circuit concluded that the conflict between the future claimants and the class representatives resulted in inadequate representation, in violation of the class settlement-related due process requirements articulated in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). The court found Stephenson and Isaacson were inadequately represented because of intra-class conflicts and therefore were not proper parties in the Agent Orange settlement, and held that plaintiffs' collateral attack on the class settlement was permissible, and denied claim-preclusive effect to the settlement.

In 2003, the Supreme Court granted *certiorari* to consider the propriety of this collateral attack on the Agent Orange class settlement. The Supreme Court was evenly split on the issue (4-4), leaving open the question of whether a collateral attack on class settlements based on adequacy is permissible. *See*

Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd in relevant part by equally divided Court*, 539 U.S. 111 (2003). Is the Second Circuit analysis of *res judicata* in *Stephenson* persuasive? *Cf. Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 171, 173 (2d Cir. 2006) (distinguishing *Stephenson* on factual grounds). Are there practical ways to provide for claims arising from later-manifesting diseases, short of retrospectively attacking the adequacy of those who negotiated the settlement.

6. The Third Circuit has taken a markedly different approach from the Second Circuit's *Stephenson* decision on the propriety of collateral attacks based on adequacy. In *In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 431 F.3d 141 (3d Cir. 2005), the Third Circuit held that certain class members could not collaterally attack the adequacy of their representation at settlement of a multi-district class action against the drug manufacturer Wyeth. A class of former users of Wyeth's diet medications reached a nationwide class action settlement. Three different groups of class members appealed, arguing that they were not bound by the settlement because of inadequate representation. The Third Circuit rejected *Stephenson* and held that collateral review was inappropriate:

> A class member must have certain due process protections in order to be bound by a class settlement agreement. * * * In a class where opt out rights are afforded, these protections are adequate representation by the class representatives, notice of the class proceedings, and the opportunity to be heard and participate in the class proceedings. * * *
>
> There must be a process by which an individual class member or group of class members can challenge whether these due process protections were afforded to them. * * *
>
> Class members are not, however, entitled to unlimited attacks on the class settlement. Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated. Appellants understandably rely heavily on *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd by equally divided Court*, 539 U.S. 111 (2003), in support of their insistence that they have a right to collaterally attack the adequacy of representation determination of the class action court. While *Stephenson* supports appellant's position on this issue, it is inconsistent with circuit case law by which this panel is bound. In *Carlough v. Amchem Products, Inc.,* 10 F.3d 189 (3d Cir. 1993), we held that notice and failure to exercise an opportunity to "opt out" constitutes consent to the jurisdiction of the class action court by an absent member of a plaintiff class even when that member lacks minimum contact with the class action forum. * * * [W]e further held that, where the class action court has jurisdiction over an absent member of a plaintiff class and it litigates and determines the adequacy of the representation of that member, the member is foreclosed from later relitigating that issue. Thus, it follows that challenges to the terms of a settlement agreement, itself, are not appropriate for collateral review.

> * * *
>
> Applying due process protections to the facts of each set of Appellants, we find that they have already received adequate procedural protections. No collateral review is available when class members have had a full and fair hearing and have generally had their procedural rights protected during the approval of the Settlement Agreement. Collateral review is only available when class members are raising an issue that was not properly considered by the District Court at an earlier stage in the litigation. Here, the District Court carefully examined the adequacy of representation and procedural protections at the fairness hearing, and that examination duly covered the variations presented by the appeals before us. Thus, the District Court was correct in rejecting all three challenges.

431 F.3d at 145-47. Which approach is preferable–the Second Circuit's or Third Circuit's? The members of the *Diet Drugs* class had an opportunity to opt out before the final settlement judgment. Would your analysis change if *Diet Drugs* had been a "mandatory" (non-opt out)_ class under Rule 23(b)(1) or (2)?

7. The ALI's *Principles of the Law of Aggregate Litigation* rejects the approach taken by the Second Circuit in *Stephenson*. Instead, the ALI's position on the availability of collateral review of adequacy is more circumscribed. Section 2.07 states:

> (a) As necessary conditions to the aggregate treatment of related claims by way of a class action, the court shall
>
> (1) determine that there are no structural conflicts of interest
>
> (A) between the named parties or other claimants and the lawyers who would represent claimants on an aggregate basis, which may include deficiencies specific to the lawyers seeking aggregate treatment or
>
> (B) among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claim ants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-a-vis the lawyers themselves * * *.

American Law Institute, *Principles of the Law of Aggregate Litigation* § 2.07, at 144 (2010). The ALI emphasizes the importance of judicial scrutiny throughout the aggregate proceedings to ensure that there are no structural conflicts of interest in the representation of claimants on an aggregate basis. *Id*. at 146. Such scrutiny is a precondition to class certification and should have preclusive effect, unless challenged directly on appeal. *Id*. at 149-50. As the *ALI Principles* state: "The treatment of loyalty as a precondition to aggregate treatment in subsection [2.07](a)(l) disapproves of the analysis of adequate class representation in *Stephenson* * * *." *Id*. at 161. According to the ALI, most courts have rejected the Stephenson app roach. Id. ("By and large, *Stephenson* has not garnered much following in subsequent case law. Even courts

purporting to follow its reasoning have not sought to permit absent class members such broad escape from the preclusive effects of judgments.").

As the ALI states: "The normal vehicle for challenging a settlement is a direct appeal from the order or judgment approving the settlement. Apart from appeal, a judgment embodying a class action settlement may not be challenged, except" under a few limited circumstances, such as when a court has failed to make the necessary initial adequacy of representation findings. *American Law Institute, Principles of the Law of Aggregate Litigation* § 3.14, at 267- 68 (2010). The ALI' s *Aggregate Litigation Project* disapproves of post-judgment challenges as a means of relitigating adequacy findings made prior to the judgment by the court approving the settlement. *Id*. at 269. Such limited availability of collateral attack on class settlements stems from the importance of finality, which is central to the settlement process. *Id*. at 268. So long as there are sufficient safeguards and a thorough and careful initial adequacy determination, post-judgment attacks should be minimal. *Id*. at 269. *See also id*. § 3.10, at 240 (addressing issues of adequacy of representation surrounding the settlement of future claims, topics that are also discussed in Chapter ____ of this text).

8. Does the ability to collaterally attack adequacy, and therefore avoid preclusion of class judgments, pose practical or fairness problems? Professors Marcel Kahan and Linda Silberman argue that allowing collateral attack on adequacy results creates several problems: (1) disruption of federal and state class settlements; (2) possible multiple and wasteful litigation on the issue of adequacy; and (3) additional forum shopping. Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 765- 66 (1998). Other commentators argue, however, that absent class members' ability to collaterally attack class judgments is a critical aspect of due process. *See, e.g., Patrick Woolley, The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 388- 89, 432 (2000) (arguing that collateral attack on adequacy is essential because "judges presiding over a class may be unduly reluctant to find inadequate representation"); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1153-55, 1195, 1197-99 (1998) (collateral attack is important "as a check on collusion" and "is essential if absent class members are to receive adequate representation in fact"). *See also* Susan P. Koniak*, How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 Notre Dame L. Rev. 1787 (2004) (arguing that permitting collateral attack on adequacy will not lead to a flood of litigation).

9. What should a court do when a proposed class includes non-U.S. members, but a foreign country is not likely to recognize a U.S. class action judgment? Professor Clopton surveys the case law and commentary on this issue, noting that the prevailing approach has been one that "ask[s] courts to identify relevant foreign plaintiffs"—i.e., those whose home country's law will not give preclusive effect to a U.S. class action judgment-- "and exclude them from class actions." Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 Ind. L.J. 1387 (2015); *see also* Kevin M. Clermont, *Solving the Puzzle of Transnational Class Actions*, 90 Ind. L.J. Supp. 69, 75- 77 (2015). Both Clopton and Clermont criticize the prevailing

approach and offer approaches that are more inclusive of foreign class members. The international class action settlement in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 39 (E.D.N.Y. 2000) is an example of a successful counter-example of reaching a multinational agreement, approved by a United States federal court, that the parties and class members trusted to be preclusive in order to enable an historic distribution of reparations to victims of the Nazi regime across the globe.

C. ISSUE PRECLUSION IN THE CLASS ACTION CONTEXT

Collateral estoppel—or issue preclusion—permits a court to prevent a party who has actually litigated an issue in a prior action from relitigating that issue in a subsequent action. In federal court, issue preclusion may be applied if (i) the issue in question in the second suit is identical to an issue actually litigated in the prior adjudication; (ii) there was a final judgment on the merits in the prior action; (iii) the party against whom preclusion is asserted was a party or was in privity with a party to the prior adjudication; and (iv) preclusion would not cause unfairness. *See, e.g.*, Jack H. Friedenthal, Mary K. Kane & Arthur R. Miller, *Civil Procedure*, §§ 14.11, 14.13, at 708-13, 718-23 (4th ed. 2005). Issue preclusion may be applied in situations in which the plaintiff and defendant in the subsequent action are the same as in the initial action–in which case what is still described as "mutual" collateral estoppel is asserted. Alternatively, issue preclusion may in some cases be asserted in situations in which one of the parties in the second action was *not* a party to the first action—in which case "non-mutual" collateral estoppel is involved. *Id*. § 14.14, at 704-10.

Collateral estoppel issues can arise in a variety of class action contexts. Consider what facts would be important to a court in determining whether preclusion should apply in the following scenarios.

Example 1. Pl, a member of a plaintiff class that prevailed in a class action against defendant Dl, attempts to assert collateral estoppel against defendant D2 concerning issues adjudicated in the first action. Are there situations in which Pl should be able to successfully assert collateral estoppel against D2?

Example 2. Pl, a member of a plaintiff class that prevailed in a class action against defendant Dl seeking only declaratory or injunctive relief, attempts to assert collateral estoppel against defendant Dl in a follow-up individual action for damages. *See, e.g., Crowder v. Lash*, 687 F.2d 996, 1011-12 (7th Cir. 1982) (member of class in injunctive class action may use findings underlying grant of class injunctive relief to preclude relitigation of certain issues in subsequent individual damages action). Or, if Dl prevailed in the original class suit, Dl asserts collateral estoppel against Pl in Pl's subsequent individual damages suit. *See, e.g., Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) (ruling against class plaintiffs in pattern-or-practice trial does not foreclose subsequent individual discrimination suit, but may be used for purposes of collateral estoppel in subsequent trial to preclude relitigation of whether bank engaged in pattern or practice of discrimination against black employees during relevant period).

Example 3. In suit 1 (*PC v. D1*), a plaintiff class loses to Dl. In a subsequent individual suit against D2 by Pl (a member of the earlier plaintiff class in *PC v. D1*), D2 asserts collateral estoppel against Pl to bar litigation by Pl of issues litigated in the prior class action against Dl.

Example 4. In suit 1, defendant Dl prevails over a class of plaintiffs PC. When a subset of PC brings suit against Dl raising a different claim, Dl asserts collateral estoppel relating to issues decided in suit 1. *See, e.g., Audette v. Sullivan*, 1992 WL 220910 (W.D. Mich. 1992) (plaintiffs in second class action precluded from relitigating issue determined in earlier class action). Would claim preclusion (*res judicata*) also potentially apply in this example?

Example 5. Interesting issue-preclusion questions arise when addressing suits by plaintiffs who opt out of a Rule 23(b)(3) class action, but later sue the same defendant. Should a defendant who prevails in class action litigation be permitted to preclude opt-out plaintiffs from relitigating issues that were decided against the class in the prior class action? The Fifth Circuit has answered the question in the negative:

> A class action judgment cannot be used to collaterally estop an opt-out plaintiff's action against a defendant in a separate action. An opt-out plaintiff is not a party to the class action and is not bound by the class action judgment. The doctrine of collateral estoppel cannot bind a person who was neither a party nor privy to a prior suit.

In re Corrugated Container Antitrust Litig., 756 F.2d 411, 418-19 (5th Cir. 1985). Indeed, while Rules 23(c)(1)(B) and 23(B)(A) combine to provide both *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) as to class members, Rule 23(c)(3)(B) requires a judgment in an opt-out class action to: "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members," thus exempting opt-outs from the class judgment. Should there be circumstances under which collateral estoppel should apply to bar an opt-out plaintiffs' litigation of issues that were adjudicated in favor of the defendant in the class action?

Example 6. Consider now the opposite situation, in which the plaintiff class prevails in the initial class action, and an opt-out plaintiff in his subsequent individual suit attempts to assert non-mutual collateral estoppel against the defendant. Should the opt-out plaintiff be entitled to take advantage of issues resolved against the defendant in the earlier litigation? That question, like the questions in the previous example, strikes at the heart of Rule 23's structure, and is addressed in the decision below.

PREMIER ELEC. CONSTR. CO. V. NAT'L ELEC. CONTRACTORS ASS'N, INC.

United States Court of Appeals, Seventh Circuit, 1987.

814 F. 2d 358.

Before BAUER, CHIEF JUDGE, AND COFFEY AND EASTERBROOK, CIRCUIT JUDGES.

EASTERBROOK, CIRCUIT JUDGE.

This antitrust case presents questions concerning issue preclusion [as well as substantive antitrust law]. The questions arise from an agreement in 1976 between the National Electrical Contractors Association, Inc. (the Association), which comprises firms doing 50-60% of the nation's electrical contracting work, and the International Brotherhood of Electrical Workers, AFL-CIO (the Union), which represents employees of these and many other contractors. The agreement established the National Electrical Industry Fund (the Fund), and members of the Association pay 1% of their gross payroll to the Fund to finance its activities. The Fund helps to defray the costs of the Association's bargaining with the Union on behalf of its members and administering their collective bargaining agreements. The Fund also pays for some research and educational programs. The 1976 agreement calls for the Union to obtain, as part of any collective bargaining agreement with a firm that is not a member of the Association, a requirement that the firm contribute 1% of its gross payroll to the Fund.

I.

Firms that were outside the Association objected to the Union's effort to divert 1% of each employer's payroll to the Fund. Characterizing the contribution requirement as a cartel, they filed an antitrust suit in the federal court in Maryland in 1977. Two of the plaintiffs in the Maryland case asked that it be certified as a class action on behalf of all electrical contractors that did not belong to the Association. * * * [T]he district court allowed [the class certification] issue to slide for three years. It then simultaneously decided the merits and the application for certification of the class. The court held the contribution requirement unlawful per se under § 1 of the Sherman Act. It also certified a class of electrical contractors that do not belong to the Association and have signed agreements with the Union requiring them to make the 1% contribution to the Fund. The court denominated this as a class under Rule 23(b)(3), which required that each member be given notice and offered an opportunity to opt out. Certification under Rule 23(b)(3) was appropriate, the judge concluded, because all members of the class had identical claims for damages, which could be computed in a mechanical fashion. The district court then deferred the required notice while the Association, Union, and Fund took an appeal under 28 U.S.C. § 1292(a)(l) from the injunction against their demand that firms pay the 1% fee.

On September 16, 1980, seven days after the Maryland court filed its opinion, Premier Electrical Construction Co.—a member of the class that had been certified in Maryland—filed this suit in Chicago. [Premier engaged in extensive procedural maneuvering, including a frustrated attempt to have its case consolidated with the Maryland action using

Multi-District Litigation procedures. Meanwhile, the Fourth Circuit affirmed the judgment in the Maryland case.]

[While the Maryland defendants were seeking review before the Supreme Court, they settled with the class, consenting to] entry of an injunction against collecting the 1% contribution from firms that did not belong to the Association. They also offered to create a fund of $6 million, on which class members could draw in proportion to their contributions to the Fund since 1977.

[Premier then attempted to intervene in the Maryland action, but was rebuffed by the Maryland district court, which noted] "that Premier, being a member of the class in this suit, should, if it so desires, object to the settlement, either that or seek to opt out of the settlement and pursue any further claims it may have elsewhere. " The notices to the class were issued in April 1983 and told class members that they could accept the benefits of the settlement, object to the settlement, or opt out of the class. Premier opted out. The district court approved the settlement, and in August 1983 the defendants dismissed their petition for *certiorari*.

The Maryland case was over, but the Chicago case had just begun. There had been only limited discovery, and Premier wanted to keep things that way. It asked the Chicago court to hold that the defendants are bound by the Fourth Circuit's decision that they violated the Sherman Act. The defendants opposed this request. * * * Both sides moved for summary judgment.

The district court held that the defendants are bound by the Maryland decision under principles of issue preclusion (collateral estoppel, here the offensive, non-mutual variety). The court concluded that class members should be entitled to the benefit of preclusion even when they opt out, because preclusion will reduce claims on judicial resources.

* * *

II.

We start with the district court's conclusion that Premier is entitled to the benefit of the Maryland court's holding that the defendants violated the Sherman Act. If the question of preclusion had arisen in 1967, there would have been a ready answer. Most federal courts would apply estoppel only among the parties to the original suit. This is the mutuality requirement—the rule that unless a party would have obtained the full benefit of any victory against the person relying on preclusion, it does not bear the risk of loss. Had the settlement broken down and the defendants won this case in the Supreme Court, Premier would not have been bound. Until recently, that would have prevented Premier from taking advantage of a loss by the defendants in the Maryland case.

We choose 1967 as the benchmark because the preceding year the Supreme Court rewrote Fed. R. Civ. P. 23. One of the complaints about the old Rule 23 was that it allowed courts to entertain what were called "spurious class actions"—actions for damages in which a decision for or against one member of the class did not inevitably entail the same result for all. One party could style the case a "class action," but the missing parties would not be bound. A victory by the plaintiff would be followed by

an opportunity for other members of the class to intervene and claim the spoils; a loss by the plaintiff would not bind the other members of the class. (It would not be in their interest to intervene in a lost cause, and they could not be bound by a judgment to which they were not parties.) So the defendant could win only against the named plaintiff and might face additional suits by other members of the class, but it could lose against all members of the class. This came to be known as "one-way intervention," which had few supporters. A principal purpose of the 1966 revision of Rule 23 was to end "one-way intervention."

The drafters of new Rule 23 assumed that only parties could take advantage of a favorable judgment. Given that assumption, it was a simple matter to end one-way intervention. First, new Rule 23(b)(3) eliminated the "spurious" class suit and allowed the prosecution of damages actions as class suits with preclusive effects. Second, new Rule 23(c)(3) required the judgment in a Rule 23(b)(3) class action to define all members of the class. These members of the class were to be treated as full-fledged parties to the case, with full advantage of a favorable judgment and the full detriments of an unfavorable judgment. Third, new Rule 23(c)(l) required the district courts to decide whether a case could proceed as a class action "as soon as practicable" after it was filed. The prompt decision on certification would both fix the identities of the parties to the suit and prevent the absent class members from waiting to see how things turned out before deciding what to do. Finally, new Rule 23(c)(2) allowed members of a 23(b)(3) class action to opt out immediately after the certification in accordance with 23(c)(l). So a person's decision whether to be bound by the judgment-like the court's decision whether to certify the class-would come well in advance of the decision on the merits. Under the scheme of the revised Rule 23, a member of the class must cast his lot at the beginning of the suit and all parties are bound, for good or ill, by the results. Someone who opted out could take his chances separately, but the separate suit would proceed as if the class action had never been filed. * * *

The drafters of new Rule 23 did not anticipate that courts would give preclusive effect to judgments in the absence of mutuality. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), which severely curtailed the mutuality doctrine in federal litigation, washed away the foundation on which the edifice of Rule 23 had been built. A rule requiring each person's decision whether to be bound by the judgment to precede the decision on the merits works only when the choice is conclusive. The curtailment of the mutuality requirement meant that a decision to opt out might not be conclusive. The drafters also did not anticipate the degree to which district judges would disregard Rule 23(c)(l). Rules 23(c)(l) and (2) together force class members to choose the binding effect of the judgment in advance of decision on the merits. (If they can choose later, it's one-way intervention all over again.) But district courts frequently postpone deciding whether a case may be maintained as a class action until the case has been settled or a decision has been rendered on the merits. That is what happened in the Maryland litigation. The district judge decided the merits and certified the case as a class action simultaneously, more than three years after it had been filed. The judge then did not give the Rule 23(c)(2) notice for another 2 years, by which time the judgment had been

affirmed and the case had been settled. So by the time Premier and the other members of the class were asked to choose, they knew how the case had come out. * * *

The district court in Chicago concluded that these two unanticipated developments make all the difference. * * * It relied principally on *Parklane*, which allowed a private plaintiff in a securities case to obtain the benefit of a judgment against the defendant in an action brought by the Securities and Exchange Commission. The Court criticized the mutuality doctrine for "failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost," and for wasting the time of courts (and parties) on the way to a duplication of the initial result. Even if the second case differed from the result of the first, this might mean that the second decision was the error. If the first litigation is complete, and the parties have good reason to present their cases fully, the decision is as likely to be accurate as any later outcome, and there is accordingly no reason to endure a series of similar cases. The application of the first outcome to all parties is as accurate as a sequence of cases with varying outcomes. Still, the Court recognized, the use of non-mutual, offensive issue preclusion might leave the defendant being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success. This sort of sequence, too, would waste resources; it also could make the minority (and therefore presumptively inaccurate) result the binding one. *Parklane* therefore gave the district courts discretion not to use offensive issue preclusion. It stated: "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where... the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."

The parties concentrate their attention on this phrase, from which each draws comfort. Premier points out that both the Panel on Multidistrict Litigation and the Maryland court declined to allow it to press its theory of damages in Maryland. The defendants observe that Premier was a party to the Maryland case for six years before voluntarily opting out, and that it could have raised its damages theory there had it not slept through most of that period. The district judge in Chicago thought Premier closer to the mark. We doubt, however, that *Parklane* contains the answer to our problem. The Supreme Court did not address the extent to which class members may use issue preclusion after opting out of the class; indeed it did not mention Rule 23. The rules that govern the extent to which one judgment in a federal case precludes litigation in a second federal case are part of the federal common law. Issue preclusion is made available when it is sound to do so in light of the effects on the rate of error, the cost of litigation, and other instrumental considerations. When there are good reasons to allow relitigation of a category of disputes, preclusion does not apply. * * *

If the scope of issue preclusion is a matter of federal common law, then *Parklane* is not a sufficient reason to upset the balance struck in Rule 23. Under the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Civil Procedure have the effect of statutes. A development in the common law of

judgments is not a reason to undo a statute, to treat a thorough rethinking of the law as so much fluff. The revision of Rule 23 in 1966 does away with one-way intervention in class actions. It should stay done-away-with until the Supreme Court adopts a new version. Whether class members should get the benefit of a favorable judgment, despite not being bound by a non-favorable judgment, was considered and decided in 1966. That decision binds us still.

* * *

We also lack a sound reason to deviate from the plan of 1966. The district court concluded that application of issue preclusion would produce judicial economy. "Judicial economy" sounds like a sure-fire Good Thing—especially to the ears of judges. Conservation of resources is the principal reason the Supreme Court gave for its decision in *Parklane*. And it has been used as a reason for preclusion when there are two actions, one for injunction and one for damages. For example, we held in *Crowder v. Lash*, 687 F.2d 996, 1011-12 (7th Cir. 1982), that a member of the class in an injunctive case may use the findings underlying the grant of injunctive relief to preclude defendants from relitigating certain issues in a separate suit for damages. *Cf. Cooper v. Federal Reserve Banh of Richmond*, 467 U.S. 867 (1984) (a judgment that an employer did not discriminate against an entire class does not necessarily preclude a member of the class from showing, in a separate action, that the employer discriminated against her, because the issues in the pattern-or-practice class suit may be different from the contentions in the individual action). When there are bound to be two separate actions, as we assumed in *Crowder*, a plaintiff who does not opt out of the injunctive action is entitled to keep his victory, as he will be bound by defeat. (*Crowder* is a case of mutual estoppel.) It serves the interest of economy to have as few issues litigated in the second suit as possible. The district court took our case as a similar situation. Yet this assumes that there will be two suits against the Association, Union, and Fund. *Parklane* was a case of this type. The SEC's suit and the private suit were bound to go forward independently; nothing the court could do would reduce the number of cases that had to be litigated. If there are bound to be two suits, why not cut down on the number of issues? The district court treated this case as similar to *Parklane*, but it is not. Here there were not bound to be two suits. There were two suits in fact, but there need not have been.

An approach that asks how to hold down the costs of litigation given the existence of multiple suits is an ex post perspective on judicial economy. It is the wrong perspective when inquiring about the consequences of a legal rule. A decision to make preclusion available to those who opt out of a class influences whether there will be multiple suits. The more class members who opt out may benefit from preclusion, the more class members will opt out. Preclusion thus may increase the number of suits, undermining the economy the district court hoped to achieve. * * *

This case makes the point. The class action in Maryland lasted six years. If Premier had known that it must start from scratch in Chicago, it might well have stayed in the Maryland litigation. It had the right under Rule 23(e) to protest the settlement and obtain a decision about its adequacy. Instead of finishing the litigation in Maryland, Premier walked

away to try again, fortified by its belief that it could win in Chicago but not lose. * * * The defendants in Maryland thought that for $6 million and an injunction they would purchase peace. Premier wants to deny defendants that boon, but not to refund any of the $6 million. If enough other class members had opted out, the settlement would have collapsed, and the Maryland litigation would have dragged on. * * * If defendants anticipate significant opting out, they also will reduce the amounts they offer in settlement, which may in turn make it worthwhile for more parties to opt out. The more attractive it is to opt out—and giving the parties who opt out the benefit of preclusion makes it very attractive—the fewer settlements there will be, the less the settlements will produce for the class, and the more cases courts must adjudicate. This is not judicial economy at work!

* * *

[In response to Premier's argument that its damage theory differed from the theory advanced in the Maryland action, the court responded that] this is a reason to establish subclasses (or to appeal the approval of a one-sided settlement) rather than to increase the number of separate suits. If the result of the first class action binds only the parties, then class members who have different theories of damages will be induced to present them as early as possible in order to have a subclass certified. If the differences in the kinds of damages suffered are indeed substantial, perhaps it is mistaken to certify any class. If, as Premier contends, a class member dissatisfied by the measure of damages selected by the representative party may pick up his portfolio and start again, there will be an incentive to stand on the sidelines and see how things turn out. If the first case proceeds well, the bystander will take the benefit, and if not it will try again. The benefits of presenting common claims in a single forum will be lost. Premier should have presented its theory of damages in the Maryland suit as quickly as possible, because it cast doubt on the district court's belief that common questions predominated and that damages could be computed mechanically. It would be an unwelcome development to induce class members to keep to themselves reasons to doubt the propriety of class certifications.

One more consideration. The district court believed that issue preclusion would ensure equal treatment of members of the class. Equality, like judicial economy, is desirable; the judicial system uses a variety of devices, including stare decisis and rules of preclusion, to treat likes alike. But the threat to equal treatment of class members came from Premier itself. The class members who stayed in the Maryland litigation were treated equally. Premier wanted to be treated differently; it wanted a unique measure of damages. This measure might well be appropriate * * *; it might even produce "equality" from a different standpoint. "Equality" is an open term. Equal with respect to what is the essential question, the answer to which must come from some independent source. Maybe only a unique measure of damages will lead to equal treatment with respect to injury suffered (that is, to recompense for an equal percentage of the damage incurred). Still, Premier's decision to opt out is the best indicator that it wanted special treatment. It wanted a greater recovery without risk. It could have had equal treatment (though not necessarily with identical effect) by staying in the Maryland case.

We conclude that class members who opt out may not claim the benefits of the class's victory. * * *

III.

To say that issue preclusion does not apply is not to say that this case must follow the dreary course of many antitrust matters and bury the court under mountains of documents, to be followed by an interminable trial. Preclusion is not an all-or-nothing matter; there are degrees. The doctrine of stare decisis supplies some of the lesser degrees. A decision by the Supreme Court that the Agreement violates the Sherman Act would be authoritative, precluding further contention in Chicago. A decision by the Fourth Circuit is not authoritative in district courts of the Seventh Circuit, but it is entitled to respect, both for its persuasive power and because it involves the same facts. The application of stare decisis will produce most of the judicial economy the district court sought to achieve.

The value of the first decision as a prediction of how other courts will act produces part of the savings. If the class wins, the opting-out plaintiff should expect to win for the same reasons that persuaded the first court. If the class loses, the opting-out plaintiff should expect to meet the same fate. He may drop the suit; if he presses the suit, the earlier decision again shortens the path to disposition of the second case. Stare decisis should be particularly potent in cases suitable for class treatment. The conclusion of the first court that certification of a class is proper, if correct, means that there will be few significant differences between the class suit and the opt-out suit. The second litigation may safely concentrate on those differences, whether or not issue preclusion comes into play.

When as here the defendant's activities span more than one court of appeals, only the gravest reasons should lead the court in the opt-out suit to come to a conclusion that departs from that in the class suit. This circuit pays respectful attention to the decisions of others, to the point of suppressing doubts in order to prevent the creation of a conflict or overruling existing cases to eliminate a conflict. The benefits of following the decision of another circuit are particularly apparent when the two courts are dealing with the same set of facts. A conflict among the circuits about a single collective bargaining agreement or other common endeavor may compel the Supreme Court to hear the case even though the dispute lacks independent significance. We therefore approach the merits of this case with a strong presumption in favor of the Fourth Circuit's disposition. The presumption does not eliminate the need for independent analysis, but it does mean that doubts should be resolved in favor of the Fourth Circuit's disposition.

[After independent analysis, the Seventh Circuit reached the same conclusion as the Fourth Circuit with respect to whether the defendants' conduct, if proven, would constitute a violation of the Sherman Act. It also found that Premier's damage theory could proceed and therefore remanded the case for further proceedings consistent with its opinion.]

Notes and Questions

1. What does Judge Easterbrook rely upon as the basis for refusing to permit collateral estoppel? What arguments can be made that an opt out plaintiff should be entitled to assert collateral estoppel against a defendant

who lost an earlier class action? *See, e.g., Note, Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class*, 31 Hastings L.J. 1189 (1980) (arguing that opt-out plaintiff should be permitted to assert collateral estoppel if he or she presents a "strong individual interest" in pursuing a separate suit).

2. To what extent is the result in *Premier* compelled by the history of Rule 23 and the intent of the drafters of the 1966 version to eliminate one-way intervention?

3. As a practical matter, did the Seventh Circuit's resolution of the case end up giving Premier the same benefit as one-way intervention? What is the difference between the analysis adopted by the district court and the analysis adopted by the Seventh Circuit? Do the two approaches normally lead to the same outcome, particularly if, as the Seventh Circuit notes, a federal court of appeals should normally follow a sister court of appeals as a matter of *stare decisis*?

4. What, if any, preclusive effect does the denial of class certification have on the putative class? Rule 23(c)(1)(C) provides that "an order that grants or denies class treatment may be altered or amended before final judgment." If a court denies class certification, should the same class representatives be able to relitigate that issue? Does it matter whether the attempt is made in the same court or another court? Should new class representatives be allowed to relitigate the same class certification issues? Again, does it matter whether the subsequent attempt is before the same court or a different court? Should the answers to these questions depend upon the grounds for denial of certification? Consider the following:

SMITH V. BAYER CORP.

564 U.S. 299.

Supreme Court of the United States, 2011.

JUSTICE KAGAN delivered the opinion of the Court.*

In this case, a Federal District Court enjoined a state court from considering a plaintiffs request to approve a class action. The District Court did so because it had earlier denied a motion to certify a class in a related case, brought by a different plaintiff against the same defendant alleging similar claims. The federal court thought its injunction appropriate to prevent relitigation of the issue it had decided.

We hold to the contrary. In issuing this order to a state court, the federal court exceeded its authority under the "relitigation exception" to the Anti-Injunction Act. That statutory provision permits a federal court to enjoin a state proceeding only in rare cases, when necessary to "protect or effectuate [the federal court's] judgments." 28 U.S.C. § 2283. Here, that standard was not met for two reasons. First, the issue presented in the state court was not identical to the one decided in the federal tribunal. And second, the plaintiff in the state court did not have the requisite connection to the federal suit to be bound by the District Court's judgment.

* JUSTICE THOMAS joins Parts I and II-A of this opinion.

I

Because the question before us involves the effect of a former adjudication on this case, we begin our statement of the facts not with this lawsuit, but with another. In August 2001, George McCollins sued respondent Bayer Corporation in the Circuit Court of Cabell County, West Virginia, asserting various state-law claims arising from Bayer's sale of an allegedly hazardous prescription drug called Baycol (which Bayer withdrew from the market that same month). McCollins contended that Bayer had violated West Virginia's consumer-protection statute and the company's express and implied warranties by selling him a defective product. And pursuant to West Virginia Rule of Civil Procedure 23 (2011), McCollins asked the state court to certify a class of West Virginia residents who had also purchased Baycol, so that the case could proceed as a class action.

Approximately one month later, the suit now before us began in a different part of West Virginia. Petitioners Keith Smith and Shirley Sperlazza (Smith for short) filed state-law claims against Bayer, similar to those raised in McCollins' suit, in the Circuit Court of Brooke County, West Virginia. And like McCollins, Smith asked the court to certify under West Virginia's Rule 23 a class of Baycol purchasers residing in the State. Neither *Smith* nor McCollins knew about the other's suit.

In January 2002, Bayer removed McCollins' case to the United States District Court for the Southern District of West Virginia on the basis of diversity jurisdiction. *See* 28 U.S.C. §§ 1332, 1441. The case was then transferred to the District of Minnesota pursuant to a preexisting order of the Judicial Panel on Multi -District Litigation, which had consolidated all federal suits involving Baycol (numbering in the tens of thousands) before a single District Court Judge. See § 1407. Bayer, however, could not remove Smith's case to federal court because Smith had sued several West Virginia defendants in addition to Bayer, and so the suit lacked complete diversity. *See* § 1441(b).[1] Smith's suit thus remained in the state courthouse in Brooke County.

Over the next six years, the two cases proceeded along their separate pretrial paths at roughly the same pace. By 2008, both courts were prepar-ing to turn to their respective plaintiffs' motions for class certification. The Federal District Court was the first to reach a decision.

Applying Federal Rule of Civil Procedure 23, the District Court declined to certify McCollins' proposed class of West Virginia Baycol purchasers. The District Court's reasoning proceeded in two steps. The court first ruled that, under West Virginia law, each plaintiff would have to prove "actual injury" from his use of Baycol to recover. The court then held that because the necessary showing of harm would vary from plaintiff to plaintiff, "individual issues of fact predominate[d]" over issues common to all members of the proposed class, and so the case was not suitable for class treatment. In the same order, the District Court also dismissed

[1] The Class Action Fairness Act of 2005, 119 Stat. 4, which postdates and therefore does not govern this lawsuit, now enables a defendant to remove to federal court certain class actions involving nondiverse parties. *See* 28 U.S.C. §§ J33 2(d), 1453(b).

McCollins' claims on the merits in light of his failure to demonstrate physical injury from his use of Baycol. McCollins chose not to appeal.

Although McCollins' suit was now concluded, Bayer asked the District Court for another order based upon it, this one affecting *Smith*'s case in West Virginia. In a motion-receipt of which first apprised *Smith* of McCollins' suit-Bayer explained that the proposed class in *Smith*'s case was identical to the one the federal court had just rejected. Bayer therefore requested that the federal court enjoin the West Virginia state court from hearing *Smith*'s motion to certify a class. According to Bayer, that order was appropriate to protect the District Court's judgment in McCollins' suit denying class certification. The District Court agreed and granted the injunction.

The Court of Appeals for the Eighth Circuit affirmed. * * *

We granted *certiorari* because the order issued here implicates two circuit splits arising from application of the Anti-Injunction Act's relitigation exception. The first involves the requirement of preclusion law that a subsequent suit raise the "same issue" as a previous case. The second concerns the scope of the rule that a court's judgment cannot bind nonparties. We think the District Court erred on both grounds when it granted the injunction, and we now reverse.

II

The Anti-Injunction Act, first enacted in 1793, provides that

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. " 28 U.S.C. § 2283.

The statute, we have recognized, "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. " *Chick Kam Choo v. Exxon Corp*., 486 U.S. 140, 146 (1988). And the Act's core message is one of respect for state courts. The Act broadly commands that those tribunals "shall remain free from interference by federal courts." That edict is subject to only "three specifically defined exceptions." * * * .

This case involves the last of the Act's three exceptions, known as the relitigation exception. That exception is designed to implement "well-recognized concepts" of claim and issue preclusion. *Chick Kam Choo*, 486 U.S. at 147. The provision authorizes an injunction to prevent state litigation of a claim or issue "that previously was presented to and decided by the federal court." *Ibid*. But in applying this exception, we have taken special care to keep it "strict and narrow." After · all, a court does not usually "get to dictate to other courts the preclusion consequences of its own judgment." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4405, p. 82 (2d ed. 2002). Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the second court (here, the one in West Virginia). So issuing an injunction under the relitigation exception is resorting to heavy artillery. For that reason, every benefit of the doubt goes toward the state court; an injunction can issue only if preclusion is clear beyond peradventure.

The question here is whether the federal court's rejection of McCollins' proposed class precluded a later adjudication in state court of *Smith*'s certification motion. For the federal court's determination of the class issue to have this preclusive effect, at least two conditions must be met. First, the issue the federal court decided must be the same as the one presented in the state tribunal. And second, *Smith* must have been a party to the federal suit, or else must fall within one of a few discrete exceptions to the general rule against binding nonparties. In fact, as we will explain, the issues before the two courts were not the same, and *Smith* was neither a party nor the exceptional kind of nonparty who can be bound. So the courts below erred in finding the certification issue precluded, and erred all the more in thinking an injunction appropriate.[7]

A

In our most recent case on the relitigation exception, *Chick Kam Choo v. Exxon*, we applied the "same issue" requirement of preclusion law to invalidate a federal court's injunction. The federal court had dismissed a suit involving Singapore law on grounds of forum non conveniens. After the plaintiff brought the same claim in Texas state court, the federal court issued an injunction barring the plaintiff from pursuing relief in that alternate forum. We held that the District Court had gone too far [because federal and Texas forum non conveniens law were not the same]. * * *

The question here closely resembles the one in *Chick Kam Choo*. The class *Smith* proposed in state court mirrored the class McCollins sought to certify in federal court: Both included all Baycol purchasers resident in West Virginia. Moreover, the substantive claims in the two suits broadly overlapped: Both complaints alleged that Bayer had sold a defective product in violation of the State's consumer protection law and the company's warranties. So far, so good for preclusion. But not so fast: a critical question—the question of the applicable legal standard—remains. The District Court ruled that the proposed class did not meet the requirements of Federal Rule 23 (because individualized issues would predominate over common ones). But the state court was poised to consider whether the proposed class satisfied *West Virginia* Rule 23. If those two legal standards differ (as federal and state forum non conveniens law differed in *Chick Kam Choo*)—then the federal court resolved an issue not before the state court. In that event, much like in *Chick Kam Choo*, "whether the [West Virginia] state cour[t]" should certify the proposed class action "has not yet been litigated. "

The Court of Appeals and Smith offer us two competing ways of deciding whether the West Virginia and Federal Rules differ, but we think the right path lies somewhere in the middle. The Eighth Circuit relied almost exclusively on the near-identity of the two Rules' texts. That was the right place to start, but not to end. Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways. If a State's procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner

[7] Because we rest our decision on the Anti-Injunction Act and the principles of issue preclusion that inform it, we do not consider Smith's argument, based on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that the District Court's action violated the Due Process Clause.

federal courts have not, then the state court is using a different standard and thus deciding a different issue. * * * But if state courts have made crystal clear that they follow the same approach as the federal court applied, we see no need to ignore that determination; in that event, the issues in the two cases would indeed be the same. So a federal court considering whether the relitigation exception applies should examine whether state law parallels its federal counterpart. But as suggested earlier, the federal court must resolve any uncertainty on that score by leaving the question of preclusion to the state courts.

Under this approach, the West Virginia Supreme Court has gone some way toward resolving the matter before us by declaring its independence from federal courts' interpretation of the Federal Rules—and particularly of Rule 23. In *In re W. Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003) (*In re Rezulin*), the West Virginia high court considered a plaintiffs motion to certify a class-coincidentally enough, in a suit about an allegedly defective pharmaceutical product. The court made a point of complaining about the parties' and lower court's near-exclusive reliance on federal cases about Federal Rule 23 to decide the certification question. Such cases, the court cautioned," 'may be persuasive, but [they are] not binding or controlling.' "And lest anyone mistake the import of this message, the court went on: The aim of "this rule is to avoid having our legal analysis of our Rules 'amount to nothing more than Pavlovian responses to federal decisional law.'" Of course, the state courts might still have adopted an approach to their Rule 23 that tracked the analysis the federal court used in McCollins' case. But absent clear evidence that the state courts had done so, we could not conclude that they would interpret their Rule in the same way. And if that is so, we could not tell whether the certification issues in the state and federal courts were the same. That uncertainty would preclude an injunction.

But here the case against an injunction is even stronger, because the West Virginia Supreme Court has disapproved the approach to Rule 23(b)(3)'s predominance requirement that the Federal District Court embraced. Recall that the federal court held that the presence of a single individualized issue—injury from the use of Baycol—prevented class certification. The court did not identify the common issues in the case; nor did it balance these common issues against the need to prove individual injury to determine which predominated. The court instead applied a strict test barring class treatment when proof of each plaintiffs injury is necessary. By contrast, the West Virginia Supreme Court in *In re Rezulin* adopted an all-things-considered, balancing inquiry in interpreting its Rule 23. Rejecting any "rigid test, " the state court opined that the predominance requirement "contemplates a review of many factors." Indeed, the court noted, a " 'single common issue' " in a case could outweigh " 'numerous... individual ques-tions.' " That meant, the court further explained (quoting what it termed the "leading treatise" on the subject), that even objections to certification" 'based on... causation, or reliance' "—which typically involve showings of individual injury—" 'will not bar predominance satisfaction.' " So point for point, the analysis set out in *In re Rezulin* diverged from the District Court's interpretation of Federal Rule 23. A state court using the *In re Rezulin* standard would decide a different question than the one the federal court had earlier resolved.

This case, indeed, is little more than a rerun of *Chick Kam Choo*. A federal court and a state court apply different law. That means they decide distinct questions. The federal court's resolution of one issue does not preclude the state court's determination of another. It then goes without saying that the federal court may not issue an injunction. The Anti-Injunction Act's re-litigation exception does not extend nearly so far.

B

The injunction issued here runs into another basic premise of preclusion law: A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions. The importance of this rule and the narrowness of its exceptions go hand in hand. We have repeatedly "emphasize[d] the fundamental nature of the general rule" that only parties can be bound by prior judgments; accordingly, we have taken a "constrained approach to nonparty preclusion." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). Against this backdrop, Bayer defends the decision below by arguing that Smith—an unnamed member of a proposed but uncertified class—qualifies as a party to the McCollins litigation. Alternatively, Bayer claims that the District Court's judgment binds Smith under the recognized exception to the rule against nonparty preclusion for members of class actions. We think neither contention has merit.

Bayer's first claim ill-comports with any proper understanding of what a "party" is. In general, "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought,' "*United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009), or one who "become[s]a party by intervention, substitution, or third-party practice," *Karcher v. May*, 484 U.S. 72, 77 (1987). And we have further held that an unnamed member of a certified class may be "considered a 'party' for the [particular] purpos[e] of appealing" an adverse judgment. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). [*See* Chapter 9(B)(2).] But as the dissent in *Devlin* noted, no one in that case was "willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." Still less does that argument make sense *once certification is denied*. The definition of the term "party " can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent. If the judgment in the McCollins litigation can indeed bind Smith, it must do so under principles of *non* party preclusion.

As Bayer notes, one such principle allows unnamed members of a class action to be bound, even though they are not parties to the suit. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation"); *see also Taylor*, 553 U.S. at 894 (stating that nonparties can be bound in "properly conducted class actions"). But here Bayer faces a conundrum. If we know one thing about the McCollins suit, we know that it was not a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court's decision that a class could not properly be certified. So Bayer wants to bind Smith as a member of a class action (because it is only as such that a nonparty in Smith's situation can be bound) to a determination that there could not be a class

action. And if the logic of that position is not immediately transparent, here is Bayer's attempt to clarify: "[U]ntil the moment when class certification was denied, the McCollins case was a properly conducted class action." That is true, according to Bayer, because McCollins' interests were aligned with the members of the class he proposed and he "act[ed] in a representative capacity when he sought class certification."

But wishing does not make it so. McCollins sought class certification, but he failed to obtain that result. Because the District Court found that individual issues predominated, it held that the action did not satisfy Federal Rule 23's requirements for class proceedings. In these circumstances, we cannot say that a properly conducted class action existed at any time in the litigation. Federal Rule 23 determines what is and is not a class action in federal court, where McCollins brought his suit. So in the absence of a certification under that Rule, the precondition for binding Smith was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23. But McCollins' lawsuit was never that.

We made essentially these same points in *Taylor v. Sturgell* just a few Terms ago. The question there concerned the propriety of binding nonparties under a theory of "virtual representation" based on "identity of interests and some kind of relationship between parties and nonparties." We rejected the theory unanimously, explaining that it "would 'recogniz[e], in effect, a common-law kind of class action.'" Such a device, we objected, would authorize preclusion "shorn of [Rule 23's] procedural protections." Or as otherwise stated in the opinion: We could not allow "circumvent[ion]" of Rule 23's protections through a "virtual representation doctrine that allowed courts to 'create *de facto* class actions at will.'" We could hardly have been more clear that a "properly conducted class action, " with binding effect on nonparties, can come about in federal courts in just one way—through the procedure set out in Rule 23. Bayer attempts to distinguish *Taylor* by noting that the party in the prior litigation there did not propose a class action. But we do not see why that difference matters. Yes, McCollins wished to represent a class, and made a motion to that effect. But it did not come to pass. To allow McCollins' suit to bind nonparties would be to adopt the very theory *Taylor* rejected.[11]

Bayer's strongest argument comes not from established principles of preclusion, but instead from policy concerns relating to use of the class action device. Bayer warns that under our approach class counsel can repeatedly try to certify the same class "by the simple expedient of changing the named plaintiff in the caption of the complaint." And in this

[11] The great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members. *See* Restatement (Second) of Judgments § 41(1), p. 393 (1980) (A nonparty may be bound only when his interests are adequately represented by "The representative of a class of persons similarly situated, designated as such with the approval of the court "); ALI, *Principles of the Law Aggregate Litigation* § 2.11, Reporters' Notes, cml. b, p. 181 (2010) ("[N]one of [the exceptions to the rule against nonparty preclusion] extend generally to the situation of a would-be absent class member with respect to a denial of class certification"); 18A Wright & Miller § 4455, at 457-58 ("[A]bsent certification there is no basis for precluding a nonparty" under the class action exception).

world of serial relitigation of class certification," Bayer contends, defendants "would be forced in effect to buy litigation peace by settling."

But this form of argument flies in the face of the rule against nonparty preclusion. That rule perforce leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief. We confronted a similar policy concern in *Taylor*, which involved litigation brought under the Freedom of Information Act (FOIA). The Government there cautioned that unless we bound nonparties a "'potentially limitless' "number of plaintiffs, perhaps coordinating with each other, could "mount a series of repetitive lawsuits" demanding the selfsame documents. But we rejected this argument, even though the payoff in a single successful FOIA suit—disclosure of documents to the public—could "trum[p]" or "subsum[e]" all prior losses, just as a single successful class certification motion could do. As that response suggests, our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment.

And to the extent class actions raise special problems of relitigation, Congress has provided a remedy that does not involve departing from the usual rules of preclusion. In the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453 (2006 ed. and Supp. III), Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship. Once removal takes place, Federal Rule 23 governs certification. And federal courts may consolidate multiple overlap- ping suits against a single defendant in one court (as the Judicial Panel on Multi-District Litigation did for the many actions involving Baycol). See § 1407. Finally, we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dis-pute. CAFA may be cold comfort to Bayer with respect to suits like this one beginning before its enactment. But Congress's decision to address the relitigation concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding principles of preclusion.[12] And once again, that is especially so when the federal court is deciding whether to go so far as to enjoin a state proceeding.

The Anti-Injunction Act prohibits the order the District Court entered here. The Act's relitigation exception authorizes injunctions only when a former federal adjudication clearly precludes a state -court decision. As we said more than 40 years ago, and have consistently maintained since that time, "[a]ny doubts... should be resolved in favor of permitting the state courts to proceed." *Atlantic Coast Line*, 398 U.S. at 297. Under this approach, close cases have easy answers: The federal court should not issue an injunction, and the state court should decide the preclusion question.

[12] By the same token, nothing in our holding today forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions. * * *

But this case does not even strike us as close. The issues in the federal and state lawsuits differed because the relevant legal standards differed. And the mere proposal of a class in the federal action could not bind persons who were not parties there. For these reasons, the judgment of the Court of Appeals is

Reversed.

NOTES AND QUESTIONS

1. Would the *Smith v. Bayer* Court's reasoning have been the same had the subsequent class action suit been filed in (or removed to) federal court? Should that distinction matter?

2. The American Law Institute (ALI) *Principles of the Law of Aggregate Litigation* has taken the following approach:

> A judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity.

American Law Institute, *Principles of the Law of Aggregate Litigation* § 2.11 at 177 (2010). To what extent did *Smith v.* Bayer adopt the ALI' s approach? What does it mean to expect federal courts to apply a "rebuttable presumption "against aggregate treatment? Should courts apply such a presumption?

3. Judge Easterbrook describes the use of an injunction under the relitigation exception as "resorting to heavy artillery." Why? Should it be so hard for a court to issue an injunction following a class certification denial?

4. In *Smith v. Bayer*, defendant argued that policy considerations countenance against prohibiting an injunction. What are those considerations? Are they meritorious?

5. Justice Kagan noted, as a "remedy" to relitigation of class suits in state courts, the Class Action Fairness Act's removal provisions, coupled with the multidistrict litigation centralization mechanism. Since the 2005 enactment of CAFA, the MDL docket had increasingly featured multi-state consumer class claims, often accompanying individual tort claims involving the same product, typically a drug, medical device, or motor vehicle. Do you think this phenomenon has provided an adequate practical remedy to the relitigation problem?

6. In *Duffy v. Si-Sifh Corp.*, 726 So. 2d 438 (La. Ct. App. 1999), the Louisiana Court of Appeal faced the issue of whether *res judicata* bars a class action suit based on the same underlying facts as a previous class action suit filed in the same state. (Although the court spoke in terms of *res judicata*, the only question at issue was whether class action allegations were barred, not whether class members could pursue their individual claims.) Both *Duffy* and the previous case involved classwide allegations of breach of contract, fraud, and other claims in connection with the sale of burial insurance policies in Louisiana. The named plaintiffs in the previous

suit (the *Feldheim* case) were different, but the statewide classes sought to be certified in both cases were identical, and the same attorneys represented both sets of plaintiffs. The *Feldheim* trial court held that the case could not proceed as a class action (because individual issues would predominate over common issues) and thus dismissed the class allegations. Although the trial court in *Duffy* held that it was not bound by the dismissal of class claims by the *Feldheim* court, the appellate court in *Duffy* reversed, reasoning as follows:

> The plaintiffs claim * * * that the trial court correctly [rejected the assertion] of *res judicata* because the named plaintiffs are not identically the same in this suit and the *Feldheim* case. * * * Thus, this court must determine whether an identity of parties exists be- tween the two cases.
>
> "Identity of parties does not mean the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity." The only requirement is that the parties be the same "in the legal sense of the word." Under that definition, an identity of parties exists between the two cases. The named plaintiffs in each case are the proposed class representatives for the exact same class of people, since the definitions of the class as alleged are identical in the two cases. Thus, the parties are the same in the legal sense of the word.
>
> The plaintiffs focus on the fact that the named plaintiffs are different, coupled with the fact that the class was never certified in *Feldheim*. Because the class has never been certified, they argue, the named plaintiffs in the *Feldheim* case cannot be considered to have represented the named plaintiffs in the instant case. However, the plaintiffs fail to acknowledge the reality of the facts of this case. The "party plaintiffs" in the *Feldheim* case are all the members of the defined class; the "party plaintiffs" in the instant case are the very same people. The fact that different proposed representatives filed suit in the instant case does not affect that analysis. Thus, we find that the identity of parties requirement for a class action is present.
>
> Nothing in the *Feldheim* decision or the decision of this court in the instant case affects the rights of the individual plaintiffs who filed the instant suit; those individual plaintiffs still have a right to assert a cause of action for their losses. However, allowing the plaintiffs to relitigate the class action question in the instant case would encourage forum shopping, allowing the plaintiffs numerous "bites" at the class action "apple," and frustrate the purposes of the *res judicata* doctrine.

Id. at 443. Does the *Duffy* court's reasoning conflict with that in *Smith*? If so, which approach is more faithful to the policies underlying collateral estoppel?

7. Would *Duffy* have reached the same result had the second suit involved burial insurance sold throughout the United States? What about a class limited to burial insurance sold within a specific parish (*i.e.*, county) in Louisiana?

8. *Duffy* held that the members of a class could be precluded from relitigating the propriety of a decision dismissing class allegations. In an unusual and unprecedented case, a federal court of appeals went even further, holding that class members could be barred *on the merits* from relitigating issues that class representatives litigated in their *individual* capacities in another court. In *Sandel v. Northwest Airlines, Inc.*, 56 F.3d 934 (8th Cir. 1995), three plaintiffs filed a putative class action against Northwest Airlines in federal court, asserting sex discrimination in violation of Title VII and Minnesota state law. Plaintiffs then dropped the state-law claim from their federal-court suit, and (represented by the same attorneys) filed a proposed class action in Minnesota state court based on the same facts and seeking the same relief under Minnesota law. The federal court certified the federal suit as a class action, but the state court did not. Accordingly, the state suit proceeded in the named plaintiffs' individual capacities, and the defendant prevailed at trial.

Subsequently, the federal district court granted summary judgment in favor of Northwest, holding that the federal class action suit was barred as a result of the state-court verdict. In *Sandel,* The Eighth Circuit affirmed, reasoning:

> When the class action lawsuit was certified by the federal district court, the certified representatives and the class counsel assumed certain fiduciary responsibilities to the Class. Thus, the certified representatives and the class counsel had fiduciary responsibilities to the Class when prosecuting the state court action. For example, the certified representatives may not take any action which will prejudice the Class's interest, or further their personal interests at the expense of the Class. We do not believe that these duties are confined to the four corners of the federal lawsuit. Accordingly, by virtue of their fiduciary duties to refrain from taking any action prejudicial to the Class, the certified representatives were representing the interests of the Class at the state trial.* * * [W]e believe it is significant that the same attorneys who represented the state court plaintiffs are the class counsel in the federal class action. At the federal summary judgment motion the class counsel informed the district court that he was not planning to introduce any additional evidence beyond that presented at the state trial. Furthermore, the Class was financially interested in the outcome of the state court suit because its counsel prosecuted the state suit with the intent of using offensive collateral estoppel in the federal suit if successful in the state suit. Thus, we believe that the interests between the certified representatives, the class counsel and the Class are more than coincidental. Accordingly, we hold that the district court properly found that the Class was in privity with the state court plaintiffs.

Id. at 938-40. Is the Eighth Circuit's ruling fair to the unnamed class members? Can it withstand scrutiny in light of *Smith*? Should the federal

court have certified the class? Are the named plaintiffs with parallel state claims typical class members? Adequate representative?

D. TRANS-JURISDICTIONAL PRECLUSION: FULL FAITH AND CREDIT

This section addresses in greater depth the important issues implicated when related litigation exists at both the federal and state levels. The Anti-Injunction Act has already been discussed in *Smith v. Bayer*. An important additional doctrine is discussed here: the Full Faith and Credit doctrine, under which federal courts are obligated to give state judgments the same effect in federal courts that the judgments would be given in state court.

WALKER v. R.J. REYNOLDS TOBACCO COMPANY

734 F.3d 1278

United States Court of Appeals, Eleventh Circuit. 2013.

Before Pryor and Hill, Circuit Judges, and Hall, District Judge

PRYOR, Circuit Judge:

***

This appeal by R.J. Reynolds Tobacco Company of money judgments in favor of the survivors of two smokers requires us to decide whether a decision of the Supreme Court of Florida in an earlier class action is entitled to full faith and credit in federal court. Florida smokers and their survivors filed in state court a class action against the major tobacco companies that manufacture cigarettes in the United States. In the first phase of the class action, a jury decided that the tobacco companies breached a duty of care, manufactured defective cigarettes, and concealed material information, but the jury did not decide whether the tobacco companies were liable for damages to individual members of the class. The Supreme Court of Florida approved the jury verdict, [in this respect] but decertified the class going forward. *Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1254 (Fla. 2006). Members of the class then filed individual complaints in federal and state courts.

***

R.J. Reynolds argues that the application of res judicata in later suits filed by individual smokers violates its constitutional right to due process of law because the jury verdict in the class action is so ambiguous that it is impossible to tell whether the jury found that each tobacco company acted wrongfully with respect to any specific brand of cigarette or any individual plaintiff. After the district court ruled that giving res judicata effect to the findings of the jury in the class action does not violate the rights of the tobacco companies to due process, two juries [in federal court] awarded money damages to the survivors of two smokers in their suits against R.J. Reynolds. Because R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under Florida law does not cause an arbitrary deprivation of property, we affirm the

judgments against R.J. Reynolds and in favor of the survivors of the smokers.

I. BACKGROUND

In 1994, six individuals filed a putative class action in a Florida court against the major domestic manufacturers of cigarettes, including R.J. Reynolds.*** Their complaint asserted claims of strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress.*** A Florida court of appeals approved the certification of a plaintiff class of all Florida citizens and residents who have suffered or died from medical conditions caused by their addiction to cigarettes and the survivors of those citizens and residents. ***

The trial court divided the class action [trial] in three phases. Phase I of the class action "consisted of a year-long trial to consider the issues of liability and entitlement to punitive damages for the class as a whole." *Engle*, 945 So.2d at 1256. During that phase, the jury considered only "common issues relating exclusively to the defendants' conduct and the general health effects of smoking," *Id.* at 1256, but the jury did not decide whether the tobacco companies were liable to any of the class representatives or members of the class, *id*. at 1263. In Phase II of the trial, the same jury determined the liability of the tobacco companies to three individual class representatives, awarded compensatory damages to those individuals, and fixed the amount of class-wide punitive damages. *Id*. at 1257. According to the trial plan, in Phase III of the class action, new juries were to decide the claims of the rest of the class members. *Id* at 1258.

In Phase I of the trial, the plaintiffs presented evidence about some defects that were specific to certain brands or types of cigarettes and other defects common to all cigarettes. *** "Similarly, arguments concerning the class's negligence, warranty, fraud, and conspiracy claims included whether the Engle defendants failed to address the health effects and addictive nature of cigarettes, manipulated nicotine levels to make cigarettes more addictive, and concealed information about the dangers of smoking." *Id.* The trial plan called for the jury "to decide issues common to the entire class, including general causation, [and] the Engle defendants' common liability to the class members for the conduct alleged in the complaint." *Id*. at 422.

At the conclusion of Phase I, the trial court submitted to the jury a verdict form with a series of questions to be answered "yes" or "no." The trial court instructed the jury that "all common liability issues would be tried before [the] jury" and that Phase I of the trial "did not address issues as to the conduct or damages of individual members of the Florida class." The first question on the verdict form asked the jury whether "smoking cigarettes cause[s]" a list of enumerated diseases, and the jury found that smoking causes 20 specific diseases, including various forms of cancer. The second question asked the jury whether "cigarettes that contain nicotine [are] addictive and dependence producing," and the jury found that cigarettes are addictive and dependence producing.

The jury then answered "yes" to each of the following questions for each tobacco company:

- Did the tobacco company "place cigarettes on the market that were defective and unreasonably dangerous";
- Did the tobacco company "make a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers";
- Did the tobacco company "conceal or omit material information, not otherwise known or available, knowing that the material was false and misleading, or fail[] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes";
- Did the tobacco company "enter into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment";
- Did the tobacco company "enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment";
- Did the tobacco company "sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended";
- Did the tobacco company "sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by [the tobacco company], either orally or in writing";
- Did the tobacco company "fail[] to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances";
- Did the tobacco company "engage[] in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress."

The final question asked the jury whether "the conduct of [each tobacco company] rose to a level that would permit a potential award or entitlement to punitive damages," and the jury answered "yes" for each tobacco company.

The tobacco companies unsuccessfully objected to the verdict form that the trial court submitted to the jury in Phase I. They argued that the verdict form did not "ask for specifics" about the tortious conduct of the tobacco companies, "render[ing] [the jury findings] useless for application to individual plaintiffs." They requested that the trial court submit to the jury a more detailed verdict form that would have asked the jury to identify the brands of cigarettes that were defective and the information the companies concealed from the public. The trial court rejected that proposed verdict form as too detailed and impractical.

In Phase II of the trial, the same jury determined that the defendants were liable to three named plaintiffs. The jury awarded compensatory damages of $12.7 million to those three named plaintiffs, and the jury awarded punitive damages of $145 billion to the class. ***

Before Phase III of the trial began, the tobacco companies filed an interlocutory appeal of the verdicts in Phases I and II, and the Supreme Court of Florida approved in part and vacated in part the verdicts. *Engle*, 945 So.2d at 1246. The court concluded that the trial court did not abuse its discretion when it certified the Engle class for purposes of Phases I and II of the trial, but that the class must be decertified going forward so that members of the class could pursue their claims to finality in individual lawsuits. *Id* at 1267-69. The court explained that "problems with the three phase trial plan negate the continued viability of this class action" and that "continued class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id*. at 1267-68. The court held as follows

that most findings of the jury in Phase I should have "res judicata effect" in the ensuing individual trials:

> The pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those on the fraud and intentional infliction of emotion[al] distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. *Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.*

Id. at 1269 (emphasis added). The court concluded that the findings about fraud and misrepresentation and intentional infliction of emotional distress cannot have preclusive effect because "the non-specific findings in favor of the plaintiffs" on those questions were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." *Id.* at 1255. The court also vacated the finding about civil conspiracy- misrepresentation because it relied on the underlying tort of misrepresentation. But the court stated that the other findings, now known as the approved findings from Phase I, have res judicata effect. *Id*. The court also vacated the award of punitive damages on the ground that it was excessive and premature, affirmed the damages award in favor of two of the named plaintiffs, and vacated the judgment in favor of the third named plaintiff because the statute of limitations barred his claims. Engle, 945 So.2d at 1254-56.

After the decision of the Supreme Court of Florida, members of the Engle class filed thousands of individual cases in both state and federal courts. A central issue in these cases is whether plaintiffs may rely on the approved findings from Phase I to establish the "conduct" elements of their claims against the tobacco companies. ***

We were the first appellate court to consider the res judicata effect of the approved findings from Phase I [in *Brown v. R. J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), and we concluded that the findings have preclusive effect in a later case only when the plaintiff can establish that the jury in Phase I actually decided that a tobacco company acted wrongfully regarding cigarettes that the plaintiff smoked. *Brown*, 611 F.3d at 1336. We explained that, when the Supreme Court of Florida stated in *Engle* that the approved findings from Phase I "were to have res judicata effect," the court "necessarily refer[red] to issue preclusion" and not claim preclusion because "factual issues and not causes of action were decided in Phase I." *Id* at 1333. We explained that issue preclusion applies only to issues that were "actually decided" in a prior litigation, and we remanded the matter for the district court to consider in the first instance whether the approved findings from Phase I establish that the tobacco companies acted wrongfully toward each plaintiff. *Id*. at 1334-35. We explained that, to determine whether a specific factual issue was determined in favor of the plaintiff, the district court should look beyond the face of the verdict and consider "[t]he entire trial record." *Id* at 1334-36. ***

Several Florida [state] courts of appeal then held that the approved findings from Phase I establish the conduct elements of [] each class

member's claims against the tobacco companies, and they rejected our decision in *Brown* that smokers must establish from the trial record that an issue was actually decided in his or her favor.***

Because federal courts sitting in diversity are bound by the decisions of state courts on matters of state law, those decisions of the Florida courts of appeal supplanted our interpretation of Florida law in *Brown*. *** The tobacco companies could no longer argue that the approved findings from Phase I have no preclusive effect as a matter of Florida law. Instead, they argued that giving the approved findings preclusive effect would violate their federal rights to due process. The Tobacco companies raised that argument in each of the cases filed in the [federal] district court, which consolidated those cases in *Waggoner v. R.J Reynolds Tobacco Co*., 835 F.Supp.2d 1244 (M.D. Fla. 2011).

The district court in *Waggoner* held that giving preclusive effect to the approved findings from Phase I does not violate a right of the tobacco companies to due process of law. *Id.* at 1279. The district court concluded that "a state's departure from common law issue preclusion principles does not implicate the Constitution unless that departure also violates 'the minimum procedural requirements of the Fourteenth Amendments Due Process Clause." *Id.* at 1270. *** And the district court concluded that the decisions of the Florida courts of appeal do not violate those procedural requirements because those decisions do not arbitrarily deprive the tobacco companies of property, *Waggoner*, 835 F.Supp.2d at 1272-74, and because the tobacco companies had a full and fair opportunity to litigate the conduct elements at Phase I of the class action, *id*. at 1274-77.

After the district court decided *Waggoner*, the Supreme Court of Florida in *Douglas* held, as a 'matter of Florida law, that the approved findings from Phase I establish the conduct elements of the claims brought by members of the *Engle* class. *Douglas*, 110 So.3d at 428. The court acknowledged that "the *Engle* jury did not make detailed findings for which evidence it relied upon to make the Phase I common liability findings." *Id.* at 433. But the court explained that, "[n]o matter the wording of the findings on the Phase I verdict form, the jury considered and determined specific matters related to the [Engle] defendants' conduct." *Id.* *** The court explained that, although the proof submitted at the Phase I trial included both general and brand-specific defects, "the class action jury was not asked to find brand-specific defects in the Engle defendants' cigarettes," but only to "determine like all common liability issues' for the class." *Id*. at 423. The court concluded that the approved findings from Phase I concern conduct that "is common to all class members and will not change from case to case," and that "the approved Phase I findings are specific enough" to establish some elements of the plaintiffs' claims. *Id* at 428.

The Supreme Court of Florida also held in *Douglas* that giving preclusive effect to the approved findings from Phase I does not violate a right of the tobacco companies to due process. *Id.* at 430. The court stated that the tobacco companies had notice and an opportunity to be heard and were not arbitrarily deprived of property. *Id*. at 431-32. The court explained that, when it stated in *Engle* that the approved findings have "res judicata effect," it addressed claim preclusion, not issue, preclusion. *Id.* at 432. The

court stated that claim preclusion "prevents the same parties from relitigating the same cause of action in a second lawsuit," *id.*, while issue preclusion "prevents the same parties from relitigating the same issues that were litigated and actually decided in a second suit involving a different cause of action," *id.* at 433. "Because the claims in *Engle* and the claims in individual actions like this case are the same causes of action between the same parties," the court concluded that "res judicata (not issue preclusion) applies." *Id.* at 432. The court stated that "to decide here that we really meant issue preclusion even though we said res judicata in *Engle* would effectively make the Phase I findings regarding the Engle defendants' conduct useless in individual actions." *Id.* at 433.

***

In this appeal, R.J. Reynolds challenges the decision of the district court in *Waggoner* and appeals the jury verdicts in favor of two plaintiffs, Alvin Walker and George Duke III. Walker filed an amended complaint in federal court for the death of his father, Albert Walker, and Duke filed an amended complaint in federal court for the death of his mother, Sarah Duke. Walker and Duke asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. The juries decided those cases after the district court decided *Waggoner*, but before the Supreme Court of Florida decided *Douglas*. In both cases, the district court instructed each jury that, under the decision in *Waggoner*, the jury in Phase I conclusively established the tortious-conduct elements of the plaintiffs' claims. The district court instructed the juries that R.J. Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous" and that R.J. Reynolds "was negligent." The only issues for those juries to resolve were whether the decedents were members of the *Engle* class, causation, and damages. The juries in both cases returned split verdicts. The jury found in favor of Walker on the claims of strict liability and negligence, allocated 10 percent of the fault to R.J. Reynolds and 90 percent of the fault to Walker, and entered a judgment of $27,500. The jury found in favor of Duke only on the claim of strict liability, allocated 25 percent of the fault to R.J. Reynolds and 75 percent of the fault to Duke, and entered a judgment of $7,676.25. ***

III. DISCUSSION

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to "give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered." *Kahn v. Smith Barney Shearson Inc.,* 115 F.3d 930, 933 (11th Cir. 1997)***. But the Act, like all statutes, is "subject to the requirements of ... the Due Process Clause." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). And the law of preclusion is also "subject to due process limitations." See *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes[,] ... extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). These principles require that we give full faith and credit to the decision in

Engle, as interpreted in *Douglas*, so long as it "satisf[ies] the minimum procedural requirements" of due process. ***

Our inquiry is a narrow one: whether giving full faith and credit to the decision in *Engle*, as interpreted in *Douglas*, would arbitrarily deprive R.J. Reynolds of its property without due process of law. *** R.J. Reynolds argues that we should conduct a searching review of the *Engle* class action and apply what amounts to de nova review of the analysis of Florida law in *Douglas*, but we lack the power to do so. Our task is not to decide whether the decision in *Douglas* was correct as a matter of Florida law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). And we cannot refuse to give full faith and credit to the decision in *Engle* because we disagree with the decision in *Douglas* about what the jury in Phase I decided. See *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927) ("It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.").

The decision of the Supreme Court of Florida to give preclusive effect to the approved findings from Phase I did not arbitrarily deprive R.J. Reynolds of property without due process of law. The Supreme Court of Florida looked through the jury verdict entered in Phase I to determine what issues the jury decided. Based on its review of the class action trial plan and the jury instructions, the court concluded that the jury had been presented with arguments that the tobacco companies acted wrongfully toward all the plaintiffs and that all cigarettes that contain nicotine are addictive and produce dependence. *Douglas*, 110 So.3d at 423. Although the proof submitted to the jury included both general and brand-specific defects, the court concluded that the jury was asked only to "determine 'all common liability issues' for the class," not brand specific defects. *Id.* The Supreme Court of Florida was entitled to look beyond the jury verdict to determine what issues the jury decided. See *Fayerweather*, 195 U.S. at 308, 25 S.Ct. at 68 (explaining that courts may look beyond a general verdict to the "entire record of the case" to determine what issues were decided in a prior litigation) ***.

We sanctioned a similar inquiry in *Brown*, where we stated that, although the jury verdict in Phase I was ambiguous on its face, members of the *Engle* class should be allowed an opportunity to establish that the jury in Phase I actually decided particular issues in their favor. *Brown*, 611 F.3d at 1335. We ordinarily presume that a jury followed its instructions, *see* United *States v. Stone*, 9 F.3d 934, 940 (11th Cir. 1993), and the Supreme Court of Florida did not act arbitrarily when it applied this presumption and concluded that the jury found only issues of common liability.

The decision of the Supreme Court of Florida in *Douglas* is consistent with its earlier decision in *Engle*. In *Engle*, the Supreme Court of Florida explained that the approved findings from Phase I "will have res judicata effect" in the later individual cases. *Engl*e, 945 So.2d at 1269. But the court did not approve all of the findings from Phase I. Instead, the court stated that the findings of the jury in Phase I about fraud and intentional infliction of emotional distress cannot have preclusive effect because "the non-specific findings in favor of the plaintiffs" on those questions were

"inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." *Id* at 1255. That the court in *Engle* denied preclusive effect to those findings on the ground that they were not specific enough suggests that the court determined that the jury findings about the other claims were specific enough to apply in favor of every class plaintiff. ***

R.J. Reynolds had a full and fair opportunity to litigate the issues of common liability in Phase I. *** R.J. Reynolds had an opportunity to contest its liability and challenge the verdict form that the trial court submitted to the jury. After the trial court declined to adopt the jury verdict form proposed by the tobacco companies and the jury decided against the tobacco companies on the issues of common liability, R.J. Reynolds challenged those decisions before the Supreme Court of Florida, but that court rejected its arguments. See *Engle*, 945 So.2d at 1254- 55. And R.J. Reynolds petitioned the Supreme Court of the United States to review the decision of the Supreme Court of Florida, but the Supreme Court of the United States denied its petition. See *R.J Reynolds Tobacco Co. v. Engle,* 552 U.S. 941 (2007) (denying the petition for writ of certiorari).

R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle* class. Although R.J. Reynolds has exhausted its opportunities to contest the common liability findings of the jury in Phase I, it has vigorously contested the remaining elements of the claims, including causation and damages. The modest sums received by the plaintiffs in this appeal--less than $28,000 for Walker and less than $8,000 for Duke--suggest that the juries fairly considered the questions of damages and fault.

R.J. Reynolds argues that "traditional practice provides a touchstone for constitutional analysis" under the Due Process Clause, *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994), and that the decision in *Douglas* extinguishes the protection against arbitrary deprivations of property embodied in the federal common law of issue preclusion, which bars relitigation only of "issues *actually decided* in a prior action." See *Gjellum v. City of Birmingham, Ala.,* 829 F.2d 1056, 1059 (11th Cir. 1987) (emphasis added). R.J. Reynolds fails to identify any court that has ever held that due process requires application of the federal common law of issue preclusion. Nor does R.J. Reynolds identify any other court that has declined to give full faith and credit to a judgment of a state court as later interpreted by the same state court on the ground that the later state court decision was so wrong that it amounted to a violation of due process. R.J. Reynolds argues that the Supreme Court held in *Fayerweather*, 195 U.S. at 299, that parties have a right, under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree. The Supreme Court stated in *Fayerweather* that the Due Process Clause is implicated when a party argues that a court has given preclusive effect to an issue that was not actually decided in a prior litigation. *Id*. But the Supreme Court held that no violation of the Due Process Clause had occurred because the issue had been actually decided in the prior litigation. *Id* at 301, 308. The Supreme Court had no occasion in *Fayerweather* to decide what sorts of applications of issue preclusion would violate due process.

R.J. Reynolds next argues that it is impossible to tell whether the jury determined that it acted wrongfully in connection with some or all of its brands of cigarettes because the plaintiffs presented both general and brand specific theories of liability, but the decision of the Supreme Court of Florida forecloses that argument. Whether a jury actually decided an issue is a question of fact, see *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1068 (Fla. 1995), and the Supreme Court of Florida looked past the ambiguous jury verdict to decide this question of fact.

If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I "go to the defendants underlying conduct which is common to all class members and will not change from case to case" and that "the approved Phase I findings are specific enough" to establish certain elements of the plaintiffs' claims. *Douglas*, 110 So.3d at 428. Labeling the relevant doctrine as claim preclusion instead of issue preclusion may be unorthodox and inconsistent with the federal common law about those doctrines, but the Supreme Court has instructed us that, "[i]n determining what is due process of law, regard must be had to substance, not to form." *Fayerweather*, 195 U.S. at 297 (quotation marks omitted). "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Our deference to the decision in *Douglas* does not violate the constitutional right of R.J. Reynolds to due process of law. Whether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours.

We must give full faith and credit to the decision of the Supreme Court of Florida about how to resolve this latest chapter of the intractable problem of tobacco litigation. For several decades, R.J. Reynolds and the other major companies of the tobacco industry have "remained under the long shadow of litigation, that chronic potential spoiler of their financial well-being." Richard Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* 760 (1996). "The tobacco industry was primed to meet these ever larger challenges as a cost of doing business, and it did not lack for plausible, even persuasive, defenses." *Id.* Courts, after all, long ago recognized the inherent risks of cigarette smoking. See, e.g., *Austin v. State*, 101 Tenn. 563, 48 S.W. 305, 306 (1898) (Cigarettes are "wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only."). And physicians "suspected a link between smoking and illness for centuries." *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 513 (1992). In 1604, King James I wrote "A Counterblaste to Tobacco," that described smoking as "a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lung, and the black stinking fume thereof, nearest resembling the horribly Stygian smoke of the pit that is bottomless." *See* Kluger, *supra*, at 15 (quoting "A Counterblaste to Tobacco"). And popular culture too recognized those risks. *See, e.g.*, Tex Williams, "Smoke! Smoke! Smoke! (That Cigarette)" (Capitol Records 1947) *** So juries often either

discounted or rejected the claims of smokers who sought to hold tobacco companies liable for the well-known harms to their health caused by smoking. But a "wave of suits, brought by resourceful attorneys representing vast claimant pools," Kluger, *supra*, at 760, continued. We cannot say that the procedures, however novel, adopted by the Supreme Court of Florida to manage thousands of these suits under Florida law violated the federal right of R.J. Reynolds to due process of law.

IV. CONCLUSION

We AFFIRM the judgments against R.J. Reynolds and in favor of Walker and Duke.

NOTES AND QUESTIONS

1. The *Engle* state court class action described in the *Walker* federal appellate decision above was the first and only smokers' case that was tried as a class action. Other smokers' cases, brought in federal courts, were denied class certification, or decertified on appeal. *See, e.g. Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (smokers' "addiction as injury" Rule 23(b)(3) opt-out class reversed); *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005) (certification of smokers under Rule 23(b)(1) as a mandatory "limited punishment" punitive damages class vacated). Given the description of smokers' litigation in *Walker*, could other questions with a "common answer" have been certified and tried on a class basis? Although the 1990s wave of tobacco litigation featured both class actions and individual tort suits in numerous federal and state courts, they were never centralized into on MDL. What strategies on the part of plaintiffs or defendants could account for foregoing this mechanism to aggregate smokers' claims?

2. As the *Engle* Florida Supreme Court determined, the year-long class trial was replete with errors and irregularities that compelled reversal of the unprecedented (and since unequaled) $145 billion verdict. Yet the same court salvaged much of the work of that trial through its "pragmatic solution" to decertify the class, while giving the former class members the ability to utilize the approved jury findings in their own follow-on trials. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269-1270 (Fl. 2006) Are there policies other than pragmatism that support this decision? Do you agree or disagree with the *Walker* court's determining that the preclusive application of the class trial jury findings did not violate defendants' due process rights?

3. The *Engle* Florida Supreme Court's decision features a detailed analysis of then-extant federal Rule 23(c)(4)(A), ("issue class") jurisprudence; and adopts the issue class concept in giving preclusive effect to the class trial jury's answers to jury questions involving common conduct and common product characteristics. This preclusive grant was limited to Florida smokers who had been included in the class at trial, to use in their own cases, if such cases were filed as individual suits by a specified deadline. Thousands of such suits, including the *Walker* case, were filed. 945 So. 2d at 1269. The evidence on these findings had consumed a year in the *Engle* trial court. Post-*Engle* smokers' individual trials, being restricted to remaining issues of causation and damages, have taken far

less time. The federal "*Engle* Progeny" trials had time limits; each side got a specified number of hours. The jury's determinations resulting from the lengthy *Engle* trial were thus "compressed into a set of preclusive findings that took less than one minute to recite to the jury." Elizabeth Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 874, n. 114. Are there other benefits, in addition to time savings, from the *Engle* borrowing of Rule 23(c)(4) issue preclusion? Are there disadvantages to plaintiffs, defendants, or both, from this technique?

4. The *Engle* decision decertified the plaintiff class, and then gave its former members the parting gift (or perhaps the consolation prize) of preclusive findings on important issues. Was decertification necessary to do so? Can you see any reasons why class certification could or should have been retained for purposes of follow-on proceedings?

5. The *Engle* class was limited to Florida smokers. Could individual smokers in other states, or another statewide (or nationwide) smokers' class, have applied the *Engle* findings preclusively, to obtain the same time and cost savings as the "*Engle* progeny"? Why or why not?

6. The *Walker* court noted the inconsistency and confusion that can result from the nomenclature of various forms of preclusion. The Florida State courts had labelled the approved jury findings as "claim preclusion" or "res judicata" rather than the "issue preclusion" terminology of the federal courts. However, as *Walker* concluded, "in determining what is due process of law, regard must be had to substance, not to form… Whether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours." 734 F.3d at 1289 (cleaned up). Do you think this "what's in a name?" approach is a fair or functional one in addressing the various preclusion issues that the cases in this section address?

F. PRECLUSION IN RULE 42 CONSOLIDATED PROCEEDINGS

We have seen examples of preclusion working within a class action; used by class members after a class is decertified; and the extent to which opt-outs can escape a class action's preclusive effects. But class actions are not the only aggregative format within which preclusion can operate. The following *Bendectin* opinion analyzes the due process challenges raised to a binding Rule 42 consolidated trial that utilized a then-novel multi-phase trial structure. This consolidated trial was conducted by the MDL transferee court between hundreds of plaintiffs who agreed to join and be bound by the trial, and the drug manufacturer defendant. This "trifurcated" Rule 42 trial was commenced after a class action settlement, rejected on appeal, had failed to resolve the MDL proceedings. Plaintiffs then voluntarily joined the Rule 42 consolidated jury trial, lost during Phase I of the trial, and this appeal followed:

IN RE BENDECTIN LITIGATION. v. MERRELL DOW PHARMACEUTICALS, INC.

857 F.2d 290

United States Court of Appeals, Sixth Circuit. 1988

ENGEL, CHIEF JUDGE.

These actions were brought on behalf of children with birth defects against Merrell Dow Pharmaceuticals, Inc., alleging that their birth defects were caused by their mothers' ingestion during pregnancy of defendant's anti-nausea drug Bendectin. Immediately involved are eleven hundred eighty claims in approximately eight hundred forty-four multidistrict cases. These cases represent only a part of the Bendectin cases which have been brought in numerous federal and state courts around the nation. Although there are some differences among the complaints, most are virtually identical, requesting relief on the grounds of negligence, breach of warranty, strict liability, fraud, and gross negligence, and asserting a rebuttable presumption of negligence per se for defendant's alleged violation of the misbranding provisions of the federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq*.

After twenty-two days of trial on the sole question of causation, the jury answered the following interrogatory in the negative: "Have the plaintiffs established by a preponderance of the evidence that ingestion of Bendectin at therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects?" Had the jury answered this question in the affirmative, it then would have answered a second question concerning the particular categories of birth defects that Bendectin caused when administered at therapeutic doses. *** Accordingly, the district judge entered judgment for defendant.

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The court designated a five-member Plaintiffs' Lead Counsel Committee to act as the counsel for all plaintiffs. After the completion of discovery, on November 16, 1983, the district court consolidated under Rule 42(a) of the Federal Rules of Civil Procedure all Bendectin cases originally filed in the Southern District of Ohio or transferred in MDL 486 from the Northern District of Ohio and set those cases for trial beginning June 4, 1984 on all common issues of liability. The original decision was to bifurcate the trial, and if the plaintiffs were successful in obtaining a verdict finding liability, the court would schedule individual damages trials. While consolidation for trial was mandated for all cases pending in federal court in Ohio, the trial judge also permitted consolidation upon the liability issues for any case which had been transferred to the Southern District of Ohio under MDL 486. 28 U.S.C. § 1404. Those cases would be returned to the originating district if the verdict in the first portion of the bifurcated trial was for the plaintiffs. The district judge indicated that under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), all claims which had been originally brought or removed to federal court in Ohio would necessarily be governed by Ohio law, and that plaintiffs who had originally filed in other districts and who voluntarily chose to participate in the common issues trial would consent to application of the law of Ohio by so agreeing to participate. A number of plaintiffs chose to leave the consolidated proceedings after the completion of discovery and this order, and the district court accordingly returned those suits to the district in which they had been originally filed.

In this order, the judge continued to allow additional plaintiffs to "opt in" to the trial, whether they had filed originally in the Southern District of Ohio or had filed in other districts and wished to have their cases

transferred pursuant to 28 U.S.C. § 1404, so that by the date opt-ins were barred on March 1, 1985, 557 cases originating in the Southern District of Ohio and 261 transferred cases were subject to the jury decision. *** One set of plaintiffs who opted in after the district court ordered a bifurcated trial on the issues of liability and damages were the *Davis* plaintiffs, who had originally filed in Arizona federal court, and who opted into the joint liability trial on February 1, 1984.

The district court asked counsel to stipulate as to all common issues of liability that could be tried during the first phase of the trial. Defendant suggested a trial only on the issue of whether Bendectin was an unreasonably dangerous product imposing upon Merrell Dow a duty to warn about such dangers. It argued that substantive law differences among the various jurisdictions represented by plaintiffs prevented consolidation as to any other issue, regardless of whether the cases had been originally filed in Ohio or had been subsequently transferred there. The plaintiffs requested a trial of all common interrelated issues of law and fact, including whether Bendectin increased the risk of birth defects in the children of pregnant mothers who ingested the drug. They also indicated that the liability issues were inextricably interwoven and needed to be tried together with causation. Because the parties could not agree which issues should be tried during the first phase of trial, the court itself decided that the common issues to be tried beginning on June 11, 1984, would be whether: (1) taken as prescribed, Bendectin caused any of a list of birth defects; (2) Bendectin was unreasonably dangerous as defined by Ohio courts; and (3) Merrell Dow provided to the medical profession adequate warnings of the danger of the product. On April 12, 1984, the district court amended this order. Rather than bifurcating the trial on issues of liability and damages, the court instead decided to trifurcate the case, or bifurcate the liability question into liability and causation. Initially, a jury determination would be made on the causation question. If plaintiffs prevailed on the causation question, the jury would then consider the other liability questions. Conversely, if defendant received a favorable verdict on the causation issue, the trial would cease. Because the case would now be trifurcated rather than bifurcated, the district judge allowed any plaintiffs whose cases had been brought originally in courts outside Ohio to rescind their agreement to participate in the trial, provided that they notify the court of their decision by May 1, 1984.

After a jury had been selected for the June 1984 trial, settlement negotiations between the parties reached a successful conclusion. The district judge certified a class for purposes of settlement. However, on appeal, another panel of this court held that class certification was inappropriate and issued a writ of mandamus vacating the district court's order. *In re Bendectin Product Liability Litigation,* 749 F.2d 300 (6th Cir. 1984).

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The trifurcated trial commenced in February, 1985. Fearing undue prejudice to defendant, the trial judge, without actually viewing any plaintiffs, granted defendant's motion *in limine* to exclude all visibly deformed plaintiffs as well as all plaintiffs below the age of ten, whether or not they displayed birth defects. In another room in the courthouse, the

court provided video arrangements to enable any excluded plaintiff to view the course of trial, as well as communications equipment so that plaintiffs could assist counsel. Further, the jurors and the deformed plaintiffs used different elevator banks so as to preclude the possibility of even accidental contact. Following trial, judgment was entered for defendant upon the jury's negative answer to the question whether plaintiffs had proven that ingestion of Bendectin proximately causes birth defects.

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I. TRIFURCATION

The plaintiffs challenge the district judge's decision to trifurcate this case by trying only the issue of proximate causation. They maintain that trifurcation violates their due process rights and Seventh Amendment right to trial by jury, and thus renders the decision an abuse of discretion.
***

Plaintiffs raise many different arguments to support their claim that the district court judge abused his discretion in ordering trifurcation. First, they maintain that under the law of proximate causation as applied in this case, causation is not an issue capable of separation from issues of defendant's fraud, wrongful conduct, or negligence. Second, they object to the ruling because: the court's trifurcation decision came as a surprise and only *after* discovery had been completed; a different jury would have heard later stages of trial; proximate cause was a particularly difficult and improper issue to be independently decided by a lay jury; and trifurcation resulted in a sterile trial removed from plaintiffs' actual injuries. Third and finally, plaintiffs assert that the trifurcation ruling resulted in the exclusion of evidence that was vital to the determination of the single, causation issue.

Of all the issues on appeal, the validity of the trifurcation ruling has been most troubling to us. We reiterate that the standard of review is abuse of discretion. "[T]he district court ha[s] broad discretion to order separate trials; the exercise of that discretion will be set aside only if clearly abused." *United States v. 1071.08 Acres of Land,* 564 F.2d 1350, 1352 (9th Cir. 1977).

The standards for separating issues is set forth in the language of Fed. R. Civ. P. 42(b):

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

"The Advisory Committee Note to the 1966 amendment, though cryptic, suggests that ... the changes in Rule 42 were intended to give rather delphic encouragement to trial of liability issues separately from those of damages, while warning against routine bifurcation of the ordinary negligence case." 9 C. Wright, A. Miller & F. Elliott, *Federal*

Practice & Procedure, § 2388 at 280 (1971 & Supp. 1987). It cannot seriously be argued that this is a routine case.

The principal purpose of the rule is to enable the trial judge to dispose of a case in a way that both advances judicial efficiency and is fair to the parties.

> The provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties. The piecemeal trial of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

Id. at 279 (footnotes omitted). Neither Rule 42(b) nor the textual elaboration cited gives any precise guidelines for the trial judge in considering the propriety of ordering separate trials, probably because of the wide variety of circumstances in which it might come into play. Consequently, courts have adopted a case-by-case approach. "Essentially, the question is one that seems to depend on the facts of each case, a matter to be determined by the trial judge exercising a sound discretion." *Southern Ry. Co. v. Tennessee Valley Authority,* 294 F.2d 491, 494 (5th Cir. 1961). "In deciding whether one trial or separate trials will best serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay, the major consideration is directed toward the choice most likely to result in a just final disposition of the litigation." *In re Innotron Diagnostics,* 800 F.2d 1077, 1084 (Fed. Cir. 1986) (citation omitted). Courts, including our own, have measured trial court decisions to try issues separately by whether fairness was advanced in the particular case:

> We add the caveat expressed in *Frasier v. Twentieth Century–Fox Film Corp.,* 119 F. Supp. 495, 497 (D.Neb. 1954) that separation of issues "should be resorted to only in the exercise of informed discretion and in case and at a juncture which move the court to conclude that such action will really further convenience or avoid prejudice" and observe further that "[a] paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto." *Baker v. Waterman S.S. Corp.* 11 F.R.D. 440, 441 (S.D.N.Y. 1951).

Moss v. Associated Transport Inc., 344 F.2d 23, 26 (6th Cir. 1965).

In our case this same test applies to whether the decision is to try only one or more than one issue separately. Our opinion in *In re Beverly Hills Five Litigation,* 695 F.2d 207 (6th Cir. 1982), approving trifurcation on the causation question, did not indicate any different standard of review than that applicable to bifurcation nor has our research led us to authority suggesting such a distinction. While few cases appear to have been trifurcated on the issue of causation, there are nonetheless numerous cases that have tried an individual issue separately under circumstances that, had the issue been decided in favor of the plaintiff, the trial would have had more than two phases to it.

***

Of course, the subject for review is not the abstract question of trifurcation generally, but the appropriateness of trifurcation in the context of the litigation at hand. It is to the specific facts of this case that we must apply the 42(b) standards for separating issues.

A. PROXIMATE CAUSATION AS A SEPARABLE ISSUE

Fundamental to plaintiffs' challenge of the trifurcation decision is their argument that the causation question in this case was not an issue which could be tried separately. In support of their claim, plaintiffs rely heavily on *Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494, 500 (1931). There, the Court held that "[w]here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." The Court noted that the issue in that case could not be submitted independently of the others without creating jury confusion and uncertainty that would "amount to a denial of a fair trial." *Id.* Many courts consider the issue's ability to be tried separately, and without injustice, to be the standard for determining whether the Seventh Amendment has been violated by conducting a trial only on that one issue. Thus, they apply the *Gasoline Products* standard to initial determinations whether a district judge properly ordered a separate trial in the first instance. *Franchi Construction Co. v. Combined Insurance Co. of America,* 580 F.2d 1, 7 (1st Cir. 1978). *** We affirm the appropriateness of the *Gasoline Products* standard to the context of Rule 42(b).

Under this standard, many courts have upheld cases bifurcated between liability and damages because the evidence pertinent to the two issues is wholly unrelated, and as a logical matter, liability must be resolved before the question of damages. *See* C. Wright, A. Miller & F. Elliott, *supra,* § 2390 at 296–97. By the same token, courts have refused to permit even bifurcation of liability and damages where these issues could not be tried separately. In *C.W. Regan, Inc. v. Parsons,* 411 F.2d 1379, 1388 (4th Cir. 1969), the court disapproved bifurcation because under the law of Virginia, liability and damages could not be divided when the separate and unconnected actions of several people may have produced the total damage.

In the present case, plaintiffs argue that the *Gasoline Products* standard is violated because under the current standards and presumptions set forth in Ohio law, the issue of causation cannot be separated from the issue of defendant's tortious conduct. In their assertion of the nonseparability of these two issues, plaintiffs cite various tort theories that shift the burden of proof to defendants before causation has been proven more probable than not or weaken plaintiffs' burden of proof with regard to causation.

[The court rejected the plaintiffs' arguments that these theories would lessen their burden to prove that Bendectin was capable of causing birth defects.]

***

B. TRIFURCATION AS A POTENTIAL SOURCE OF UNFAIR PREJUDICE

Plaintiffs also argue that the decision to trifurcate the trial was an abuse of discretion because the ruling unfairly prejudiced presentation of their case in a variety of ways. First, one of the plaintiffs' attorneys alleges that the decision to trifurcate was rendered after discovery had been completed and allowed him only two months to reorganize depositions and videotape testimony for a trial limited to the issue of proximate causation. Factually, this claim is inaccurate. Plaintiffs actually had ten months to revise the videotape depositions. The trial was postponed from June 1984, two months after the decision to trifurcate, to February 1985 because of the settlement negotiations. Plaintiffs argue that not all of this additional eight months could be used to reorganize the materials for trial, due to the settlement negotiations. While settlement discussions often dull the edge of advocacy, they do not provide a legal excuse for failure to continue preparations for trial. Had counsel for plaintiffs genuinely feared prejudice, they could have made a request to reopen discovery. While they claim on appeal that they did make such a request, the record does not support it.

***

Plaintiffs' primary argument against trifurcation as unfairly prejudicial is that trying the question alone prejudiced plaintiffs by creating a sterile trial atmosphere. In *Beverly Hills,* we addressed similar concerns that trifurcation could possibly prevent the plaintiffs from exercising their right to present to the jury the full atmosphere of their cause of action, including the reality of injury:

> A strong argument can, it is true, be made against the bifurcation of a trial limited to the issue of causation. There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury. In a litigation of lesser complexity, such considerations might well have prompted the trial judge to reject such a procedure. Here, however, it is only necessary for us to observe that the occurrence of the fire itself, a major disaster in Kentucky history by all standards, was generally known to the jurors from the outset. Further, the proofs themselves, although limited, were nonetheless fully adequate to apprise the jury of the general circumstances of the tragedy and the environment in which the fire arose. As a result, we hold that the trial judge did not abuse his discretion in severing the issue of causation here.

Beverly Hills, 695 F.2d at 217. Judge Rubin considered this language when he denied the plaintiffs' motion for a new trial. On appeal plaintiffs also rely heavily on the same language. Sterility is not necessarily the inevitable consequence in a trifurcated trial merely because the jury may not hear the full evidence of defendant's alleged wrongdoing. It more properly refers to the potential danger that the jury may decide the causation question without appreciating the scope of the injury that

defendant supposedly caused and without the realization that their duties involve the resolution of an important, lively and human controversy. It is with respect to this latter concern that the plaintiffs urge that they were unfairly prejudiced by the trifurcation. The record reveals that the district judge consciously worked to avoid the potential for unfair prejudice. For example, he instructed the jury:

> Let me suggest to you that what you are about to do may be one of the most important things you will ever do in your entire entire [sic] life. This is a significant case. It involves a lot of people. It involves not only the plaintiffs who are individuals, it involves people, scientists, people who have done experiments, people who are employees of the defendant company. The totality of this case involves people and while you will hear technical evidence, I do point out to you that at all times, you should keep in mind that on both sides, there are people involved.

The court was not alone in efforts to avoid the dangers of sterility. In his final argument, plaintiffs' attorney Eaton told the jury that the trial was not an academic exercise, and that the case involved many real people who sought justice, and who would, as children, be affected by the jury's verdict well into the next century.

Finally, plaintiffs argue that Judge Rubin failed to consider the caveats of Rule 42(b) in his trifurcation decision, and instead justified trifurcation only upon unsubstantiated claims of judicial efficiency, thus unduly prejudicing plaintiffs' case without good reason. We believe, however, that the district judge carefully made the necessary inquiry. In his final order the trial judge noted that Bendectin litigation could "substantially immobiliz[e] the entire Federal Judiciary. There have been only four cases involving Bendectin which have been individually tried. They required an average of 38 trial days." *In re Bendectin,* 624 F.Supp. at 1221. Judge Rubin calculated that if all 1100 cases were tried at that average length on an individual basis, they would be able to keep 182 judges occupied for one year. *Id.* at n. 6. Contrary to the plaintiffs' claims that Judge Rubin never considered the language of Rule 42(b), he did correctly require plaintiffs to prove that the defendant's drug caused their injury, and would not allow plaintiffs to buttress a weak causation case with a strong negligence case. Thus, in line with the language of Rule 42(b), the trial judge considered the causation question to be a separate issue.

In reviewing the district court's decision to trifurcate we further note Rule 42 which "giv[es] the court virtually unlimited freedom to try the issues in whatever way trial convenience requires." C. Wright, A. Miller & F. Elliott, *supra,* § 2387 at 278. Thus, a court may try an issue separately if "in the exercise of reasonable discretion [it] thinks that course would save trial time or effort or make the trial of other issues unnecessary." *Richmond v. Weiner,* 353 F.2d 41, 44 (9th Cir. 1965). In this case, the district judge considered the time savings in trying this case in this fashion, and surmised that if the plaintiffs won on this issue, another eight weeks of trial would be necessary to resolve the other questions.

Many courts have in fact permitted separate issue trials when the issue first tried would be dispositive of the litigation. The courts do so

because the efficiency of the trial proceedings is greatly enhanced when a small part of the case can be tried separately and resolve the case completely. For example, in *Yung v. Raymark,* 789 F.2d at 401, we recently approved the separate trial of the issue of statute of limitations because if that issue were resolved to bar recovery, the court would be spared the necessity of trying liability and damages. "Whether resolution of a single issue would likely dispose of an entire claim is extremely relevant in determining the usefulness of a separate trial on the issue.... This procedure should be encouraged because court time and litigation expenses are minimized." *Id.* (citation omitted). The defendant relies heavily on language like this. As the defense correctly observed: "[T]he plaintiffs can never win a case if they can't prove the drug caused the problem. That is the central issue in this case." And later, "[a]ll claims depended upon the answer to a single question. Does Bendectin, taken in therapeutic doses cause birth defects?" Plainly, Judge Rubin had a massive case management problem to resolve, and chose to do so by trying the case on a separate issue that would be dispositive.

***

Plaintiffs also assert on appeal that they were unable to argue that there was a genetic susceptibility to Bendectin that varied among individuals, and that the jury should have been so instructed. The plaintiffs were not precluded from arguing that there was an individual susceptibility to Bendectin, but all their witnesses testified only that there were individual genetic susceptibilities to drugs in general. No one testified that there was such a susceptibility to Bendectin. Judge Rubin therefore correctly advised counsel that if the plaintiffs argued to the jury that there was such an individual susceptibility to Bendectin, he would have to instruct the jury that there was no evidence to that effect.

Probably the plaintiffs' most serious charge is that the trifurcation format prevented them from challenging the validity of various studies that the defendant relied on in support of its position that Bendectin did not cause birth defects. For example, at oral argument plaintiffs' counsel represented that while plaintiffs could attack part of the Bunde–Bowles study defendant had used to justify the safety of Bendectin, most of the study could not be criticized because of limitations placed upon counsel by the court. Also, co-counsel alleged at oral argument that when the defendants relied on a particular study, the plaintiffs tried to cross-examine these studies' methodology and biases, but the district judge prevented this line of inquiry because of the trial's limitation to causation. These assertions would be potentially serious except that they are not supported by the record.

For example, the plaintiffs complain that they could not show criminal conduct and fraud in the preparation of the Bunde–Bowles study. It is true that the district judge would not allow testimony going to the fraudulent preparation of this study, but he did not preclude proof affecting the accuracy of test results indicating that Bendectin did not cause birth defects. Although a fraudulent motive might be more dispositive of the value of a study, it is also in most cases a prejudicial and inaccurate gauge of how incomplete a scientific study actually is. Instead the most effective

way to discredit these studies is through a critique of their technical flaws, as was done here.

Similarly, plaintiffs challenge the inadmissibility of a portion of a letter prepared by one of the testers in Merrell's 1970's study, the Smithells study. Specifically, the plaintiffs wanted to introduce a letter written by Smithells to Merrell Dow that mentioned his hope that publication of his study would save the defendant large sums of money defending California litigation. The district judge refused to admit this letter. He said that this went to classical bias of the person conducting the study, and not scientific bias that would go to whether the study was actually accurate. As long as the methodology was correct, the fact that somebody might have intended to use the results in a particular way would be of no consequence. Additionally, the trial judge held that any reference to this sort of bias could create the potential for undue prejudice to defendant. We see this narrow ruling as merely a careful balancing of the factors of relevancy and prejudice under Fed. R. Evid. 403.

***

To summarize, the three considerations we apply in reviewing a decision to try an issue separately are (1) whether the issue was indeed a separate issue, (2) whether it could be tried separately without injustice or prejudice, and (3) whether the separate trial would be conducive to judicial economy, especially if a decision regarding that question would be dispositive of the case and would obviate the necessity of trying any other issues. We hold that since the initial trial on the proximate causation issue was a separate issue, promoted efficiency, and did not unduly prejudice plaintiffs, trifurcating this case on the separate issue of proximate causation was proper. We need not decide whether this was the best or even the only good method of trying this case. We need only determine whether, under all of the circumstances before him, the trial judge's decision to trifurcate was an abuse of discretion.

While Ohio tort law does govern all suits originally filed in Ohio state courts or in federal courts located in Ohio, under our previous conflict of laws analysis, it is not clear that Ohio tort law would apply to those claims filed initially in other states or federal courts outside of Ohio, which were subsequently transferred to Ohio. Based on the cases cited by plaintiffs and a thorough search of the literature on causation however, we are not persuaded that the law in any American jurisdiction would preclude separation of the issues of causation and culpability in such complex cases as the present one. Therefore, we conclude that the district judge did not abuse his discretion in determining to try causation as a separate issue as to all plaintiffs over which that court had jurisdiction.

CONCLUSION

In reviewing the record and in making the determination as to the extent to which the decisions of the district court should be upheld or reversed, it is helpful to the perspective to realize, as we observed earlier, that the jury verdict following trial here might have been for the plaintiffs instead of for the defendant. Thus, where judicial discretion is to be reviewed, it must be from the perspective of a trial judge faced with many difficult choices and without the benefit of hindsight. Likewise, where there

have been issues which are purely legal in nature, their resolution requires an objective adherence to sound legal and constitutional principles. In a trial of this length and complexity, it is virtually certain that at specific points of the trial one or all of us might have ruled differently on a certain procedure or on the admissibility or inadmissibility of a certain piece of evidence. It is with this realization in mind that we defer in large part to the wisdom and discretion of the trial judge who is provided with a superior vantage point from which he is able to exercise this discretion in organizing the course of trial in a meaningful and practical way. In upholding the result here to the extent we have, it is at least deserving of note that a careful examination of the trial record itself reveals the management of the trial by a judge who does not appear at any time throughout to have sought consciously or unconsciously to have unfairly tipped the scales in favor of one side or the other, but who instead in his rulings appeared to be genuinely concerned with producing a trial that was as fair and free from error as human endeavor could make it. While we must always be conscious of the potential danger of making the trial a sterile exercise of scientific investigation by limiting issues and evidence too narrowly, it is quite evident, through several thousand pages of testimony, that the jury was presented with and bound to appreciate the seriousness of a very real issue of great importance to the parties at suit. In fact, to have broadened the issues beyond that of causation would have occasioned a real risk of overencumbering the jurors and impairing their ability to reach a knowledgeable and intelligent verdict based upon the evidence and upon the law applicable under the appropriate instructions. The result of these proceedings, and of our decision here, will of course mean that for some parties the litigation is concluded, but that for others it may be resumed and continued elsewhere. The reasons for this we have already set forth at length in this opinion and to those we can only observe that such would have been the case in any event had efforts at joinder and then trifurcation not been attempted. This litigation has been substantially advanced by the efforts of the district judge and, we hope, by this decision. We can expect no more at this juncture.

That portion of the district court's order dated August 27, 1985 which remands all cases brought by Ohio citizens originally in state courts is not disturbed. The remainder of that order, which dismisses without prejudice Ohio citizens who brought suit in federal court, is vacated and those cases are remanded to the district court with instructions to enter judgment on the merits and in favor of the defendant. Finally, those thirteen cases brought by Ohio citizens in federal court over which it is conceded there is no federal jurisdiction shall be dismissed without prejudice.

The judgment of the district court is otherwise AFFIRMED.

Notes and Questions

1. The *Bendectin* panel was a divided one. In his decision concurring in part and dissenting in part, Judge Nathanial R. Jones expressed skepticism over the "trifurcation" trial structure affirmed by the majority, noting:

> [T]rifurcation orders present fundamental problems of fairness simply because the typical procedure in litigation does not involve

> the splitting up of a case, element by element, and trying each point to the jury separately. Rather, the plaintiff's entire case is presented to the jury at once, thereby preventing the isolation of issues in a sterile atmosphere. Simply because a litigant shares his complaint with eight hundred other claimants is not a reason to deprive him of the day in court he would have enjoyed had he been the sole plaintiff. However, as the majority points out, a trifurcation order is authorized and *necessitated* at some point so as to allow a district court to manage and control the complexities and massive size of a case. The duty of this court, however, is to prevent such a case-management tool from becoming a penalty to injured plaintiffs seeking relief via the legal system.

857 F.2d at 328.

2. In *Walker*, the defendant claimed its due process rights had been violated by the application of the state court *Engle* findings from the *Engle* phase I trial to the subsequent federal smoker trials on the remaining issues. In *Bendectin*, the shoe was on the other foot: the joined plaintiffs claimed due process violations (and multiple trial errors) when they lost at the initial general causation phase of the "trifurcated" trial. Do you agree with the appellate court in *Walker*? Does it make a difference to your due process analysis that the *Bendectin* plaintiffs and defendants were both voluntary participants in the same trial?

3. *Bendectin* is an early example of the innovative use of Rule 42 consolidation in MDL proceedings. Although the *Manual for Complex Litigation*, § 22.93, continues to recommend such consolidated "common question" trials as a fair and cost-effective means to attain finality in multi-party litigations, it has been rarely used since *Bendectin*. Instead, the use of non-binding "bellwether" trials has become almost routine in MDLs. Why? Do you think this reluctance can be overcome by differences in the design of consolidated trials? Should they become, in effect, non-preclusive group bellwether trials? Can and should courts notify the parties that some or all bellwether trials will be presumptively preclusive, as to certain common claims or issues?

E. ISSUE PRECLUSION AND "LAW OF THE CASE" IN MULTIDISTRICT LITIGATION

HOME DEPOT USA, INC. v. LAFARGE NORTH AMERICA, INC.

59 F.4th 55
United States Court of Appeals, Third Circuit 2023

SCIRICA, CIRCUIT JUDGE

In this interlocutory appeal, we are asked to decide how the doctrines of law of the case and issue preclusion apply to a particular dispute in this multidistrict litigation proceeding (MDL). Our answer is that those doctrines generally apply to each case in this MDL in the same way as they apply to cases outside of it. Because the District Court's decision was not consistent with that principle, we will vacate and remand.

This case involves allegations of a conspiracy to fix prices in the drywall, industry. The District Court relied on issue preclusion and law of the case to exclude substantial portions of the testimony of Plaintiff Home Depot's expert, Dr. Robert Kneuper. As part of Home Depot's case against Defendant Lafarge, Dr. Kneuper opined that the conduct of several firms in the drywall industry, including Lafarge, was consistent with illegal price fixing. The same conduct was at issue in a class action brought by direct purchasers of drywall as part of an MDL before the same court. Home Depot's later-filed case was consolidated with this MDL over its objection.

The Court found that large portions of Dr. Kneuper's testimony were "fundamentally improper" because they were "contrary to fundamental events" that had occurred in the MDL before Home Depot filed its case. *Home Depot U.S.A., Inc. v. Lafarge N. Am. Inc.*, No. 2:18-cv5305, 2021 WL 3728912, at *15 (E.D. Pa. Aug. 20, 2021). Specifically, the Court faulted Dr. Kneuper for failing to conform his testimony to three such "events": (1) the Court's prior grant of summary judgment to one of the alleged conspirators, CertainTeed, (2) the fact that another supplier, Georgia-Pacific, had not previously been sued, and (3) the fact that alleged conspirator USG settled very early in the class action case. ***

The District Court said that Home Depot was "bound by the[se] underlying events" under the doctrines of issue preclusion and law of the case. *** We believe that was error. Issue preclusion applies only to matters which were actually litigated and decided between the parties or their privies. But Home Depot was not a party (or privy) to any of the relevant events, and two of the three events to which it was "bound" were not judicial decisions. Similarly, the law of the case doctrine applies only to prior decisions made in the same case. But Home Depot's case is not the same as the one in which the decisions were made, and as noted two of the three events were not decisions. On the facts here, the application of these doctrines was improper. We will vacate the District Court's decision and remand for reconsideration.

I

This case arises out of the decade-old domestic drywall MDL. In 2012 and 2013, direct purchasers of drywall—not including Home Depot—sued multiple drywall suppliers for conspiring to fix prices. *** Those cases were centralized in an MDL before Judge Baylson in the Eastern District of Pennsylvania. *** In June 2013, the purchasers filed a consolidated class complaint against the drywall supplier defendants. *** Home Depot was a member of that putative class but was not a named plaintiff. Named as defendants were seven of the industry's leading firms: USG, TIN, CertainTeed, Lafarge, National, American, and PABCO. *** Another supplier, Georgia-Pacific, was not sued.

Before any class-certification or dispositive motions were filed, Plaintiffs reached a settlement with defendants USG and TIN. The terms of the settlement preserved participating class members' rights to sue non-settling defendants. In 2015, the District Court preliminarily certified two settlement classes. Home Depot did not opt out. Following final approval of the USG and TIN settlements in August 2015, the Court granted summary judgment to defendant CertainTeed. *** The Court denied

summary judgment as to the remaining defendants: American, National, Lafarge, and PABCO. ***

In 2016, the named plaintiffs settled with Lafarge. The Court certified a new settlement class, but Home Depot opted out. A final judgment followed, to which Home Depot was not bound.

The class action then continued against the three remaining defendants—National, American, and PABCO. In August 2017, the Court certified a litigation class of drywall direct purchasers. *** Before notice could be given to the class, however, the three remaining defendants agreed to settle. The Court certified a new settlement class with terms similar to the USG/TIN settlement—i.e., one which preserved the right of class members to pursue claims against alleged co-conspirators other than the settling defendants. This time, Home Depot elected to remain in the settlement class. The Court entered final judgment on July 17, 2018, ending the class action.

In June 2018, Home Depot, acting alone, sued Lafarge in the Northern District of Georgia. Home Depot never bought drywall from Lafarge, but argued that antitrust law made Lafarge liable for the overcharges Home Depot paid its own suppliers. The Judicial Panel on Multidistrict Litigation transferred the suit to Judge Baylson over Home Depot's objection.

At the close of discovery, Home Depot produced expert reports from Dr. Robert Kneuper in which he opined that the pricing behaviors of Lafarge and other drywall suppliers, including USG, CertainTeed, and Georgia-Pacific, were indicative of a conspiracy to fix prices.

Lafarge then moved to exclude Dr. Kneuper's testimony under Rule 702 of the Federal Rules of Evidence and moved for summary judgment. The Court requested supplemental briefing to address whether the prior MDL proceedings bound Home Depot under the doctrines of issue preclusion or law of the case. In August 2021, the Court struck Dr. Kneuper's report and ordered him to submit a new one. *** In the Court's opinion, it described the "issue presented" as whether Home Depot "can present opinions by an economist that [i]gnore relevant facts and prior decisions in the same case" and that "ignore the benefits Home Depot received as a member of a settlement class." *** The Court struck the expert report for two reasons: first, because Dr. Kneuper's opinions "cross the line from economist to attorney-juror-judge," and second, "because they lack a fundamental acknowledgement of the unique and important procedural history . . . that binds Home Depot as a member of the direct purchaser settlement class, and contradicts [Kneuper's] conclusions." ***

The Court noted that it "must be careful to respect Home Depot's constitutional right to have its own claims, and proceed to a jury trial, against Lafarge." But what it found "most important" was that Home Depot had "conveniently forgotten this case's history." *Id*. The Court refused to "countenance" what it viewed as Home Depot's "strategy" of "ignor[ing] the many rulings that this Court has made over the prior ten years of this litigation."

In particular, the Court found three aspects of Dr. Kneuper's testimony "fundamentally improper." First, the Court thought that "Dr.

Kneuper's conclusions about Georgia-Pacific must be excluded" because "[n]o party has ever litigated against Georgia-Pacific" and "it was not part of the MDL." Second, the Court found that Home Depot "waived any right to make any claim" that CertainTeed's conduct was "consistent with the economics of collusion." This was because Home Depot did not take new discovery from CertainTeed, and because "relying on discovery about CertainTeed would have run contrary to this Court's conclusion that CertainTeed was entitled to summary judgment . . . ." Third, the Court prohibited Dr. Kneuper from expressing opinions about USG. "Because USG . . . settled very early in the class action case," the Court explained, "this Court had no occasion to conclude anything about their role in the alleged conspiracy . . . ."

***

III

A

The District Court "rel[ied] on the law of the case doctrine" in excluding Dr. Kneuper's testimony. *** It held that this doctrine bound Home Depot to the three events already mentioned: the grant of summary judgment to CertainTeed, the lack of summary judgment as to USG, and the fact that Georgia-Pacific was not sued. We will vacate and remand.

The law of the case doctrine "prevents reconsideration of legal issues already decided in earlier stages of a case." *Bedrosian v. IRS*, 42 F.4th 174, 181 (3d Cir. 2022). The doctrine "only applies within the same case," *** and affects only issues that were "expressly" or "necessarily resolved" by prior decisions in the same case ***.

The law of the case doctrine cannot be applied across distinct actions in this multidistrict proceeding. Cases centralized in an MDL "retain their separate identities" unless they choose to proceed on a consolidated "master" complaint. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 & n.3 (2015). "That means a district court's decision whether to grant a motion . . . in an individual case depends on the record in that case and not others." *In re National Prescription Opiate Litig.*, 956 F.3d 838, 845 (6th Cir. 2020).

The law of the case doctrine cannot bind Home Depot to decisions in the direct purchaser class action because Home Depot's case and the class action are different cases. All of the binding "events" in the class action occurred before Home Depot filed this lawsuit on June 11, 2018. The cases proceeded on different complaints. And, as already noted, the different cases brought together in an MDL remain separate. *** The law of the case doctrine thus does not apply here. Therefore, law of the case cannot bind Home Depot to decisions in the prior direct purchaser class action.

Moreover, the doctrine does not apply because "[l]aw of the case only extends to issues that were actually decided in prior proceedings." *Farina*, 625 F.3d at 117 n.21 (citing 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4478, at 649 (2d ed. 2002)). But two of the events relied on by the Court—the absence of a summary judgment ruling as to USG and lack of a suit against Georgia-

Pacific—were not decisions. Not having been "actually decided," law of the case cannot reach these events. *Id.*

The Court appeared to believe that the MDL procedure created an exception to usual law of the case rules. It quoted approvingly from a district court's opinion in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381, 383 (E.D. Pa. 1970), where that court concluded without much analysis that the doctrine could be applied across different cases in the same multidistrict proceeding. Whatever the merits of this opinion in 1970, it is not applicable after *Gelboim*. As discussed above, separate cases brought together for pretrial proceedings "retain their separate identities." *Gelboim*, 574 U.S. at 413. The MDL process "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *In re TMI Litig.*, 193 F.3d 613, 724 (3d Cir. 1999). *** And neither MDL centralization nor any other procedural device can "impose the heavy toll of a diminution of any party's rights." *Bradgate Assocs., Inc. v. Fellows, Read & Assocs.*, 999 F.2d 745, 750 (3d Cir. 1993).

***

B.

The District Court held that issue preclusion "applies to Home Depot in this case" and bars the admission of Dr. Kneuper's testimony. *** Issue preclusion bars a party from relitigating an issue when "the identical issue was decided in a prior adjudication," "there was a final judgment on the merits," "the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication," and "the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question." *In re Bestwall LLC*, 47 F.4th 233, 243 (3d Cir. 2022) *** Each "event" to which the Court purported to bind Home Depot fails these requirements.

We first consider the Court's grant of summary judgment to CertainTeed in February 2016. As noted, preclusion "binds only the parties to a suit, subject to a handful of discrete and limited exceptions." *Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011). Home Depot was not a party in February 2016. At that time, Home Depot's only relationship to the litigation was as an absent member of a putative class. "It is axiomatic that an unnamed class member is not 'a party to the class-action litigation before the class is certified.' " *N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492 (3d Cir. 2019) (quoting *Smith*, 564 U.S. at 313). Nor was Home Depot in privity with any party. *See Taylor v. Sturgell*, 553 U.S. 880, 893-95(2008) (describing the types of privies, including "preceding and succeeding owners of property," members of a certified class, and those who litigate "through a proxy"). *** Home Depot cannot be bound by those doctrines here.

Given that Home Depot was not a party to the summary judgment proceeding, it is unsurprising that it also lacked the "full and fair opportunity to litigate" the issue. *See Taylor*, 553 U.S. at 892-93. As such, preclusion would be contrary to "our deep-rooted historic tradition that everyone should have his own day in court." *Richards v Jefferson Cnty.*, 517 U.S. 793, 798 (1996).

***

The District Court's concern with Home Depot "having taken its money and ignored the [prior] rulings of the Court," *** is understandable. But the necessary effect of making important rulings (like those on summary judgment) before certification is that "the decision will bind only the named parties." *** The district court has broad authority to structure and manage the MDL proceeding to promote efficiency and avoid unfairness. But it does "not have the authority to create special rules" to "bind plaintiffs by the finding of previous proceedings in which they were not parties, even by a proceeding as thorough as the multidistrict common issues trial." *TMI*, 193 F.3d at 726. ***

C

***

On remand, the Court should consider the admissibility of Dr. Kneuper's testimony afresh, unencumbered by reliance on the doctrines of law of the case and issue preclusion. The decision should instead be shaped by the traditional evidentiary principles governing the admissibility of expert testimony—"qualifications, reliability, and fit." *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000). In considering the parties' pending motions for summary judgment, the Court need not blind itself to its prior decisions. But the Court may only apply its prior reasoning after it has allowed Home Depot to put forth new legal theories and to raise new arguments based on newly developed or preexisting evidence. It should also consider Home Depot's arguments that prior rulings in the MDL should not be followed.

IV.

Complex multidistrict cases like this one demand much from transferee courts. The MDL process requires a judge to move hundreds or thousands of cases towards resolution while respecting each litigant's individual rights. Managing an MDL may be "fundamentally . . . no different from managing any other case." U.S. Judicial Panel on Multidistrict Litig. & Fed. Judicial Ctr., Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges 3 (2d ed. 2014). But the complexity of most MDLs makes it harder to safeguard the procedural values which underlie all cases while simultaneously pursuing an efficient resolution on the merits.

MDL judges have risen to this challenge by devising efficient, effective, and fair case management techniques. *** We endorse the considerable authority which is vested in MDL transferee courts to efficiently and fairly manage complex cases.

In this case, the District Court tried to protect one of our legal system's central values—finality. It recognized the "vital interest" in protecting "judicial determinations that were the products of costly litigation and careful deliberation." *Jean Alexander Cosmetics. Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 254-55 (3d Cir. 2006). It accordingly tried to protect "the many rulings that [it] ha[d] made over the prior ten years of this litigation." *Home Depot*, 2021 WL 3728912, at *13. Lafarge similarly appeals to values of "judicial economy," *** and objects to the idea that "MDL courts cannot even consider or refer to their own prior rulings in deciding later motions." ***

On the facts here, we disagree with the trial court's use of the doctrines of law of the case and issue preclusion. But we understand that preserving the finality of past rulings is essential "to secure the peace and repose of society," "for the aid of judicial tribunals would not be invoked for the vindication of rights" if "conclusiveness did not attend" their judgments. *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 42 L.Ed. 355 (1897). And the District Court has called

for appellate guidance on applying these principles in this MDL proceeding. *** As such, we discuss two aspects of finality—judicial economy and fairness to litigants—and identify proper methods of vindicating these values.

A.

The first value at stake is judicial economy. The trial court and Lafarge have both emphasized the importance of ensuring that transferee judges remain able to "maximize" the "judicial economy" that MDLs "were designed" to further. *** An MDL transferee court has a variety of options at its disposal to avoid the needless duplication of work across the cases that make up the proceeding. We detail several possibilities.

First, a court may rely on its prior decisions as persuasive, and demand good reasons to change its mind. Both parties here agree that this procedure is appropriate. ***

A judge may formalize this process through the use of case management orders. This practice is regularly employed in MDLs—a judge may enter an order with respect to one party and then provide that it will be automatically extended to other parties if they do not come forward and show cause why it should not be applicable. *** Order No. 50, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-02543, at 8 (S.D.N.Y. Apr. 24, 2015) (implementing a show-cause procedure for applying rulings made on the basis of consolidated pleadings to non-consolidated actions).

This is a technique that we have approved. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 240-41, 247-49 (3d Cir. 2013) (affirming dismissal of claims for failing to produce diagnostic information as required by a case management order). Just last year, we said:

> In an MDL case, management orders are essential tools in helping the court weed out non-meritorious or factually distinct claims. Accordingly, an MDL court needs to have broad discretion to keep the parts in line by entering Lone Pine orders that drive disposition on the merits. Such orders may impose preliminary discovery requirements, like the production of relevant expert reports, or may require plaintiffs to furnish specific evidence like proof of a medical diagnosis, with the goal of winnowing noncompliant cases from the MDL. That said, efficiency must not be achieved at the expense of preventing meritorious claims from going forward.

Hamer v. LivaNova Deutschland GmbH, 994 F.3d 173, 178 (3d Cir. 2021) (cleaned up).

Even without such an order, parties will be unlikely to relitigate issues on which the judge has already ruled without a compelling reason. "New parties will figure out quickly which efforts to litigate issues already decided by the judge at the urging of others will be futile." Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595, 669 (1987); *see also* Eldon E. Fallon, Jeremy T. Grabill, and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tulane L. Rev. 2323, 2338 & n.73 (2008).

A transferee judge may also make use of consolidated complaints, to simplify the litigation. *** The Manual for Complex Litigation provides an order that a court may easily use to direct the plaintiffs to file such a complaint. Manual for Complex Litigation (Fourth), § 40.21, at 737. *** In the same vein, guidance provided to judges by the Judicial Panel on Multidistrict Litigation and the Federal Judicial Center emphasizes the value of grouping related cases. *See* Catherine R. Borden, Fed. Jud. Ctr., Managing Related Proposed Class Actions in Multidistrict Litigation 3-5 (2018). Plaintiffs may be grouped in any number of ways, including "by the nature of the claims

brought," by "substantive state-law differences," by geography, by the "time of filing," by "which subset of defendants is being sued," or even "whether they have opted out of arbitration or not." *Id.* at 4-5. We commend the creativity of transferee judges in devising these groups and other methods to manage litigation—bounded, of course, by the Federal Rules and the Constitution.

B.

The second value at stake is fairness to litigants. The District Court was concerned by the possibility of late-arriving plaintiffs free-riding on the work of their predecessors. *** In its certification order, the Court noted the "need for additional guidance from appellate courts" on the treatment of "tag-along parties who first opted out of a class as to one defendant, but who later joined the MDL . . . . This is a distinct problem from the one discussed above and calls for different resolutions.

A court may avoid unfairness through the use of appropriate discovery management orders. We do not prescribe any "single, undifferentiated approach," but endorse wide "latitude" for "judicial oversight . . . to manage the availability of discovery obtained in one case for use in another . . . ." Am. L. Inst., Principles of the Law of Aggregate Litigation § 2.07, cmt. g (2010); *see also In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 659 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2009) ("We see no reason why the parties in subsequent actions, subject to the same conditions as those imposed on parties to the MDL, should not be able to avail themselves of the documents and depositions accumulated [in the MDL].").

The judge might also deal with monetary aspects of the problem by assessing common benefit fees. In multidistrict cases, "it is standard practice for courts to compensate attorneys who work for the common benefit of all plaintiffs by setting aside a fixed percentage of settlement proceeds." *** *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 128-30 (2d Cir. 2010) *** (approving this order). We have upheld the use of such fees in situations where an attorney "confer[s] a substantial *** benefit to members of an ascertainable class." *In re Diet Drugs*, 582 F.3d 524, 546 (3d Cir. 2009). The American Law Institute endorses the use of common benefit fees to compensate lawyers for work they do on behalf of others. *See* Principles of the Law of Aggregate Litigation § 2.07, cmt. G (recommending that the use of discovery obtained by class counsel be compensated by "order of the class-action court to sequester a portion of any recovery obtained by the exiting claimant to account for the benefit obtained from the class discovery"). ***

No particular approach will be suitable in every case. We describe these options as examples of alternatives that may be available. A district court charged with the responsibility of achieving this goal across "the multiplicity of actions in an MDL proceeding must have discretion to manage them that is commensurate with the task." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006).

* * *

We VACATE the judgment of the District Court and REMAND for further proceedings consistent with this opinion.

NOTES AND QUESTIONS

1. "Law of the Case," as described in *LaFarge*, seems more normative and less formal then the preclusion afforded to truly formal judgments. It seems designed to provide some degree of predictability while a case is still in development. As the *LaFarge* decision observes, "a court may rely on its prior decisions as persuasive, and demand good reasons to change its mind." 59 F.4th 55, 66.

2. The doctrine of "law of the case" provides some measure of predictability, if not actual preclusion, when case management proceeds under a single judge. Can other judges who are subsequently managing the same case, or simultaneously managing related or similar cases, be bound by it? Should they be? Where it cannot be applied as a matter of law, should "law of the case" be given persuasive, or presumptive effect?

3. Judge Scirica lists and describes a number of complex case management techniques that judges can utilize to promote consistency and judicial economy, short of formal preclusion. In effect, the final passages of *LaFarge* comprise a "Complex Case Management in a Nutshell" handbook. What are these techniques? Which do you find most practical? Most problematic?

4. Judge Scirica recites "judicial economy" and "fairness to litigants" as values to be promoted by the appropriate application of law of the case specifically, and to judicial case management more generally. Are there, or should there be, additional values implicit in either?

5. When the J.P.M.L. issues a "Transfer Order" and centralizes the constituent actions under 28 U.S.C. § 1407, this order does not formally consolidate them; they retain their status as separate actions, albeit coordinated for pre-trial proceedings. If law of the case operates within a single action, should MDL transferee courts consider formally consolidating the cases transferred to them for unitary trial, at least as to common claims or issues, under Rule 42? Under Judge Scirica's analysis, would there be an issue with this if prior notice of this case management intent, and an opportunity to be heard, were given to the litigants?

H. THE POTENTIALLY PRECLUSIVE EFFECT OF "BELLWETHER" TRIAL DETERMINATIONS

Bellwether trials are often used in MDLs to generate information about claim values that they parties can take into account in deciding whether to settle other similar cases. When, if ever, should the results of bellwether trials have preclusive effects on other cases? Consider the litigation over DuPont's so-called "forever chemicals" used to make Teflon that were discharged into drinking water supplies for decades.

In 2002, a West Virginia state court certified a class of 80,000 individuals whose drinking water had been contaminated with perfluorooctanoic acid (or C-8) discharged from a DuPont plant. In 2005, DuPont and the class agreed to, and the West Virginia court approved, a unique class action settlement. Under the terms of the settlement, DuPont agreed to treat the affected ground water and fund a community health study on the effects of C-8 exposure. Using blood samples obtained from class members, a panel of three scientists jointly selected by DuPont and the plaintiff class conducted a seven-year epidemiological study on the link between C-8 exposure and various diseases. Litigation was paused during the pendency of the study but would commence again once the science panel released its results. For diseases where science panel found a "probable link" to C-8 exposure, class members could bring individual suits and DuPont agreed not to contest general causation (though it retained the right to contest specific causation). Class members were forever barred

from bringing claims based on diseases where the science panel found "no probable link." In 2012, the science panel found a probable link for six diseases, and class members brought approximately 3500 claims based on those diseases in federal court, which were transferred to an MDL in the Southern District of Ohio.

The MDL judge and parties selected 20 cases for full discovery and six for bellwether trials (three chosen by the plaintiff's lead lawyers and three by the defendant). The plaintiffs won the first three bellwether trials, and the parties settled the rest. In 2017, DuPont entered a global settlement with the remaining cases in the MDL. After the MDL settlement, however, several other plaintiffs, who were members of the class, brought new claims. These new plaintiffs argued that, based on the results of the three bellwether trials, DuPont should be issue precluded from contesting not only general causation based on the class action settlement, but also the elements of duty, breach, and foreseeability in their trials.

The district court agreed, applying offensive nonmutual issue preclusion under Ohio law, which follows the doctrine of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In *Parklane*, the Supreme Court held that where an issue has been decided against a defendant in one case after a full and fair opportunity to be heard, a new plaintiff can rely on nonmutual collateral estoppel to preclude the defendant from relitigating that same issue in a subsequent case. But the Court in *Parklane* cautioned that courts should not allow new plaintiffs to invoke issue preclusion offensively if doing so would be unfair to defendants based on four factors: (1) where the new plaintiff could have easily joined in the first action but instead adopted a "wait and see" attitude, (2) where the defendant lacked incentive to vigorously defend the first action because future suits were not foreseeable, (3) where it would be inconsistent with prior judgments in the defendant's favor, or (4) where the subsequent suit would afford the defendant procedural opportunities not available in the first.

In affirming, the Sixth Circuit said the district court's decision:

> We begin by determining whether the "identical issue was actually decided in the former case." * * * In *Bartlett*, *Freeman*, and *Vigneron*—the cases that served as the basis for collateral estoppel—each jury received identical instructions on duty, breach, and foreseeability. Each jury found that DuPont owed a duty to the class member, breached that duty, and should have foreseen that injury would result from the alleged breach. * * * The key concept applicable here is that DuPont's conduct impacted the Plaintiffs in virtually identical ways—contamination of their water supplies with a carcinogen. The district court was correct to conclude that the "facts relating to DuPont's negligence were virtually identical" across the four trials. * * * There is little doubt that the jury trials' decisions on duty, breach, and foreseeability were necessary to each of the verdicts for the earlier Plaintiffs on their negligence claims. * * * And finally, we consider whether the prior cases reached final judgment on the merits and whether DuPont had a sufficient opportunity to litigate the issues in those cases. * * * As to actual litigation, the vast size of the MDL and individual case dockets

belie any argument to the contrary. The record is clear that DuPont vigorously contested duty, breach, and foreseeability in all the prior trials. * * *

In *Parklane Hosiery*, the Supreme Court provided additional guidance as to the doctrine of nonmutual offensive collateral estoppel. The unique parameters established by the *Leach* Agreement [i.e., the state court class action settlement] and the resulting MDL play the key role in applying the *Parklane* factors here. * * * The bargained-for exchange that the *Leach* Agreement established informs the application of collateral estoppel here. Every class member agreed to release all claims related to diseases without a Probable Link finding and not to sue DuPont until the Science Panel completed its multiple-year study. DuPont agreed not to contest general causation. In light of the benefits and concessions embodied in the Agreement, we disagree with our dissenting colleague's concern that it is fundamentally unfair to hold DuPont to the terms of the contract that it negotiated and has received the benefit of, especially when DuPont has mounted multiple challenges to the district court's interpretation of the Agreement to no avail. * * *

Turning to the *Parklane* factors, we note as to the first factor that the MDL gave DuPont a greater measure of power over case scheduling than in normal cases: few concerns about Plaintiffs using a "wait-and-see" approach for another successful action are possible when DuPont was able to select three of the six bellwether cases, including the first-tried case, *Bartlett*. Second, the MDL structure presented DuPont with "every incentive," *Parklane Hosiery Co.*, 439 U.S. at 332, to defend itself vigorously in each of the early trials: the first two bellwether cases tried were selected to inform the resolution of the 3,500 other pending cases, and DuPont knew that the third trial could continue to influence the remaining litigation. Even after the global settlement, DuPont was aware that cases could continue to be filed—cases that would necessarily receive the same treatment as the MDL litigation. As to the third *Parklane* factor, there is no concern about inconsistent verdicts with a previous judgment in favor of DuPont. *Id.* DuPont was not successful at any trial.

Importantly, the district court applied collateral estoppel only after three consistent jury verdicts for the Plaintiffs in the only cases to proceed to trial—the first of which was a bellwether selected by DuPont (*Bartlett*) and then another selected by the Plaintiff class (*Freeman*). DuPont chose to settle the remaining bellwether cases with the Plaintiffs. As to the fourth *Parklane* factor, then, DuPont presented no evidence that it had any procedural opportunities "that could readily cause a different result" * * * that were not available in the earlier trials. *Id.* at 331. * * *

Thus, as to all the factors governing issue preclusion or collateral estoppel, DuPont has received a full and fair opportunity for resolution of its issues—it had its day in court. DuPont's other

> objections—absence of advance notice of possible preclusive effect, the lack of consideration of representativeness in bellwether selection, and alleged promises of no preclusive effect—are not grounded in our collateral estoppel case law. At bottom, DuPont argues that we should impose further rules constraining the use of nonmutual offensive collateral estoppel, beyond the federal common law and the Supreme Court's instructions in *Parklane Hosiery*. DuPont does not offer any cases that create a notice requirement for collateral estoppel, nor does it show that bellwether trials are prohibited from having such preclusive effect. * * *
>
> Even were we to imagine a fairness issue related to notice, the record does not support DuPont's arguments. The district court did not promise that the general assumptions of litigation—including that issue preclusion is possible—would not apply to the bellwether trials. At most, the district court confirmed that the bellwether trials would not be "binding bellwethers," meaning that the results of those trials would not automatically be extrapolated to non-bellwether plaintiffs. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 609–10 (2008). The Supreme Court has instructed the courts that the factors articulated in *Parklane* offer the necessary constraints on the use of nonmutual offensive collateral estoppel. We cannot and do not follow DuPont's recommendation to create additional rules restricting the use of the doctrine. We affirm the district court's use of nonmutual offensive collateral estoppel in this case.

E.I. DuPont de Nemours & Co. C-8 Personal Injury Litig., 54 F.4th 912, 923-28 (6th Cir. 2022).

Judge Batchelder dissented, saying:

> I agree that nonmutual offensive collateral estoppel does not necessarily violate due process in this context. Nowhere in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), did the Supreme Court create a categorical ban on that doctrine in mass-tort litigation. The Court, instead, used "fairness" as its guide to determine when the doctrine is appropriate. I also agree with the majority that the district court was not required to give DuPont advance notice that the bellwether trials could later have preclusive effect.
>
> That said, however, collateral estoppel was not appropriate in this case. The district court used plaintiff-specific verdicts, based on general verdict forms, from three early trials—as to which the court had told the parties from the outset that they would be informational and non-binding—to preclude DuPont from contesting certain liability issues in thousands of potentially different cases. For a court to apply offensive collateral estoppel against a defendant in a mass-tort multidistrict litigation such as this, due process requires an inquiry into the representativeness of the plaintiffs, as well as a faithful adherence to the collateral estoppel rules. Because neither happened in this case, the district

court's sweeping estoppel order subverts DuPont's constitutional rights. I would reverse and remand.

Id. at 936. DuPont petitioned for certiorari.

E.I. DUPONT DE NEMOURS & CO. v. ABBOTT

Supreme Court of the United States, 2023

144 S. Ct. 16

The petition for a writ of certiorari is denied. JUSTICE KAVANAUGH would grant the petition for a writ of certiorari. JUSTICE ALITO took no part in the consideration or decision of this petition.

JUSTICE THOMAS, dissenting from the denial of certiorari

Plaintiffs brought negligence claims against petitioner E. I. du Pont de Nemours & Co. (DuPont) on behalf of a class of approximately 80,000 residents for DuPont's discharge of perfluorooctanoic acid into the Ohio River and the air. They alleged that their exposure to the chemical caused a range of diseases. The Judicial Panel on Multidistrict Litigation assigned the cases to multidistrict litigation (MDL). The MDL court directed the parties to identify cases for bellwether trials, which it explained would be informational for the other pending MDL cases. The three resulting trials ended in verdicts for the plaintiffs. DuPont then settled the remaining cases in the MDL.

After the settlement, however, more plaintiffs brought claims, including respondents Travis and Julie Abbott. Relying on the three bellwether trials, the District Court held that DuPont was collaterally estopped from disputing several elements of the Abbotts' (and the other new plaintiffs') claims. Specifically, the District Court prevented DuPont from challenging duty, breach, and foreseeability. The only elements seemingly left unresolved were specific causation and damages. *** The jury found for the Abbotts, awarding them roughly $40 million. The Sixth Circuit affirmed over Judge Batchelder's partial dissent. *In re E. I. du Pont de Nemours & Co. C-8 Personal Injury Litigation*, 54 F.4th 912 (2022).

DuPont now asks us to review the District Court's application of collateral estoppel. I would grant the petition. I have serious doubts about the application of nonmutual offensive collateral estoppel in the MDL context.

Nonmutual offensive collateral estoppel prevents a defendant from relitigating issues that it lost in an earlier case against a different plaintiff. At common law, however, collateral estoppel—also called issue preclusion—required mutuality of parties: A prior judgment prevented only the same parties from relitigating settled issues in a new case between them. See, *e.g., Hopkins v. Lee*, 6 Wheat. 109, 113 (1821); *Deery v. Cray*, 5 Wall. 795, 803 (1867). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court relaxed the mutuality requirement for a plaintiff's offensive use of collateral estoppel. But the Court cautioned that this preclusion should not be used when "the application of offensive estoppel would be unfair to a defendant." *Id.*, at 331.

Extending *Parklane* to the MDL context seems illogical and unfair. First, an MDL is a mechanism for streamlining pretrial proceedings; it is not designed to fully resolve the merits of large batches of cases in one fell swoop. When several courts face cases involving common questions of fact, an MDL pools resources by having one court handle the pretrial proceedings for all related cases simultaneously. An MDL's scope, however, is limited to pretrial proceedings. See 28 U. S. C. § 1407(a). Once pretrial proceedings are complete, the MDL court *must* remand the cases back to their originating courts to be resolved on the merits. *Ibid.* ("Each action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings ..." (emphasis added)); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). Although the MDL court may hold bellwether trials, I have not yet seen evidence that they are anything more than "*nonbinding* trial[s] ... held to determine the merits of the claims and the strength of the parties' positions on the issues." Black's Law Dictionary 190 (11th ed. 2019) (defining "*bellwether*" (emphasis added)); see also 4 W. Rubenstein, Newberg and Rubenstein on Class Actions § 11:20, and n. 13 (6th ed. 2022). Indeed, the MDL court here shared that understanding and described the bellwether trials as helpful "information gathering." *In re E. I. du Pont de Nemours & Co. C-8 Personal Injury Litigation*, No. 2:13–md–2433 (SD Ohio 2016), ECF Doc. 4624, p. 100947. It is quite a stretch to use a mechanism designed to handle only pretrial proceedings to instead resolve multiple elements of a claim based on a few nonbinding bellwether trials. This use of nonmutual offensive collateral estoppel is far afield from any this Court has endorsed.

Second, expansive use of nonmutual offensive collateral estoppel in the MDL context raises serious due process concerns. See *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("[P]reclusion is ... subject to due process limitations"). Although not without limits, it is "part of our deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal quotation marks omitted). Application of this type of collateral estoppel in an MDL, however, could prevent a defendant from raising a defense in potentially thousands of cases. It would make no difference if other MDL plaintiffs have material differences that would prevent them from making their required showing on that element—once nonmutual offensive collateral estoppel has been applied, a defendant's hands are tied. In fact, a defendant cannot raise a defense even if there was *no notice* that bellwether trials would dictate the results of every MDL case. Collateral estoppel also must contend with a defendant's right to a jury trial. See *Parklane*, 439 U.S., at 346–347 (Rehnquist, J., dissenting). In short, applying nonmutual offensive collateral estoppel in the MDL context runs afoul of this Court's warning that preclusion should not be used when "the application of offensive estoppel would be unfair to a defendant." *Id.*, at 331.

The MDL here is a case in point. The MDL court originally told the parties that the bellwether trials would be informational and "would facilitate valuation of cases to assist in global settlement." ECF Doc. 4624, at 100947. Yet, the MDL court later treated them as binding. Far from mere gauges of the parties' claims, the three trials turned out to be DuPont's only chance to litigate several elements of claims brought by

numerous different plaintiffs. The MDL court thus used a tiny fraction of the cases against DuPont to impose sweeping liability—all without any warning to DuPont of the bellwether trials' import.

The MDL court's ruling was not only breathtaking in its scope, but it also disregarded the fact that the three bellwether trials were not representative of the cases against DuPont. For example, two bellwether plaintiffs drank water from wells that were less than one-third of a mile from DuPont's plant; the Abbotts' water, by contrast, came from wells 14 to 56 miles away. Two bellwether plaintiffs asserted exposure through air emissions, in addition to exposure through drinking water; the Abbotts' alleged exposure was only through their water. These differences in location and source of exposure are material to each plaintiff 's claim that DuPont injured him through its negligent discharge of the chemical: "Any combination of these factual differences could lead a jury to find that a particular plaintiff 's injuries were not reasonably foreseeable and, therefore, that DuPont did not owe or breach a duty of care." 54 F.4th, at 943 (Batchelder, J., concurring in part and dissenting in part). And, of course, the third bellwether plaintiff was chosen not as a representative case, but as one of "the most severely impacted plaintiffs." ECF Doc. 4624, at 100962. Given the differences among plaintiffs, DuPont may have lost the first three trials, but perhaps it would have won the rest. Under the MDL court's ruling, however, DuPont had no chance to find out.

The preclusion was also entirely one sided: While plaintiffs were able to use their bellwether trial wins against DuPont, if the roles were reversed, DuPont could not have asserted collateral estoppel against new MDL plaintiffs without violating those plaintiffs' due process rights. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971) (explaining that "[d]ue process prohibits estopping" those litigants "who never appeared in a prior action"). DuPont had all of the downside without any potential for upside. The lopsidedness of the preclusion adds to the potential for unfairness.

I have doubts about whether the application of nonmutual offensive collateral estoppel based on bellwether trials comports with due process. Given that MDLs constitute a large part of the federal docket, this issue should be resolved sooner rather than later. We should not sacrifice constitutional protections for the sake of convenience, and certainly at least not without inquiry.

NOTES AND QUESTIONS

1. In *Parklane Hosiery*, which forms the basis of the *DuPont* opinion's preclusion analysis, a class received the benefit of an issue determination made against a defendant in a prior, non-class proceeding. In *DuPont*, the Sixth Circuit invoked *Parklane Hosiery* – and a deferential analysis of Ohio preclusion law – to uphold the shift from non-binding to binding fact determinations made by juries in a series of bellwether trials. What similarities, and dissimilarities, do you see between this rationale and that used by the Eleventh Circuit in *Walker* to give preclusive effect to a state court jury's findings?

2. The defendant in *DuPont* argued that its lack of notice that the bellwether findings could be preclusive violated due process. Do you agree, or

disagree? Is there an essential component of due process that does, or should, apply to preclusion analyses in all litigation scenarios? If so, should it be notice, "voice," "exit," "adequate representation," or some other consideration?

3. In *DuPont* how might defendants' (and plaintiffs') bellwether trial preparations or presentations have differed had they known that the jury determinations would at some point be preclusive?

4. In sports, championship tournaments often take the form of a "best of" structure, in which the winner of a majority of a set number of games is the victor, such as the best of seven games structure of baseball's World Series. Could such a concept be applied to obtaining preclusive effect in a series of MDL bellwether trials? Would the parties' prior agreement be essential? Is that, in effect, what occurred retroactively in *DuPont*, or were additional rules or principles of preclusion involved? In a much earlier decision, *In re the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F. 3d 1293 (7th Cir. 1995), the appellate court reversed class certification in a mass tort MDL because in 13 prior trials, the defendant had prevailed, and juries had rejected the plaintiffs' liability theory. Even though class certification was a procedural decision, independent of the merits, the *Rhone-Poulenc* court was concerned that the creation of a class would unfairly advantage the plaintiffs in terms of litigation and settlement pressure, to the extent their individual track record--in effect, the law of their cases--did not support. At some point, courts appear to take an "enough already" approach, and declare a claim or issue to be decided, at least in terms of informing case management decisions, such as class certification. If this is a practical reality, and if a shared goal of both aggregation and preclusion is the avoidance of relitigation of common questions, at what point should "enough already" occur? Should there be a set number of trials for all cases, set by Rule, or recommended in a benchbook such as the *Manual For Complex Litigation*? Should that number be determined based upon the particular circumstances of each litigation? Should the court consult with the parties before setting it? Fed. R. Civ. P. 49(a) provides for "a special verdict in the form of a special written finding on each issue of fact." Should the Court allow the parties to negotiate the jury instructions that will comprise uniform (and preclusive) special verdict forms in these trials in advance? Should there be a number of pilot, or trial run ("pre-bellwether"), trials, before trial outcomes start to count toward preclusion?

5. Other MDL judges remain open to affording preclusive effect to the results of bellwether trials, at least in some circumstances. In the *Uber Technologies Passenger Sexual Assault Litigation*, for example, Judge Breyer issued an order "clarifying" his plan to try six bellwether cases. The order put the parties on notice (as the judge in *DuPont* did not) that the judgments reached in the bellwether cases might have preclusive effect "as appropriate" under the "normal standards of collateral estoppel." *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. 23-md-3084, Pretrial Order No. 27: Clarifying PTO 26 Regarding Collateral Estoppel (N.D. Cal. May 2, 2025). Does advance notice that bellwether trials may be preclusive answer Justice Thomas's critique in *DuPont*? Does such notice affect how the *Parklane* factors are applied under "normal standards of collateral estoppel?"