SCALING UP: IMPLEMENTING ISSUE PRECLUSION IN MASS TORT LITIGATION THROUGH BELLWETHER TRIALS

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The civil litigation system aims to resolve disputes in an efficient, centralized, and final manner. In the context of mass tort litigation, one technique courts often use to achieve these goals is what I call "scaling up": holding individual trials, and then applying results from these trials to similarly situated individuals. Scaling up, however, presents two difficulties. First, the technique risks compromising defendants' Due Process rights by creating impermissible settlement pressure. Second, scaling up requires the initial court to structure the litigation so that it may serve as a template for follow-on proceedings; where this is not done, attempting to graft the results of one proceeding onto the remaining group of similarly situated individuals may simply lead to more protracted litigation.

Yet these difficulties are not inherent to the technique; in fact, courts can scale up in a way that avoids these problems. In order to mitigate the Due Process problem, courts should not apply the results of individual trials to subsequent trials involving similar claims until a substantial number of trials have been completed, and until it has become clear that any verdicts unfavorable to defendants are not flukes or outliers. And to ensure that scaling up does not simply lead to more protracted litigation, the initial trials should be structured so as to maximize the likelihood that individuals in follow-on litigation can invoke the findings under the issue preclusion doctrine of Parklane Hosiery v. Shore. *The American Law Institute has made a proposal with these considerations in mind with respect to issue classes. This Note argues that a similar approach should be taken in the Multidistrict Litigation (MDL) process, where most mass tort litigation occurs today. This approach would be particularly useful if applied to one device that is being used with increasing frequency in the MDL process: the bellwether trial.*

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INTRODUCTION

Successfully resolving mass tort controversies is like balancing a seesaw. On one side of the seesaw is the drive for efficiency. Mass tort controversies, by definition, involve large numbers of claims that, if not resolved through efficient and streamlined procedures, can overwhelm the judicial system and prevent individuals who have been injured from receiving appropriate compensation. The well known asbestos litigation, in which transaction costs consumed sixty-one cents out of every dollar spent on litigation and the sickest individuals were often denied compensation, is the most salient example.[1] The need for streamlined procedures in mass litigation can be traced back to the electrical equipment antitrust cases of the 1960s, when the

[1] *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990) ("Transaction costs consumed $.61 of each asbestos-litigation dollar with $.37 going to defendants litigation costs; the plaintiffs receive only $.39 from each litigation dollar."), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998); Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-sick*, 31 PEPP. L. REV. 271, 274–75 (2003) (noting that "lawyers who represent asbestos cancer victims have said . . . the litigation threaten[s] payments to the truly sick"); *see also* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 476 (1994) ("[T]he problem in mass torts is one of providing a fair and speedy compensation system that also reduces transaction costs.").

proliferation of thousands of similar antitrust suits across the country prompted the creation of new procedural devices to deal with the "big case."[2]

On the other side of the seesaw are individuals' Due Process rights, which often conflict with this focus on efficiency. Trial courts that have experimented with novel procedures to maximize efficiency frequently face appellate courts' skepticism as to whether those procedures run afoul of the Due Process Clause. Sometimes, the appellate courts focus on the rights of defendants; in other cases, they note potential unfairness to plaintiffs, typically individuals who are absent from the litigation but still purportedly bound by its judgment.[3] Although not all novel and efficient procedures raise Due Process concerns, it seems clear that movement away from the traditional, bipolar litigation process at least increases the likelihood of Due Process violations.[4]

One technique that courts use to try to strike a balance between efficiency and individual rights is what I call "scaling up." Scaling up involves taking particular findings from ordinary, bipolar trials and applying them to a mass of similarly situated individuals, in an effort

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[2] *See* Mark Hermann & Pearson Bownas, *An Uncommon Focus on "Common Questions": Two Problems with the Judicial Panel on Multidistrict Litigation's Treatment of the "One or More Common Questions of Fact" Requirement for Centralization*, 82 TUL. L. REV. 2297, 2299–307 (2008) (describing how the federal judiciary's experience with the electrical equipment cases prompted the enactment of the multidistrict litigation panel statute, 28 U.S.C. § 1407); *see also* Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 27–29 (1950) (describing the procedural complexities of the "Big Case").

[3] Cases expressing concerns for the rights of defendants include *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–303 (7th Cir. 1995) (expressing concerns about the settlement pressure placed on defendants facing small probabilities of enormous judgments in class actions) and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (disapproving of a "Trial by Formula" approach proposed by plaintiffs on the grounds that it would deprive the defendant of its entitlement to litigate its statutory defenses to individual claims). Those expressing concern for absent plaintiffs' rights include *Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that Due Process requires that plaintiffs absent from a representative lawsuit be adequately represented by other members in the litigation), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809–12 (1985) (holding that absent plaintiffs in an opt-out class action must receive notice of the litigation, the opportunity to opt out, and have their interests adequately represented by the named plaintiff), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (rejecting certification of an asbestos settlement class for, among other reasons, failing to protect the "interest of exposure-only plaintiffs").

[4] For perhaps the most extreme example of a novel procedure that was met with skepticism by the appellate court (but ultimately approved), see *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996) (describing a multi-stage trial plan whereby the district court selected a random sample of claims, a special master issued recommendations as to how the claims in the sample should be treated, and the special master testified in a jury trial).

to efficiently resolve complex cases. Typically, the findings applied to the group concern an issue shared by most, if not all, plaintiffs—for instance, whether the defendant was negligent, or whether the defendant's product is capable of causing the alleged harm. The term "scaling up" characterizes a variety of devices that courts employ, including nonmutual issue preclusion, the Rule 23(c)(4) issue class, and the bellwether trial. But, as this Note describes, none of these scaling devices has successfully struck a balance between efficiency and respect for Due Process.

Courts have struggled with two main problems when scaling up. First, on the Due Process side of the seesaw, scaling up may create impermissible settlement pressure on defendants. As Judge Richard Posner explained in *In re Rhone-Poulenc Rorer Inc.*, if an individual trial's outcome can determine a defendant's liability with respect to not only the parties before the court, but also to thousands of other individuals, a risk-averse defendant may opt to settle the entire litigation to avoid the chance of enterprise-ending liability, regardless of the suit's actual merits.[5] The second problem is that scaling up may not always maximize efficiency. Scaling up requires the court running the initial trial to structure the trial so that its results are specific enough to be invoked in follow-on proceedings. Where the initial proceeding is not structured in this way, attempting to graft the results of the initial proceeding onto similarly situated individuals is unlikely to succeed. In such a situation, scaling up may simply lead to more protracted litigation, as dramatically illustrated in *R.J. Reynolds Tobacco Co. v. Engle*, a state court tobacco class action.[6]

This Note argues that the difficulties posed by scaling up are not inherent to the technique. In fact, there is at least one scaling device—the bellwether trial—with which courts can structure litigation to avoid these problems and successfully balance the mass tort seesaw. First, to mitigate the settlement pressure problem, trial courts should run multiple bellwether trials, and prevent these trials' results from applying to subsequent proceedings unless and until the bellwether trials result in a substantial number of favorable verdicts for the plaintiffs. And second, to fully reap the efficiency gains of scaling up, courts should structure the bellwether trials so as to maximize the likelihood that individuals in follow-on litigation can successfully invoke the bellwether trials' findings under the nonmutual issue preclusion doctrine of *Parklane Hosiery Co. v. Shore*.[7] In particular,

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[5] 51 F.3d 1293 (7th Cir. 1995). *See infra* notes 42–48 and accompanying text (describing *Rhone-Poulenc*).

[6] See *infra* Part III.A for a discussion of the *Engle* litigation.

[7] 439 U.S. 322 (1979).

instead of holding the trial first and then trying to use its results to bind subsequent litigants—as was done in *Engle*—courts should structure the bellwether trial with the remaining mass of individuals in mind. The American Law Institute (ALI) has made a proposal like this with respect to issue class actions; this Note argues that a similar approach should be taken in the Multidistrict Litigation (MDL) process, where most mass tort litigation occurs today.[8]

This Note proceeds in three parts. Part I describes two ways that courts scale up: through the issue preclusion doctrine and the Rule 23(c)(4) issue class. It demonstrates, however, that neither of these methods is likely to generate the efficiency gains needed to resolve mass harm cases, at least not without raising serious Due Process concerns. Part II then introduces the main vehicle for resolving mass tort litigation today, the MDL process, and describes a scaling method that the MDL process frequently uses, the bellwether trial. The bellwether trial, this Part argues, should play a more significant role than it does presently in resolving mass harm controversies. Allowing the bellwether trial to have issue preclusive effect under *Parklane* can generate efficiency gains while minimizing the Due Process concerns raised by other scaling devices. Part III cautions, however, that the efficiency gains promised by this approach are threatened by subsequent courts' inability to identify the findings made in the bellwether trial. This problem, illustrated by cases such as *Engle*, can undermine the very efficiency gains sought in the first place. The Note closes by suggesting a solution to this problem, modeled on a proposal first made by the ALI's *Principles of Aggregate Litigation*: The court running the bellwether trials must issue a plan of adjudication that anticipates (but does not determine) the preclusive effects of the trials before they actually begin.

[8] The ALI's proposal can be found in section 2.12 of the *Principles of the Law: Aggregate Litigation*, adopted by the ALI in May 2009. *See* AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.12 (2010) [hereinafter ALI PRINCIPLES OF AGGREGATE LITIGATION]. The aim of the overall project was to identify procedures that promote the "efficiency and efficacy of aggregate lawsuits as tools for enforcing valid laws." *Id.* at 1–2. The intended audience of the project is judges, legislators, rule-makers, and researchers, and others with control of or interest in civil litigation. *Id.* Certain portions of the project envision no change in existing law, while others explicitly depart from it. *Compare id.* § 2.06 cmt.c (noting that § 2.06 reflects "the consensus of the federal courts of appeals on the appropriate scope for the class-certification inquiry"), *with id.* § 3.17 cmt.f (noting that subsections (b)–(e) of § 3.17 depart from existing rules of professional responsibility).

I
The Limits of Preclusion and Class Actions

One consequence of today's industrialized, interconnected world is the emergence of mass torts. Mass tort cases are those in which claims are highly numerous, exhibit a limited set of factual variations, and are geographically dispersed across jurisdictions.[9] This type of litigation gives rise to the need for procedures that provide definite resolution of claims in an efficient manner; much of modern procedural law can be characterized as a search for such devices.[10] The following section discusses two devices which, on initial inspection, appear to hold some promise for the efficient resolution of mass tort controversies: the issue preclusion doctrine and the Rule 23(c)(4) issue class. Both of these devices allow the findings of one court to be scaled up to the remaining mass of similarly situated individuals. This section demonstrates, however, that neither mechanism is satisfactory because neither is able to strike the appropriate balance between efficiency and individuals' Due Process rights.

A. Issue Preclusion

1. Parklane *and the Fall of Mutuality*

Issue preclusion, also called collateral estoppel, is a common law doctrine that bars parties from relitigating issues decided at some earlier time.[11] The doctrine seeks to ensure that the judicial system does not waste resources reexamining already-resolved factual issues.[12] Yet in its traditional form, issue preclusion failed to generate significant efficiency gains because of the mutuality requirement: For issue preclusion to attach, the second suit had to involve the exact same parties as the original suit. Under this mutuality regime, issue preclusion

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[9] Richard A. Nagareda, Mass Torts in a World of Settlement xiii–xvi (2007) (defining mass torts).

[10] Richard A. Nagareda, The Law of Class Actions and Other Aggregate Litigation 1 (2009) (introducing the field of aggregate litigation as a response to "the challenges posed for the civil justice system when claims arise not as isolated events but . . . when wrongdoing on a mass scale gives rise to the potential for large numbers of civil claims that exhibit varying degrees of similarity").

[11] 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4416 (2d ed. 2002) (noting that "the principle [of issue preclusion] is simply that later courts should honor the first actual decision of a matter that has been actually litigated").

[12] *See* Samuel Issacharoff, Civil Procedure 164 (3d ed. 2012) (noting that the issue preclusion doctrine serves to "limit waste" of "the tremendous investment of societal resources represented by a trial").

assured litigants that factual issues litigated between them would remain settled, but did little else to enhance judicial efficiency.[13]

The Court abolished the mutuality requirement in *Parklane Hosiery Co. v. Shore*,[14] where it held that nonmutual issue preclusion was permissible even if used "offensively."[15] Here, the Securities and Exchange Commission had sued Parklane Hosiery for issuing a materially misleading proxy statement in connection with a merger.[16] Parklane lost this initial suit, and a district court entered a declaratory judgment to that effect.[17] Subsequently, Parklane's shareholders brought a similar class action, and argued that Parklane could not relitigate the question of whether the proxy statement was materially false and misleading, since it had already litigated and lost on that same issue.[18] The Court agreed and allowed issue preclusion to attach.[19]

This expansion of issue preclusion was not uncontroversial. Offensive issue preclusion creates an incentive for plaintiffs to "adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."[20] In addition, it has the potential to infringe defendants' Due Process rights.[21] Further, nonmutual issue preclusion may distort the stakes of the controversy, creating undue settlement pressure on defendants or encouraging defendants to overinvest in litigation.[22]

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[13] *See id.* at 164 ("In its early form, issue preclusion effectively did not preclude very much. Its primary function was to . . . provid[e] an expansive form of closure for the litigants . . . .").

[14] 439 U.S. 322, 331 (1979).

[15] Prior to *Parklane*, the Court had accepted the use of "defensive" nonmutual issue preclusion. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971). But it had not permitted a plaintiff to bind a defendant to the outcome of a proceeding in which the defendant had lost. To date, the Court has not accepted a theory of offensive collateral estoppel whereby a plaintiff could bind a party without his day in court. *See* ISSACHAROFF, *supra* note 12, at 170 (distinguishing between ways in which courts have defined offensive collateral estoppel).

[16] *Parklane*, 439 U.S. at 324.

[17] *Id.* at 325.

[18] *Id.*

[19] *See id.* at 331.

[20] *Id.* at 330. *See also* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 113 (2001) ("[Nonmutual offensive issue preclusion] is likely to induce potential plaintiffs *not to join* in an existing litigation because of the rewards of a 'wait and see' posture.").

[21] The *Parklane* Court imagined a hypothetical situation in which a railroad carrier, sued for a collision that injured fifty passengers, won the first twenty-five suits, but then, having lost the twenty-sixth, would automatically lose suits twenty-seven through fifty. *Parklane*, 439 U.S. at 330 n.14.

[22] *See* SHAPIRO, *supra* note 20, at 112 (suggesting that the distortionary effect of nonmutual issue preclusion may either "lead the defendant to invest disproportionately in the

To guard against these perverse incentives, the Court in *Parklane* did not allow issue preclusion to attach automatically. Rather, *Parklane* granted the trial judge presiding over the second litigation the discretion to decide whether or not issue preclusion should apply. The Court instructed trial courts in this position to consider various factors to guard against strategic misuses of issue preclusion, including whether the "judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant,"[23] whether the defendant "received a 'full and fair' opportunity to litigate,"[24] and whether the plaintiff "could easily have joined in the earlier action."[25] By commanding trial courts to consider such factors, the Court hoped to "promot[e] judicial economy" without significantly compromising fairness values.[26]

Parklane remains good law today, but there are additional requirements that must be met for issue preclusion to attach in the second litigation. A typical formulation of these requirements is that (1) the same issue must have been involved in both actions; (2) the issue must have been "actually litigated" in the first action after a full and fair opportunity for litigation; (3) the issue must have been "actually decided" in the first action; and (4) it must have been necessary to decide the issue in disposing of the first action.[27]

2. *The Limits of Preclusion*

By itself, the scaling device of *Parklane* nonmutual issue preclusion is not sufficiently robust to be a serious tool to resolve mass harm litigation. *Parklane* continued to embrace the traditional "day in court" ideal; as a result, a judgment's binding effect was limited to the parties before the court.[28] For issue preclusion to effectively resolve mass harm litigation, courts would have to push the boundaries of preclusion further and allow some nonparties to be bound.

The Supreme Court reaffirmed the importance of the "day in court" ideal in *Taylor v. Sturgell*.[29] The facts of *Taylor* seemed to call

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first case in order to . . . prevent [nonmutual issue preclusion] or give the plaintiff more leverage in negotiating a settlement than he would otherwise have had").

[23] *Parklane*, 439 U.S. at 330–31.

[24] *Id.* at 332.

[25] *Id.* at 331.

[26] *Id.* at 326. For a thorough discussion of the benefits and drawbacks of nonmutual issue preclusion, see SHAPIRO, *supra* note 20, at 109–16.

[27] WRIGHT, MILLER & COOPER, *supra* note 11, § 4416 (internal quotation marks omitted).

[28] *See Parklane*, 439 U.S. at 330 (noting that the defendant had "every incentive" to fully and fairly litigate the lawsuit).

[29] 553 U.S. 880 (2008).

out for the application of nonparty preclusion: The case involved an individual who petitioned the Federal Aviation Administration for designs of a World War II–era plane under the Freedom of Information Act just one month after his friend had been denied the very same request. Though binding the plaintiff in *Taylor* to his friend's earlier judgment would have technically violated the "day in court" ideal, the D.C. Circuit allowed him to be bound anyway, under the doctrine of "virtual representation," which permitted a nonparty to be bound to an earlier suit if his interests were adequately represented by a party to the initial suit.[30] But the Supreme Court rejected the doctrine of virtual representation, placing great significance on the "deep-rooted historic tradition that everyone should have his own day in court."[31] The Court likened virtual representation to a class action—one of the few exceptions to the rule against nonparty preclusion—but rejected the doctrine because it lacked the essential safeguards of Rule 23.[32]

B. Mass Torts and the Class Action

The potency of the "day in court" ideal effectively renders preclusion doctrine an inadequate tool to resolve mass tort controversies.[33] Consequently, courts and litigants have turned to other means of scaling up. The following section examines another scaling device, the Rule 23(c)(4) issue class, and argues that this device, in contrast to *Parklane*'s efficiency-limiting emphasis on the "day in court," fails due to the opposite problem: It inadequately honors individuals' Due Process rights.

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[30] *Id.* at 889–91.

[31] *Id.* at 892–93 (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

[32] *Id.* at 901 (noting that "virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in . . . Rule 23"). Courts and commentators have understood the holding in *Taylor* to forbid virtual representation for the purposes of both claim and issue preclusion. *See, e.g.*, Lincoln-Dodge, Inc. v. Sullivan, 588 F. Supp. 2d 224, 235 (D.R.I. 2008) (discussing the Supreme Court's rejection of the doctrine in *Taylor*); Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1878 (2009) (noting that in *Taylor v. Sturgell*, "the Court quite clearly signaled the demise of *all* versions of virtual representation").

[33] *See* Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 222 (1991) (noting that the "federal appellate courts have effectively eliminated issue preclusion as a means of preventing the relitigation of duplicative claims . . . frustrat[ing] [their] . . . ability . . . to deal with mass tort cases in an aggregative fashion"). Issue preclusion may play a more significant role in resolving mass torts, however, when it is combined with the centralizing mechanism of the Multidistrict Litigation process. *See infra* notes 98–139 and accompanying text (discussing how bellwether trials should, in appropriate circumstances, be given issue preclusive effect in the MDL process).

1. The Appeal of the Class Action for Mass Torts

To see the appeal of the Rule 23(c)(4) issue class, it is first necessary to understand the appeal of the class action for mass torts in general. Federal Rule of Procedure 23 allows "[o]ne or more members of a class" to sue "as representative parties on behalf of all"[34] class members.[35] In the 1980s and 1990s, as a wave of mass tort litigation—most notably asbestos litigation[36]—threatened to overwhelm courts, practitioners turned to the 23(b)(3) class action as a way to resolve these cases, particularly as a vehicle to facilitate settlement.[37]

Because the class action contradicts the traditional rule against nonparty preclusion, Rule 23 requires plaintiffs to meet stringent certification requirements before a case can proceed as a class action: numerosity, commonality, typicality, and adequacy of representation.[38] A court must also find that common issues of law and fact predominate over individual issues, and that the class action is "superior to other available methods for fairly and efficiently adjudicating the controversy."[39]

In addition to the Rule 23(b)(3) class action, courts may certify a Rule 23(c)(4) issue class. Unlike traditional class actions, which require the entire case to be tried on a class-wide basis, Rule 23(c)(4) allows an action to be "brought or maintained as a class action with respect to particular issues."[40] Although plaintiffs who bring issue classes must still meet the requirements of Rules 23(a) and 23(b), most courts hold that Rule 23(c)(4) certification may be appropriate

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[34] FED. R. CIV. P. 23(a).

[35] Rule 23(b) delineates two major types of class actions: those in which class membership is mandatory, under 23(b)(1) and (b)(2), and those in which individuals may opt out of the class, under 23(b)(3).

[36] JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: AD HOC COMMITTEE ON ASBESTOS LITIGATION 33 (1991), *available at* http://www.uscourts.gov/judconf/91-Mar.pdf (noting the pressures placed on the civil litigation system by the "demands of mass tort litigation").

[37] *See* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61–62 (1996) (discussing the prevalence of settlement classes); *see also* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1056 (1993) ("There has been a dramatic shift in beliefs about the appropriateness of Rule 23 class actions for mass toxic torts since the Advisory Committee penned its admonition against the use of the Rule in tort actions in 1966.").

[38] FED. R. CIV. P. 23(a).

[39] *Id.* 23(b)(3).

[40] *Id.* 23(c)(4).

even when a court declines to certify the "entire constellation of issues in a given litigation."[41]

2. *The Issue Class's Limitations*

In re Rhone-Poulenc Rorer Inc.[42] demonstrates both the appeal and limitations of the issue class as a tool to resolve mass tort controversies. In this case, a group of hemophiliacs sued drug companies who manufactured blood solids, on the grounds that the hemophiliacs had become infected with HIV as a result of using these products.[43] The district court declined to certify the entire controversy as a class action because the "proximate cause issue [was] unmanageable on a class basis," but instead certified the class with respect to "common negligence and breach of fiduciary duty issues,"[44] namely, whether defendants had failed to exercise reasonable care in either their screening of blood donors or their treatment of blood products.[45]

On appeal, the Seventh Circuit, in an opinion by Judge Posner, reversed the district court's decision to certify a nationwide issue class. Invoking the fairness concerns discussed in *Parklane*, Judge Posner found it improper to require defendants to "stake their companies on the outcome of a single jury trial."[46] Certification was particularly problematic in this case because individual suits were economically feasible, and defendants had already won twelve of the thirteen trials that had gone to judgment. Certifying the issue class would create immense pressure for the defendants to settle, as it would have induced "thousands of plaintiffs" to join the class.[47] A risk-averse defendant might not want to "roll [the] dice" and face "$25 billion in potential liability."[48] Similar concerns have doomed issue class certification in other cases, such as *Castano v. American Tobacco Co.*[49] Although few circuits have adopted an absolute bar on the use of

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[41] Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1591 (2011). *See also In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006) (holding that "a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"). *But see* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) (arguing to the contrary).

[42] 51 F.3d 1293 (7th Cir. 1995).

[43] *Id.* at 1296.

[44] Wadleigh v. Rhone-Poulenc Rorer Inc., 157 F.R.D. 410, 422–23 (N.D. Ill. 1994).

[45] *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1296–97 (discussing the district court's refusal to certify the proposed class).

[46] *Id*. at 1299.

[47] *Id*. at 1298.

[48] *Id.*

[49] 84 F.3d 734 (5th Cir. 1996).

issue classes,[50] Due Process and Seventh Amendment concerns have limited the utility and frequency of use of the issue class in mass tort cases.[51]

3. *The Demise of the Mass Tort Class Action*

Courts have resisted not only issue classes, but also class actions in general, as viable means of resolving mass tort litigation. This shift is primarily the result of two Supreme Court decisions. In the first, *Amchem Products, Inc. v. Windsor*, the Supreme Court decertified an opt-out settlement class because it did not meet either the predominance or the adequacy requirements mandated by Rule 23.[52] The predominance inquiry was doomed by the fact that class members were exposed to "different asbestos-containing products, for different amounts of time, in different ways."[53] The conflict of interest between currently-injured and "exposure-only"[54] claimants defeated the adequacy of representation inquiry.[55] The second case, *Ortiz v. Fibreboard Corp.*, saw the Court reject the parties' attempt to structure a settlement by way of a Rule 23(b)(1) mandatory class.[56] Though defendants argued that mandatory certification was appropriate because claimants' recovery was capped by defendants' $2 billion of insurance coverage, the Court held, like in *Amchem*, that conflicts between present and future claimants meant that the representative parties could not adequately protect the interests of the class.[57] Together, *Amchem* and *Ortiz* exhibit a high degree of skepticism toward the use of class actions as a device with which to resolve mass tort cases. In part, this skepticism derives from a strict reading of Rule 23, but it also reflects a deeper concern that the class action device may not adequately protect the Due Process rights of absent class members.[58] Regardless of its cause, the important point is that resis-

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[50] *See* Farleigh, *supra* note 41, at 1601 (noting that the First, Second, Third, Fourth, Seventh, and Ninth circuits have accepted the issue class).

[51] *See generally id.* at 1605–10 (discussing courts' resistance to issue classes in products liability cases and general torts).

[52] 521 U.S. 591 (1997).

[53] *Id.* at 624.

[54] "Exposure-only" claimants were those who had been exposed to asbestos but had not manifested any asbestos-related conditions. *Id.* at 603–04.

[55] *See id.* at 626–28.

[56] 527 U.S. 815 (1999).

[57] *Id*. at 831–32 ("[T]he District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected . . . .").

[58] Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 (criticizing the Court's "retreat to rules formalism" in *Amchem* and *Ortiz*, but noting the "force of the Court's observations on the failure of representation").

tance towards the use of class actions, which persists in the Court's more recent jurisprudence,[59] prompted a shift away from class actions and toward other mechanisms to resolve mass tort cases.

II
Multidistrict Litigation, Issue Preclusion, and Bellwether Trials

The most significant alternative to the class action is the MDL process, set out in 28 U.S.C. § 1407.[60] This statute allows a panel of sitting circuit and district judges (the "MDL Panel")[61] to consolidate in a single district court related cases that are pending in the federal courts for coordinated or consolidated pretrial proceedings.[62] The MDL Panel decides whether "civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings."[63] If so, the Panel selects the judge and court—known as the transferee court—to conduct such proceedings. The purpose of this centralization process, according to the MDL Panel, is "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel, and the judiciary."[64] The MDL court's ability to facilitate the resolution of mass tort claims derives from its formal powers to conduct pretrial proceedings and an emerging informal approach by certain judges to manage MDLs as "quasi-class actions." As a formal

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[59] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552–57 (2011) (denying the certification of a class of 1.5 million female employees alleging sex discrimination because the putative class failed to satisfy Rule 23(a)(2)'s commonality requirement).

[60] *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2324 (2008) (noting that the MDL process is "emerging as the primary vehicle for the resolution of complex civil cases"); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107, 114–15 (2010) (noting that, as of 2009, the MDL Panel had "considered motions for centralization in over 2,000 dockets involving . . . millions of claims," which "encompass[ed] litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases").

[61] *See* Fallon et al., *supra* note 60, at 2326.

[62] 28 U.S.C. § 1407(a) provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." The statute goes on to require "[e]ach action so transferred . . . [to] be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a).

[63] U.S. Judicial Panel on Multidistrict Litigation, An Introduction to the United States Judicial Panel on Multidistrict Litigation (2012), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML-Overview-Brochure-11-1-12.pdf.

[64] *Id.*

matter, the transferee court exercises authority over all judicial proceedings before trial.[65] This power includes the ability to issue pretrial orders, resolve pretrial motions (including discovery motions, motions to dismiss, motions for summary judgment, and motions for class certification), and facilitate settlement.[66] In addition, some judges in transferee courts have taken control over issues such as the selection of lead attorneys and the setting of lead attorneys' compensation in an effort to "resolve complicated, multi-party cases in reasonable time and at reasonable cost."[67]

Despite these wide-ranging formal and informal powers, the transferee court's authority is limited in one significant respect: It is not permitted to transfer cases to itself for trial.[68] In *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, the Supreme Court held that the language of § 1407 precluded a transferee court from making such "self-assignments"; the Court held that once pretrial proceedings conclude, any case that has not been dismissed must be remanded to the district court from which it was transferred.[69] The vast majority of cases that are consolidated settle, so judges infrequently remand individual cases to their transferring courts,[70] but trial courts still "face the daunting possibility of adjudicating numerous similar claims."[71]

A. Bellwether Trials

Although they cannot self-assign individual cases for trial, MDL transferee courts can (and often do) conduct bellwether, or "representative," trials to facilitate the resolution of mass torts. In some sense, bellwether trials are just like other individual lawsuits; they "proceed[ ] through pretrial discovery and on to trial in the usual binary

[65] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 493 (J.P.M.L. 1968).

[66] Fallon et al., *supra* note 60, at 2328.

[67] *See* Silver & Miller, *supra* note 60, at 111.

[68] *See* Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998).

[69] *See id*. at 32–41 . Some MDL judges have sidestepped *Lexecon*'s mandate and tried cases by reassigning themselves to sit in jurisdictions in which the cases were filed. *See, e.g.*, Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1341–42 (Fed. Cir. 2007) (stating that an MDL judge from one district presided over the trial of a remanded action in another district); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (noting that a transferee judge may follow a remanded action and preside over trial in the originating district via assignment).

[70] *See* Fallon et al., *supra* note 60, at 2330 ("[T]he strongest criticism of the traditional MDL process is that the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again."); *see also* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) (criticizing the MDL process both because it is slow and because few cases return to the transferor courts for trial).

[71] R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 210 (1999).

fashion: one plaintiff versus one defendant."[72] However, bellwether trials are distinct from ordinary trials because the transferee court selects cases that are similar to the wider group of claims arising from the mass tort. These trials involve similar facts, claims, or defenses as the wider group of cases,[73] and are meant to help achieve global resolution of the litigation.[74] In this sense, bellwether trials can be seen as a scaling device, similar to the issue preclusion doctrine and the issue class.[75]

This section traces the ways in which bellwether trials have been used to help resolve mass tort litigation. It shows how, in the late 1990s, some courts experimented with "binding bellwethers," in which findings on common issues would automatically apply to the remaining mass of claimants. While courts have largely abandoned this approach because of Due Process concerns, more recently they have used bellwethers to serve a different function. At this point, bellwethers primarily provide valuable information to parties to facilitate settlement. Yet this section argues that bellwethers can do more: Their results should, in appropriate circumstances, be given preclusive effect under *Parklane*.

1. Binding Bellwethers

In a binding bellwether, once an initial court runs a trial (or multiple trials), certain findings from these trials are automatically granted preclusive effect in the remaining cases.[76] The most prominent example of binding bellwether trials arose out of litigation between residents of a residential subdivision in Houston, Texas and Chevron over Chevron's alleged failure to properly clean up a crude oil storage site. Over 3000 plaintiffs and intervenors claimed that they had suffered injuries as a result of Chevron's failure to secure the site.[77] The cases were consolidated in federal court and the district judge selected thirty bellwether plaintiffs to participate in a single trial

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[72] Fallon et al., *supra* note 60, at 2325.

[73] *Id.* (describing the characteristics of bellwether trials).

[74] Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008) (noting that judges use bellwethers to encourage settlement); *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) (noting that bellwethers "can be beneficial for litigants who desire to settle such claims").

[75] The term "bellwether" derives from the practice of hanging a bell on the neck of a sheep so that the remaining flock would follow; similarly, in MDL practice, individual bellwether trials are intended to "lead" the large mass of claimants. *See In re Chevron*, 109 F.3d at 1019.

[76] NAGAREDA, *supra* note 10, at 541 (referring to binding bellwethers as "hard-edged" bellwethers, and noting that in such trials the judgment "exert[s] some manner of preclusive effect vis-à-vis the much larger number of untried, individual cases").

[77] *In re Chevron*, 109 F.3d at 1017.

to determine "general liability or causation" issues on behalf of the remaining plaintiffs.[78] The district court "clearly intended that the combined bellwether and unitary trial would have *preclusive* effects, either establishing or defeating general liability or causation with respect to all plaintiffs' claims."[79]

On appeal, the Fifth Circuit rejected the plan to hold binding bellwether trials, on the grounds that the results could not "form the basis for a judgment affecting cases other than the selected thirty."[80] Interestingly, Judge Robert Parker grounded his opinion in the lack of statistical representativeness of the thirty bellwether plaintiffs, suggesting that where appropriate statistical sampling techniques were used, binding bellwether trials might be permissible.[81] But a concurring opinion by Judge Edith Jones discussed the larger Due Process concerns raised by binding bellwethers. She analogized binding bellwethers to the issue classes Judge Posner rejected in *Rhone-Poulenc*, and argued that binding bellwethers would similarly create "enormous momentum for settlement."[82] She also noted that binding bellwethers compromised defendants' Due Process rights by depriving them of their opportunity for an "individual assessment of liability and damages in each case."[83]

Notwithstanding the opportunity for statistically representative bellwethers to bind later claimants that Judge Parker left open, Judge Jones's opinion has carried the day; binding bellwethers have fallen out of favor.[84] On occasion, consolidated parties do agree in advance of a bellwether trial to be bound by its results,[85] but without such

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[78] Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 783–84 (1998) (citing Order Establishing Trial Plan and Resolving Related Issues at 5–6, Adams v. Chevron U.S.A., Inc., No. H-96-1462 (S.D. Tex. Dec. 19, 1996)).

[79] *Id.* at 793.

[80] *In re Chevron*, 109 F.3d at 1020.

[81] *Id.* The court held that "before a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must, prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected," and required such a finding to be "based on competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole." *Id.*

[82] *Id.* at 1022 (Jones, J., concurring).

[83] *Id.* at 1023.

[84] *See* Fallon et al., *supra* note 60, at 2331 (noting that while "[i]nitially, courts attempted to use the results of bellwether trials to bind related claimants formally . . . [a]ppellate courts have been skeptical of this practice").

[85] *See* Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359 (2d Cir. 2003) (allowing a bellwether to have binding effect on nonparties where plaintiffs and defendants had agreed to resolve the entire matter using a bellwether trial).

agreements, trials generally cannot exert preclusive effect over anyone other than their named parties.

2. *Informational Bellwethers*

Although binding bellwethers fell to Due Process challenges, bellwether trials took on a new and arguably more significant role in mass tort cases. In particular, courts increasingly use bellwethers as a device to assist defendants and plaintiffs in valuing their claims. By "providing information on the value of the cases as reflected by jury verdicts,"[86] bellwether trials reduce the uncertainty costs associated with going to trial[87] and make global settlement more likely.[88] This function, sometimes called the "informational approach," is today seen as the primary use of bellwethers.[89]

Bellwethers served this function in the federal *Vioxx* MDL. In this litigation, the MDL Panel consolidated thousands of lawsuits against Merck, in which individuals alleged that Merck's pain reliever, Vioxx, caused heart attacks and strokes.[90] Although medical studies had demonstrated that Vioxx elevated the risk of suffering these conditions,[91] individual plaintiffs faced significant hurdles in proving proximate causation because of the "host of other genetic or environmental causes" that precipitate heart attacks and strokes.[92] Consequently, the parties needed some mechanism to test whether individual factors would prevent certain plaintiffs from prevailing.

The transferee court conducted six bellwether trials. One trial resulted in a $51 million verdict for the plaintiff, another resulted in a hung jury, and the remaining four ended in verdicts for the defendants.[93] This data "helped clarify for Merck the range of prices at

[86] *In re Chevron*, 109 F.3d at 1019.

[87] *See* James Fallows Tierney, Economic Theory of Bellwether Trials 13 (Feb. 2, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754231 (describing how bellwether verdicts in Vioxx trials helped Merck determine acceptable settlement prices).

[88] *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2208 (2008) (noting that bellwether trials can encourage global settlement); Lahav, *supra* note 74, at 577–78 (same).

[89] *See* Fallon et al., *supra* note 60, at 2332 (describing the informational approach as the "modern" approach).

[90] *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452 (E.D. La. 2006).

[91] Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 216 ("The critical issue—basically not disputed—was that Vioxx exposure over a prolonged period resulted in some increased number of heart attacks and strokes among the exposed population.").

[92] *Id.*

[93] *See* Fallon et al., *supra* note 60, at 2335–36 (discussing the outcomes of the various bellwether trials).

which plaintiffs would agree to settle,"[94] and enabled the parties to negotiate a $4.85 billion settlement.[95] Bellwether trials served similar functions in another pharmaceutical MDL, *In re Propulsid Products Liability Litigation*, which ended in settlement after one bellwether trial resulted in a defense verdict and two more were dismissed on summary judgment.[96] *In re Welding Fume Products Liability Litigation* also made use of bellwethers for informational purposes.[97]

3. *A Middle Ground:* Parklane *Issue Preclusion*

While the informational, price-signaling role that mass tort bellwether trials now play is valuable, such bellwethers can serve another function. Like any other trial, a bellwether trial can decide an issue that may, under the nonmutual issue preclusion doctrine of *Parklane*, have preclusive effect in subsequent litigation.[98]

It is important to keep the *Parklane* approach conceptually separate from the binding bellwether approach described above.[99] Binding bellwethers do not follow the logic of *Parklane*. What makes binding bellwethers unique—and arguably problematic, from a Due Process standpoint—is that the initial court running the bellwether determines its preclusive effect in advance of any subsequent litigation.[100] In binding bellwethers, there is no role for the second, or "F-2" court; the first, or "F-1" court, both runs the initial bellwether *and* determines

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[94] *See* Tierney, *supra* note 87, at 13.

[95] *See* Alex Berenson, *Merck Is Said to Agree To Pay $4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1 (noting that Judge Fallon's oversight of the lawsuits in New Orleans "press[ed] the two sides to the table"); *see also The Vioxx Settlement*, MASS TORT LITIG. BLOG (Nov. 10, 2007), http://www.lawprofessors.typepad.com/mass_tort_litigation/2007/11/the-vioxx-settl.html ("Defense wins drive down settlement values, pure and simple. Had Merck lost several more of the individual trials, it would have cost a lot more than $4.85 billion to settle this.").

[96] *See* Fallon et al., *supra* note 60, at 2332–34 (describing the *Propulsid* litigation's bellwether trials and subsequent settlement).

[97] *See* Tierney, *supra* note 87, at 14–16 (describing the bellwether trials in the *Welding Fume* litigation). The *Welding Fume* litigation concluded in April 2012 via global settlement. *See* Memorandum and Order, *In re* Welding Fume Prods. Liab. Litig., No. 1:03-CV-17000 (N.D. Ohio Apr. 27, 2012) (approving a global "Resolution Agreement" providing for payment of certain funds by defendants to be allocated by a claims administrator).

[98] *See supra* note 27 and accompanying text (describing the criteria that must be satisfied for nonmutual issue preclusion to attach under *Parklane*).

[99] See *supra* notes 71–85 and accompanying text for a discussion of binding bellwethers.

[100] *See In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1020 (5th Cir. 1997) ("Our substantive due process concerns are based on the lack of fundamental fairness contained in a system that permits the . . . imposition of liability . . . based upon results of a trial of a non-representative sample of plaintiffs."); *but see* Lahav, *supra* note 74, at 610–15 (arguing that binding bellwethers are "compatible with the autonomy values that animate our traditional due process doctrines").

that its results will bind individuals not parties to the initial bellwether trial. This is precisely what the district court attempted to do in *In re Chevron*.[101] *Parklane* nonmutual issue preclusion, by contrast, gives the F-2 court the responsibility of determining preclusive effect.[102] The F-1 court makes the legal and factual determinations, but these determinations cannot bind any individuals that were not parties to the F-1 litigation unless and until the F-2 court approves the issue preclusion. Thus, *Parklane* issue preclusion avoids the Due Process concerns surrounding binding bellwethers. The *Parklane* approach also avoids some of the problems that have plagued issue classes and class actions in general. As described above, one reason that appellate courts reject issue classes in mass tort cases is because of the high stakes placed on the class certification decision.[103] Judge Posner resisted the use of an issue class in *Rhone-Poulenc* because certification would have compelled defendants to settle. By contrast, a bellwether trial that might be given preclusive effect under *Parklane* would offer lower stakes, as the F-2 court may ultimately decide not to permit issue preclusion to attach.[104] In addition, the *Parklane* approach guards against the ever-present risk in class actions that counsel may not adequately protect the rights of absent class members; under *Parklane*, there is no such thing as an absent class member, since no individual can be bound without having a "day in court."[105]

The value of allowing bellwether trials to have *Parklane* issue preclusive effect is best illustrated by litigation arising out of gasoline refiners', distributors', and retailers' use and handling of the gasoline additive methyl tertiary butyl ether (MTBE). MTBE is a chemical compound that various plaintiffs—mostly cities, municipal corpora-

[101] *See* Faulk et al., *supra* note 78, at 793 (noting that the district court "clearly intended that the combined bellwether and unitary trial would have *preclusive* effects, either establishing or defeating general liability or causation with respect to all plaintiffs' claims").

[102] See *supra* notes 23–26 and accompanying text for a discussion of the factors the F-2 court looks to when determining whether issue preclusion should attach.

[103] See *supra* notes 46–48 and accompanying text for a discussion of the role that settlement pressure played in Judge Posner's decision in *Rhone-Poulenc*.

[104] See *infra* notes 130–33 and accompanying text for a discussion of an additional mechanism to prevent bellwether trials from creating undesirable settlement pressure.

[105] Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (citing Martin v. Wilks, 490 U.S. 755, 761–62 (1989)). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971))). Although this concern did not motivate Judge Posner in *Rhone-Poulenc*, it explains the Supreme Court's skepticism toward class actions in *Amchem* and *Ortiz*. See *supra* notes 52–59 and accompanying text for a discussion of the Court's concerns of inadequate representation in *Amchem* and *Ortiz*.

tions, and water providers—alleged contaminated their groundwater, rendering it unfit for human consumption.[106] In 2000, the MDL Panel consolidated these claims before Judge Shira Scheindlin in the Southern District of New York.[107]

Collectively, plaintiffs in MTBE litigation faced two significant challenges in proving general causation. First, many of the gasoline spills had occurred long ago and beneath the ground, making it difficult for plaintiffs to identify the gasoline releases from which the contamination occurred.[108] Second, because the United States requires manufacturers to mix gasoline products together, it was impossible to identify with certainty the refiners of the gasoline that allegedly caused the groundwater contamination.[109] As a consequence, the defendants argued that they could never be held liable, because plaintiffs could not prove their role in causing the harm.[110] Against this backdrop, in 2007, the district court set a schedule for a bellwether trial to establish defendants' liability with respect to two plaintiffs.[111]

Although the results of this bellwether trial would be of interest most immediately to the individual plaintiffs, they would also be significant to various other plaintiffs in the MDL. In particular, in setting a bellwether trial, Judge Scheindlin envisioned that the jury would decide issues of "general liability, damages, and causation."[112] The resolution of the general causation issue would affect virtually every plaintiff in the MDL. From an efficiency perspective, then, it would be beneficial for judges in later MTBE cases to give the bellwether issue preclusive effect and save plaintiffs in such follow-on litigation from relitigating general causation.

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[106] *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 379 F. Supp. 2d 348, 365 (S.D.N.Y. 2005).

[107] *Id. See also In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 175 F. Supp. 2d 593, 603–05 (S.D.N.Y. 2001) (discussing the case's procedural history).

[108] *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 591 F. Supp. 2d 259, 263–64 (S.D.N.Y. 2008) ("The first obstacle is that many of the spills and leaks of gasoline that may have caused contamination of plaintiffs' well water occurred long ago and beneath the ground. . . . In many cases it is difficult for plaintiffs to identify the gasoline releases from which the MTBE contamination originated . . . .").

[109] *Id.* at 264 ("The second obstacle is that the gasoline distribution system in the United States requires manufacturers to mix their products together for transportation in a common pipeline system. Because gasoline is commingled, it is impossible to identify with certainty the refiners of the gasoline released from a leaking UST.").

[110] *Id.* (describing defendants' argument that "plaintiffs cannot prove that any particular leaking UST at a retail gas station caused the contamination of the well, and thus the companies that own those retail stations cannot be liable").

[111] *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 1:00-1898, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007).

[112] *Id.* at *3.

Of course, it may not be necessary or prudent for bellwethers to play this role in every complex case. In cases where common issues are uncontested, but individual issues are more significant, there may be little value in allowing a bellwether trial to have issue preclusive effect. In *Vioxx*, for instance, although Merck disputed the issue of general causation and sought to have plaintiffs' experts disqualified from testifying on the issue,[113] general causation was not a decisive issue in any of the four bellwether trials that it won.[114] Allowing the determination on general causation to have preclusive effect thus might not have materially advanced the litigation. For present purposes, however, it is not necessary to argue that bellwethers should have preclusive effect in every complex case. The key point is simply that allowing bellwethers to have issue preclusive effect would be valuable in at least some cases.

B. Considering Objections

While the previous sections established the doctrinal foundations and the practical utility of allowing bellwether trials to have issue preclusive effect in MDLs, this section considers legal and policy-based objections to this approach. It argues that while the legal objections are insubstantial, the approach does create legitimate policy concerns. In particular, it may risk unfairness to defendants because of the asymmetric stakes of the bellwether trial and the possibility of locking in outlier verdicts. It concludes, however, that these concerns do not justify a ban on issue preclusion in bellwether trials, as some scholars have suggested. Rather, there are procedures that courts may employ to minimize these risks while still capturing the efficiency gains promised by issue preclusion.

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[113] *See In re* Vioxx Prods. Liab. Litig., 401 F. Supp. 2d 565 (E.D. La. 2005) (analyzing and rejecting Merck's motions to exclude plaintiffs' experts on the grounds that they were not qualified to testify on general causation).

[114] *See* Heather Won Tesoriero, *Merck Is Victorious in New Orleans Vioxx Trial*, Wall St. J., Sept. 27, 2006, at A13 (noting that the verdict was based on Merck having adequately warned of Vioxx's heart risks and on a lack of proximate causation); Janet McConnaughey, *Jury Clears Merck in 11th Vioxx Trial*, Wash. Post, Nov. 16, 2006, at D3 (noting that Merck's lawyers said the plaintiff took Vioxx for less than a year and stopped taking it four days before the heart attack); Heather Won Tesoriero, *Merck Prevails in 12th Trial Since Vioxx Was Pulled*, Wall St. J., Dec. 14, 2006, at B10 (noting that the jury found that Merck adequately warned of Vioxx's risks and that the drug did not cause plaintiff's heart attack); *Merck & Co. Finally Wins Its First Federal Court Vioxx Trial*, DrugInjuryLaw.com, http://www.druginjurylaw.com/Vioxx-Merck-verdict.html (last visited Nov. 10, 2012) (noting that jurors agreed that the plaintiff did not prove that his heart attack was caused by Vioxx use).

1. Legal Objections

It should be clear at this point that the approach proposed here is consistent with current preclusion law. Nothing in *Parklane* or any other decision related to issue preclusion suggests that bellwether trials in MDLs should not be allowed to have issue preclusive effect.[115] Indeed, in the *MTBE* MDL, Judge Scheindlin noted that issue preclusion could attach to any defendant against whom there was an adverse verdict in the bellwether.[116] As discussed above, scholarly commentary considers the facilitation of settlement to be the primary function of bellwethers.[117] But there is nothing special about bellwethers, doctrinally speaking, that would prevent issue preclusion from attaching in subsequent litigation involving the same issues.[118]

2. Policy Objections

The more serious objections to this proposal sound in the policy concerns that surround *Parklane* itself.[119] In particular, one might object to the proposal for three reasons.

The first, and least weighty, objection concerns potential prejudice to plaintiffs. Allowing bellwether trials to have issue preclusive effects might increase their stakes, causing defendants to overinvest in the initial litigation and effectively prevent even meritorious plaintiffs from prevailing.[120] However, bellwether trials without issue preclusive effects already induce substantial investment by defendants. Simply structuring litigation to make issue preclusion possible

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[115] Only a strained reading of *Parklane*'s suggestion that bystander plaintiffs should be denied the benefits of issue preclusion if they "could easily have joined in the earlier action" would prohibit non-bellwether plaintiffs from utilizing the results of a bellwether trial for issue preclusive effect. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979). In fact, non-bellwether plaintiffs cannot join the "earlier action," as courts running bellwether trials select certain cases specifically amenable to aid in the resolution of the litigation. See Fallon et al., *supra* note 60, at 2360–65 for a discussion of the processes by which transferee courts and counsel select the cases to serve as bellwethers.

[116] *In re MTBE*, 2007 WL 1791258, at *3 ("Because all issues will be tried as to the representative wells, issue preclusion will attach only as to those defendants against whom there is an adverse verdict and who will then have the opportunity for appellate review."); *id.* at *4 n.21 (noting that any issues in subsequent trials will be "identical to those actually litigated and decided in the first trial, those defendants will have had a full and fair opportunity to litigate those issues, and the jury's findings on those issues will have been necessary to support a valid and final judgment on the merits").

[117] *See supra* Part II.A.2.

[118] See *supra* notes 23–27 and accompanying text for a discussion of the requirements that must be satisfied in order for issue preclusion to attach.

[119] For a discussion of the policy-related criticisms of *Parklane*, see *supra* notes 20–22 and accompanying text.

[120] Issacharoff, *supra* note 12, at 168 ("[A] defendant facing many cases may suddenly feel pressure to invest in full-bore litigation even in a case that does not merit such attention.").

seems unlikely to significantly alter defendants' calculus in mass tort cases, as their incentive is already to litigate these trials as vigorously as possible. In the *Vioxx* litigation, for instance, Merck employed several different law firms for bellwether trials, setting aside $675 million for legal fees,[121] a figure that apparently "caught the attention of the nation's top defense attorneys."[122] A more significant objection to the proposal is that the asymmetric stakes might result in unfairness to defendants by creating excessive settlement pressure. This objection stems from the premise that nonmutual offensive issue preclusion creates an imbalance in the significance of the litigation; in the words of one commentator, nonmutual issue preclusion puts the defendant at risk of "either winning one case or losing a thousand."[123] The worst-case scenario for a plaintiff, on the other hand, is that she would lose just that one particular case. Consequently, the mere possibility that a defendant could be precluded from relitigating an issue increases the likelihood the defendant would settle.[124] *Parklane* makes this problem present in all litigation, but it may be particularly acute in mass harm litigation, where, almost by definition, the number of individual plaintiffs and amount of potential liability is enormous.

Compounding this problem is a third, and related, objection: The application of issue preclusion in bellwether trials could lock in outlier, erroneous jury findings. Mass tort litigation involves "the claims of hundreds of thousands of individuals."[125] If the very first verdict happens to favor the plaintiff, application of issue preclusion could bind "subsequent juries . . . on the issue, even though they may well

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[121] *See* Heather Won Tesoriero, *Defending Multiple Vioxx Cases Is Costly Burden for Merck*, WALL ST. J., Jan. 26, 2006, at B1.

[122] *Id.* The importance of bellwether trials is also reflected in the media coverage that they generate; the *Vioxx* trials were the subject of extensive coverage. *See, e.g.*, Theresa Agovino, *First Federal Vioxx Trial Opens; Manufacturer Argues Heart Disease, Not Drug, Caused Death*, WASH. POST, Nov. 30, 2005, at D2; Janet McConnaughey, *Jury Clears Merck in 11th Vioxx Trial; Drug Firm Has Won 3 of 4 Federal Cases*, WASH. POST, Nov. 16, 2006, at D3.

[123] ISSACHAROFF, *supra* note 12, at 168; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) (noting a "nagging sense of unfairness as to the way petitioners have been treated, engendered by the *imprimatur* placed by the Court of Appeals on respondent's 'heads I win, tails you lose' theory of this litigation"); Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 743–44 (2009) (noting that, under nonmutual offensive issue preclusion, if a plaintiff "wins on defectiveness against [a] common defendant, then subsequent plaintiffs may gain issue preclusion and prevail on defect because the common defendant was in the prior case").

[124] Stier, *supra* note 123, at 746 (arguing that as a result of the asymmetrical stakes of nonmutual offensive issue preclusion "defendants are incentivized to settle with plaintiffs for more than they would without issue preclusion, increasing their total litigation exposure").

[125] *Id.* at 738.

have [come to a different result]" with respect to the remaining individuals.[126] And if the plaintiff in the bellwether trial is a particularly sympathetic individual, the risk of an aberrational verdict in the first suit can be especially high.[127] Again, although this objection applies to the *Parklane* doctrine generally, it is particularly salient in mass harm litigation, where "tremendous sums" turn on common issues.[128]

3. *Possible Responses: Safeguarding Due Process Rights While Preserving Efficiency*

One response to these objections would be to entirely disallow the application of issue preclusion in mass harm cases. This is the approach advocated by Professor Byron Stier, who argues that courts should "decline to apply issue preclusion in the mass tort context," on account of its unreliability and one-sidedness.[129] Although this response would address settlement pressure on defendants, it would also allow defendants to relitigate issues that they have lost time and again.

A more productive response to the objections above would be to design procedures that capture the efficiency gains of issue preclusion while minimizing unfairness to defendants. MDL courts often control hundreds or even thousands of cases.[130] They might take advantage of this fact by running bellwether trials on a range of these cases, and only allowing issue preclusion to attach if plaintiffs win the vast majority of them. For example, an MDL with 1000 cases could choose ten with which to hold bellwethers, but issue preclusion would not attach until all ten cases returned results. If plaintiffs won the first three but defendants won the second seven, then issue preclusion

[126] *Id.* at 738–39.

[127] *Id.* at 740 ("[T]he first plaintiff may have been selected to be the most sympathetic by plaintiffs' counsel, increasing the chance of an aberrational verdict in favor of the plaintiffs in the first suit.").

[128] *Id.* at 742.

[129] *Id.* at 756.

[130] *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 & n.29 (2008) (noting that, as of 2008, thirty-seven MDLs comprised more than 100 constituent actions and that the three largest MDLs comprised 42,000, 9300, and 5600 individual actions). In addition, the increasing popularity of "direct filing," whereby plaintiffs bypass the MDL transfer process and file their cases directly into an MDL court, creates a broader pool from which MDL courts can draw bellwether cases for trial. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. (forthcoming 2013) (manuscript at 35), *available at* http://ssrn.com/abstract=2118219 (noting that direct filing provides an MDL court with "a more representative pool from which it can draw bellwether cases for trial"); *see also* Fallon et al., *supra* note 60, at 2355–57 (describing the direct filing procedure).

would not attach in subsequent litigation. If, however, plaintiffs won all ten verdicts, then issue preclusion could attach.

This approach would guard against the risk of inappropriate settlement pressure. Here, it is important to be precise about why settlement pressure may be problematic. Settlement pressure, as Richard Nagareda has explained, is not an evil per se.[131] Rather, the normative implications of settlement pressure depend on the pressure's source, and whether one regards that source as legitimate. If, for example, the defendants in *Rhone-Poulenc* felt pressured to settle because the certification decision made it easier for individuals to bring meritorious but economically infeasible claims, then the existence of settlement pressure should have been seen as a normatively positive development.[132] The pressure created by the certification decision in *Rhone-Poulenc* would have been more problematic if it resulted from the risk that the case would be resolved based on a single jury's cognitive biases—as seemed possible given the tragic outcome to individual plaintiffs in the case.[133] Thus, when one speaks of settlement pressure, it is essential to be clear about the reason the pressure exists.

Any settlement pressure created by the approach proposed here would have to be regarded as stemming from a legitimate source. Unlike the class certification decision in *Rhone-Poulenc*, this approach would require multiple verdicts before its results could be applied on a broad scale. Defendants likely would be less concerned that a particular jury would reach an incorrect verdict as a result of its cognitive biases. Issue preclusion would not be allowed to attach unless and until defendants lost a substantial number of bellwether trials, which would counteract the risk of erroneous, outlier verdicts.[134] If the MDL judge ensured that the bellwether trials involved a wide range of plaintiffs—not just the most sympathetic ones—any

[131] *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1894 (2006) (noting that "[w]hat one should make of the amplification effect [of class certification] in normative terms depends crucially on what explanation one embraces for the underlying probability of plaintiff success that aggregation would amplify").

[132] *Id.* at 1881–85 (arguing that if all of the claims in *Rhone-Poulenc* were meritorious, then an increase in the absolute number of claims that defendants would face as a result of class certification "would be evidence of the desirable consequences of aggregation, not of its dysfunctionality").

[133] *Id.* at 1892 (positing that Judge Posner's true concern in *Rhone-Poulenc* was that a jury might have sided with the plaintiff class "not because of a bona fide disagreement over ambiguous facts, but instead for other reasons").

[134] This Note does not resolve the number of trials that would be needed before their results should be permitted to have preclusive effect. Likely, this determination would depend on case-specific factors, such as the total number of plaintiffs present in the litigation, and the number of relevant distinctions among the group of plaintiffs.

increased pressure felt by defendants would more likely be the result of the underlying merits of the suit.[135]

One might ask how MDL transferee courts could ensure that the first bellwethers would not be used for issue preclusive effect. After all, as the above discussion pointed out, the preclusion decision is not up to the F-1 court; the F-2 court decides whether or not preclusion should attach and the F-1 court may not give its findings preclusive effect in advance of subsequent litigation.[136] Nevertheless, there are ways in which the F-1 court can *prevent* its findings from being used for preclusive effect by the F-2 court. One option would be for the F-1 court to simply advise subsequent courts not to treat findings on common issues as preclusive until a certain number of bellwethers had been completed. Another, perhaps stronger approach would be for the F-1 court to issue only general, rather than special verdicts unless and until plaintiffs won a significant number of bellwether trials. As will be discussed in further detail in Part III, issue preclusion requires specific findings to be made by the F-1 court, and general verdicts do not provide enough specificity to allow issue preclusion to attach. In this way, the F-1 court could prevent issue preclusion from being applied until its application would be warranted.

To be sure, this approach would give the MDL court significant discretion. It is unlikely that a decision such as whether to use a general or special verdict would be subject to interlocutory review,[137] and some scholars have criticized the extent to which federal trial judges already exercise unchecked discretion in case management.[138] Ultimately, however, the current MDL system relies heavily on trial judges' discretion, and the amount of discretion conferred by the

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[135] *See* Fallon et al., *supra* note 60, at 2348–51 (discussing different methods by which individual cases would be selected for bellwether trials, including random selection, selection by the transferee court, and selection by the attorneys).

[136] *See supra* note 102 and accompanying text (discussing how *Parklane* assigns the preclusion decision to the F-2 court).

[137] 28 U.S.C. § 1292(b) requires the order under review to "involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion . . . ." 28 U.S.C. § 1292(b) (2006). *See also* Andrew S. Pollis, *The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1656 (2011) (describing 28 U.S.C. § 1292(b) as "[p]erhaps the most commonly attempted route" to certification for discretionary appellate review).

[138] *See, e.g.*, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 721–22 (2010); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982). With regard to MDL proceedings, one scholar has proposed that some form of appellate review of MDL judges' discretionary rulings might be appropriate. *See* Pollis, *supra* note 137, at 1686 n.300 ("Perhaps with the benefit of experience under my current proposal, there would be a case for expanding the availability of mandatory appellate jurisdiction in MDL cases to include appeals from certain discretionary rulings."). The merits of this proposal are beyond the scope of this Note.

approach proposed here is similar to that exercised by MDL judges when they make other highly significant, but unreviewable decisions, such as those on motions to dismiss or summary judgment motions.[139] While the approach proposed here certainly has its drawbacks, the alternatives, as described earlier, have proven unattractive. This proposal would thus represent an incremental improvement, working within the bounds of the current system.

III
Implementing Issue Preclusion in Bellwether Trials

Even if one accepts that, in certain circumstances, granting issue preclusive effect to bellwethers under *Parklane* in MDLs would be valuable, there is another, perhaps more significant stumbling block to the success of this approach. Nonmutual issue preclusion cannot attach unless the second court can identify the issues actually litigated in the initial proceeding. This is not always a simple task. The following section illustrates how subsequent courts' inability to identify the issues resolved in the initial proceeding can undermine the efficiency gains promised by this approach. It first illustrates the problem in an issue class action, *Engle v. R.J. Reynolds*, and then shows that the problem can arise in the context of non-class aggregations as well. The section closes by suggesting a solution to this problem, modeled on a proposal developed by the ALI.

A. Engle v. R.J. Reynolds

On May 10, 1994, nine named plaintiffs filed a class action lawsuit, captioned *Engle v. R.J. Reynolds Tobacco Co.*, in Florida state court.[140] The defendants were five major U.S. cigarette manufacturers, and the proposed class comprised all current and former smokers in the United States who had suffered or died from diseases caused by smoking cigarettes, as well as the smokers' survivors.[141] After extensive discovery, legal briefing, and an evidentiary hearing,

[139] Pollis, *supra* note 137, at 1667–68 ("Legal error in pretrial rulings has 'effects that go far beyond the mere conduct of litigation.' A trial judge, in ruling on a motion to dismiss or a motion for summary judgment, is often required to articulate the law that will govern various substantive aspects of the parties' dispute.").

[140] *See* Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000) (describing the state trial court filing as amended by the state appellate court).

[141] *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996) (explaining that the trial court certified as a class "[a]ll United States citizens and residents, and their survivors, who have suffered . . . from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine").

the Dade County Circuit Court certified the nationwide class.[142] On appeal, the Third District Court of Appeal limited the class's geographical reach to "Florida citizens and residents,"[143] but nevertheless affirmed the certification order and ordered the case to proceed as a class action.[144] This diminished class comprised approximately 700,000 members.[145]

Faced with the prospect of running an extraordinarily complex trial, the lower court structured the litigation into phases. Phase I, it decided, would be used to determine "common issues relating exclusively to the defendants' conduct and the general health effects of smoking."[146] If the tobacco companies were found liable in this first phase, the litigation would proceed to Phase II, which would involve trials to determine compensatory and punitive damages.[147] The third phase would consist of "mini-trials" to allocate the award among individual class members.[148]

After a jury selection process that took over three months,[149] Phase I began in October 1998.[150] The trial, which lasted one year and one day,[151] included the testimony of 84 witnesses and a transcript of over 35,000 pages.[152] After seven days of deliberation, the jury found for the class on almost every issue; among its findings were that each defendant had sold defective cigarettes, acted negligently, and concealed information.[153] The jury did not, however, decide which of the

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142 *See id.*; *see also* Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871, 873 (2001) ("After discovery, legal briefing, and an evidentiary hearing on the class certification issues, on October 31, 1994, the judge entered an order certifying a national class . . . .").

143 *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d at 42 ("[W]e conclude that the subject class should simply be reduced to manageable proportions, namely, that the class should be restricted to Florida citizens and residents, rather than United States citizens and residents.").

144 *Id.* (affirming the order certifying the class action as modified).

145 *See* Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1258 (Fla. 2006); Liggett Grp., Inc. v. Engle 853 So. 2d 434, 442 (Fla. Dist. Ct. App. 2003).

146 *Engle v. Liggett Grp., Inc.*, 945 So. 2d at 1256.

147 *Id.* at 1257–58 (discussing the procedural history of the litigation).

148 *See* Milo Geyelin, *In Florida, a Vast Tobacco Case Looms*, WALL ST. J., Oct. 1, 1998, at B1 (describing a "series of minitrials" in Phase III to resolve "thousands of claims by other class members").

149 *Id.* ("Picking six jurors and 12 alternates has already taken nearly three months.").

150 *Id.*; *see also* Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1357 (1999).

151 Geyelin, *supra* note 148; *see* Kearns, *supra* note 150.

152 *See* McGovern, *supra* note 142, at 873.

153 The Phase I findings included "that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or misleading statement of material fact with the intention of misleading smokers; . . . (8) [and] that all of the defendants were negligent." Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1257 n.4 (Fla. 2006).

various alternative allegations of defect, negligence, and concealment it accepted, some of which applied to different brands of cigarettes at different time periods. The litigation then proceeded to Phase II, where the jury awarded $12.7 million in compensatory damages to the class representatives, and $145 billion to the class in punitive damages.[154] Before the Phase III proceedings began, the Florida Supreme Court decertified the class "because individualized issues such as legal causation, comparative fault, and damages predominate[d]."[155]

More troubling for the Florida Supreme Court, however, was what to do with the findings from the Phase I trial. Now that the class would be decertified, former class members could initiate individual actions against the cigarette manufacturers, and the court afforded them one year in which to file such actions.[156] But would the individuals be forced to relitigate the issues that had already been adjudicated in the Phase I trial, such as the defectiveness of defendants' cigarettes and general causation? Against this background, the court reached a "pragmatic solution": For former class members who "[chose] to initiate individual damages actions," the "Phase I common core findings . . . [would] have res judicata effect in those trials."[157] In other words, the Phase I common core findings were to be given issue preclusive effect.[158]

But what exactly *were* those Phase I common core findings? The initial jury determined that all of the defendants (save one) placed cigarettes on the market that were defective and unreasonably dangerous, but the verdict did not specify which particular brand or brands of cigarettes were defective and unreasonably dangerous during any particular time period.[159] How would a court in follow-on litigation respond to a plaintiff relying on the findings from Phase I to establish the defectiveness of the particular brand of cigarette he

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154 *See* R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1063 (Fla. Dist. Ct. App. 2010) (recounting the results of the Phase II proceedings).

155 Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1268 (Fla. 2006).

156 *Id.* at 1254.

157 *Id.* at 1269.

158 The court's use of the term "res judicata" here is perplexing, as the term "res judicata" typically implies claim, rather than issue, preclusion. However, subsequent courts interpreted the Florida Supreme Court's direction that the approved findings were to have "res judicata effect" in future trials as referring to issue preclusion. *See* Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1333 (11th Cir. 2010) ("[T]he Florida Supreme Court's direction . . . necessarily refers to issue preclusion."); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d at 1067 ("[W]e generally agree with the Eleventh Circuit's analysis of issue preclusion versus claim preclusion . . . ."); R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707, 715 (Fla. Dist. Ct. App. 2011) ("[W]e agree with the Eleventh Circuit's determination . . . that the Florida Supreme Court's reference . . . necessarily meant issue preclusion, not claim preclusion.").

159 *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d at 1335.

smoked? Relying on the Phase I findings would run the risk of holding defendants liable for something the jury never decided.

This inability to identify the Phase I common core findings undermined the purported efficiency gains justifying the initial certification. Courts in follow-on litigation splintered in terms of what preclusive effect to give the results of the Phase I proceedings; some gave them broad preclusive effect, while others required individual plaintiffs seeking to invoke the Phase I findings to support their position with specific parts of the trial record.[160] This effectively meant that lower courts had to reexamine work already done in a 366-day, 84-witness, 35,000-page trial—far from a model of efficiency. And while the parties may eventually try to craft a global settlement, over 7000 individual smoker suits remained pending in state and federal court as of March 2012.[161] According to one source, these courts will not be finished clearing their dockets of *Engle* progeny trials until the year 2269.[162]

B. The Engle *Complication in Bellwethers*

The efficiency-undermining problem of identifying issues resolved in earlier proceedings is not unique to *Engle*. In fact, this very same issue has arisen in non-class aggregations utilizing bellwether trials. The clearest example of this can be seen in *Dodge v. Cotter Corp.*, litigation arising out of hazardous emissions from a uranium mill in Colorado.[163] In 1989, a group of approximately 500 residents successfully brought suit against Cotter, the company that operated the mill.[164] The plaintiffs claimed that Cotter had engaged in eleven specific acts and omissions of negligence, including permitting the hazardous emissions to occur, failing to test incoming ores for haz-

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[160] *Compare R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d at 1069 ("[T]he Phase I findings establish the conduct elements of the asserted claims, and individual *Engle* plaintiffs need not independently prove up those elements . . . ."), *with Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d at 1335 (requiring plaintiffs "to show with a 'reasonable degree of certainty' that the specific factual issue was determined in [their] favor"). The Florida Fourth District Court of Appeal took a middle ground, holding that the Phase I findings established the conduct elements of negligence and strict liability, but did not establish legal causation. *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d at 715.

[161] David Bario, *No Supreme Court Relief for Tobacco Companies in* Engle *Litigation*, CORP. COUNS. (Mar. 26, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202548112711&No_Supreme_Court_Relief_for_Tobacco_Companies_in_Engle_Litigation.

[162] *CVN's* Engle *Verdict Tracker*, COURTROOM VIEW NETWORK, http://info.courtroomview.com/engle-verdict-tracker/ (last visited Nov. 10, 2012).

[163] 203 F.3d 1190 (10th Cir. 2000).

[164] *Id.* at 1194.

ardous materials, and failing to properly train employees.[165] The jury determined that Cotter had been negligent, but was instructed only that "negligence means a failure to do an act which a reasonably careful person or company would do . . . ."[166] The verdict form did not specify what negligent act or omission formed the basis of the general finding of negligence.[167]

Not surprisingly, when another group of plaintiffs brought suit on the same grounds, they were unable to invoke *Parklane* issue preclusion against Cotter. This group of plaintiffs, from the same community, filed a complaint that was "virtually identical" to the complaint in the earlier trial.[168] However, even acknowledging that its decision would result in "time-consuming relitigation of the same issue,"[169] the Tenth Circuit reversed the district court's decision to give the jury's findings preclusive effect, because it "[could not] say as a matter of law the issue decided by the first jury [was] identical to the issue in controversy in this case," and remanded to the district court for retrial.[170] On retrial, a subsequent jury found Cotter negligent.[171]

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[165] The eleven allegedly negligent acts were:

> (A) permitting the emissions, releases and leaks of radioactive and/or hazardous materials from the facility and property to occur; (B) failing to determine where and how the emissions, releases and leaks of radioactive and/or hazardous materials occurred and in failing to correct the problems to prevent further leakage and emissions; (C) failing to provide adequate containment of the radioactive and/or hazardous materials; (D) failing to provide adequate air, surface water, ground water, rivers and soil sampling and/or monitoring to detect releases of radioactive and/or hazardous materials; (E) failing to take proper measurements of particle sizes and emissions; (F) failing to test incoming ores adequately for the presence of hazardous or toxic materials; (G) failing to timely and adequately warn or otherwise notify Plaintiffs of such releases and contamination and the effects thereof; (H) failing to take timely and adequately remedial actions to contain and clean up such contamination and to prevent recurring releases; (I) failing to properly train and supervise their employees to insure [sic] that the necessary safeguards and procedures would be followed in the event that any emissions, releases or leaks of radioactive and/or hazardous materials from the facility and property might occur; (J) failing to comply with applicable Federal and State laws, regulations, licenses or orders; (K) being negligent in the construction and implementation of remedial measures for containing releases from the tailing ponds and operating facilities.

Id. at 1196 n.7.

[166] *Id.* at 1198.

[167] *Id.*

[168] *Id.* at 1195.

[169] *Id.* at 1200 ("We therefore reverse the district court's grant of partial summary judgment, fully mindful of the impact of the conclusion on this already protracted and voluminous case.").

[170] *Id.* at 1199.

[171] Dodge v. Cotter Corp., 328 F.3d 1212, 1218–19 (10th Cir. 2003) (noting that the jury "found that Cotter was negligent" in the *Dodge II* trial).

Hardy v. Johns-Manville Sales Corp. provides a final example where the *Engle* problem has threatened the ability of bellwethers to efficiently resolve common questions in mass harm litigation.[172] In a lawsuit prior to *Hardy*, a jury had determined that the defendant, Johns-Manville, was strictly liable for various asbestos-related diseases based on a failure to warn of the dangers of asbestos-containing products.[173] Similar plaintiffs in *Hardy* tried to invoke these findings and argue, under *Parklane*, that *Johns-Manville* should be precluded from relitigating the failure to warn issue. But, for similar reasons as in *Engle* and *Cotter*, the court determined that issue preclusion could not attach. The first jury's verdict was "ultimately ambiguous as to certain key issues," including the question of when the defendant's duty to warn actually attached.[174] As such, the court held, it "[could not] justify the trial court's collaterally estopping the defendants."[175]

C. *Solving* Engle

Courts' struggles to implement issue preclusion in cases like *Engle*, *Cotter*, and *Hardy* should not be surprising. The bulk of the Supreme Court's *Parklane* analysis is devoted to the fairness concerns raised by nonmutual issue preclusion. As a consequence, it provides substantial guidance to courts on how to guard against these risks. Nowhere in the opinion, however, does the Court discuss how to achieve the efficiency gains promised by nonmutual issue preclusion. This oversight is understandable in light of the fairness concerns that nonmutual issue preclusion raises, and the shift in the doctrine that *Parklane* signaled.[176] But in order for issue preclusion to achieve its maximal, efficiency-producing effect, it is an oversight that should be addressed.

To put the matter slightly differently, the gap in the *Parklane* opinion is that the Court mainly addressed issues geared toward the F-2 court. The discretionary factors that *Parklane* discussed—whether the plaintiff is a "wait and see" plaintiff, whether there have been prior inconsistent judgments, whether the procedural rules were the same in the first and the second forum—are all factors that must be considered by the court deciding whether or not issue preclusion should attach. But the other requirements for issue preclusion—that the issues be identical, that the issue have been "actually litigated" in

[172] 681 F.2d 334 (5th Cir. 1982).

[173] *Id.* at 343.

[174] *Id.* at 343–44.

[175] *Id.* at 345.

[176] *See supra* note 15 and accompanying text (noting *Parklane*'s elimination of the mutuality requirement).

the first proceeding—implicate the structure of the F-1 litigation. If the jury instructions are not made sufficiently specific at F-1, as they were not in *Engle*, *Cotter*, and *Hardy*, then it is unlikely that the F-2 court can reap issue preclusion's efficiency gains. As such, more guidance is needed for courts at the F-1 stage.This insight regarding the role of the F-1 court has been recognized by the ALI in its *Principles of Aggregate Litigation*. In section 2.12, entitled "Adjudication Plan for Aggregation," the ALI proposes that:

> (a) When authorizing the aggregate treatment of a common issue or of related claims by way of a class action, the court should adopt an adjudication plan that explains . . . (2) the procedures to be used in the aggregate proceeding to determine the common issue . . . and (3) the anticipated effect that a determination of the common issue will have in the class proceeding and with respect to any other proceedings on the remaining issues.[177]

Ratified in 2009, this proposal was a direct response to the *Engle* problem.[178] In the context of an issue class action, this proposal makes issue preclusion more likely to attach in the F-2 court. Rather than going back through the trial record, as *Brown v. R.J. Reynolds* suggested would be necessary in order for issue preclusion to attach in the *Engle* progeny cases,[179] under this proposal, the F-2 court could simply look to the F-1's adjudication plan for guidance on whether and how issue preclusion should attach.[180] As one of the comments following the proposal suggests, "[c]lear and precise identification of the common issues to be addressed in the aggregate proceeding . . . is important so as to enable the determination of those issues to have preclusive effect in other proceedings on the remaining individual issues."[181]

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[177] ALI PRINCIPLES OF AGGREGATE LITIGATION, *supra* note 8, § 2.12.

[178] *Id.* § 2.12 cmt. b ("When the special verdict form lacks precision and specificity, determination of a common issue on an aggregate basis may be challenged as unlikely to yield issue preclusion in subsequent proceedings." (citing Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328 (M.D. Fla. 2008), *vacated*, 611 F.3d 1324 (11th Cir. 2010))).

[179] 611 F.3d 1324, 1335 (11th Cir. 2011) (requiring the party asserting issue preclusion "to point to specific parts of [the trial record] to support its position").

[180] Of course, the F-1 court would not be able to predetermine the preclusive effect of its own proceedings. *See* ALI PRINCIPLES OF AGGREGATE LITIGATION, *supra* note 8, § 2.12 cmt.b (emphasizing that subsection (a)(3) of § 2.12 does not include a suggestion that the lower court could make such a predetermination).

[181] *Id.* § 2.12 cmt. b. Facilitating the application of issue preclusion was not the ALI's only goal in adopting this procedure, however. By forcing the F-1 court to think in terms of the anticipated preclusive effects, the ALI hoped that this would serve a "disciplining function," and deter courts from authorizing class treatment if such would not subsequently yield preclusive effects. *See id.* (discussing the purpose of subsection (a)(3) of § 2.12). Nothing about this approach is particularly controversial; as the ALI notes, "[t]he

To facilitate the identification of common issues in subsequent proceedings, the comments after § 2.12 suggest that F-1 courts craft special verdict forms to be used in the aggregate proceeding.[182] Special verdicts, authorized by Federal Rule of Civil Procedure 49(a),[183] allow the jury to make specific findings about each factual issue in a case, rather than a general finding in favor of one party or another.[184] Rule 49(a) grants judges discretion in deciding how and when to implement this technique;[185] often, outside of aggregate litigation, courts consult special verdicts when confronted with an issue preclusion question to determine what was decided in the first proceeding.[186] The ALI recommends this approach in the context of aggregate litigation as well, specifically to avoid the problems encountered in *Engle*.[187] Had the initial, class-certifying court in *Engle* used a sufficiently specific special verdict form, the confusion regarding the exact results of the Phase I trial might have been entirely avoided.

D. Application to Bellwether Trials: A Cost-Benefit Approach

Although the ALI proposal picks up on the insight regarding the importance of the F-1 court, it cannot simply be applied to bellwether trials in MDL transferee courts wholesale. First, the ALI proposal applies to class actions, not the MDL process.[188] There is a good reason for this; another objective of the ALI proposal is to serve a "disciplining function" on courts, and limit their use of issue classes to only those cases where the issue class would "yield the desired preclu-

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approach of [section 2.12] describes broadly accepted judicial practice with regard to trial plans under current law." *Id.*

[182] *Id.* ("[T]he special verdict form would facilitate the identification in other proceedings of precisely what issues were litigated and determined in the aggregate proceeding.").

[183] FED. R. CIV. P. 49(a)(1) ("The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact.").

[184] Suel O. Arnold, *Special Verdicts*, 6 AM. JUR. TRIALS 1043, 1046 (1967).

[185] FED. R. CIV. P. 49(a)(2) ("The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.").

[186] *See, e.g.*, RecoverEdge L.P. v. Pentecost 44 F.3d 1284, 1291 (5th Cir. 1995) ("To define the issue that was actually litigated in the first proceeding, we look to the jury's special verdict.").

[187] *See* ALI PRINCIPLES OF AGGREGATE LITIGATION, *supra* note 8, § 2.12 cmt.b ("The use of special verdicts is one technique that allows a verdict to have clear estoppel value in subsequent litigation."); *id.* (noting that "[w]hen the special verdict form lacks precision and specificity, determination of a common issue on an aggregate basis may be challenged as unlikely to yield issue preclusion in subsequent proceedings"); *see also* Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328 (M.D. Fla. 2008), *vacated*, 611 F.3d 1324 (11th Cir. 2010) (holding that determination of common issues in tobacco class action did not yield issue preclusion in postdecertification individual actions by smokers).

[188] *See* ALI PRINCIPLES OF AGGREGATE LITIGATION, *supra* note 8, § 2.12(a) ("When authorizing the aggregate treatment of a common issue or of related claims by way of a *class action*, the court should adopt an adjudication plan . . . ." (emphasis added)).

sive effect."[189] But there is no reason to think that MDL transferee courts should be discouraged from using bellwether trials that do not yield preclusive effects; informational bellwether trials can indeed be quite useful in helping to resolve mass tort controversies.[190]

Relatedly, it is not *always* beneficial to give bellwether trials preclusive effect. As discussed in Part II.A.3, some bellwether trials are best suited to serve an informational, cost-signaling function.[191] And the use of special verdict forms is not without its problems. Most fundamentally, scholars have objected to special verdicts on the grounds that they interfere with the basic functioning and purposes of the jury; jurors are not typically required to explain their decisions.[192] In addition, special verdicts increase the amount of time required for jury deliberations,[193] and can create problems if juries come to conflicting answers to the various questions on the form.[194] It would be wasteful to use special verdict forms when significant efficiencies would not be gained from giving the results of the bellwethers preclusive effect.

Consequently, MDL transferee courts running bellwether trials should weigh the costs and benefits of applying the ALI proposal and use special verdict forms where their benefits exceed their costs. This analysis would involve various considerations. On the cost side, transferee courts should consider the risk of creating inappropriate settlement pressure and, as discussed above, should not turn to special verdict forms unless plaintiffs have already won a number of bell-

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[189] *Id.* § 2.12 cmt.b ("The obligation under this Section . . . stands to serve a disciplining function with regard to whether the aggregation will, in fact, yield the desired preclusive effect.").

[190] See *supra* notes 86–97 and accompanying text for a discussion of the utility of informational bellwethers.

[191] See *supra* notes 113–14 for a discussion of cases in which bellwethers might be better suited for a purely informational function.

[192] *See* Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 L. & PSYCHOL. REV. 1, 4 (1990) ("The most fundamental objection to special verdicts is that they interfere with the basic functioning and purpose of the jury. The jury is not required to explain its decision when it renders a general verdict."); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2503 (3d ed. 2008) (noting that one of the purposes of the jury system is "to permit the jury to temper strict rules of law by the demands and necessities of substantial justice and changing social conditions" and that those who share this conception of the jury system "rightly fear that [the jury system] will be limited or defeated by the . . . special verdict practice").

[193] *See* Samuel M. Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21, 24 (1951) ("Juries seem to have more trouble reaching an agreement on special verdicts. Most of them were obliged to deliberate for twelve hours or longer.").

[194] *See* Robert Dudnik, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 498–99 (1965) (discussing the complications created by inconsistent answers on special verdict forms).

wethers.[195] Additionally, MDL courts should be hesitant to use special verdict forms when litigation is in what has been called its "immature" stage, where the lawyers are still involved in the "exploration of the legal and factual questions surrounding the merits of the litigation."[196] It might be preferable to wait until the litigation has reached its "mature" stage, where "the threat [for plaintiffs] to prevail is such that defendants face a substantial probability of loss in the event of trial," before turning to such a technique.[197] MDL courts should also consider the costs specifically related to the use of special verdict forms, including the increased amount of time and resources that special verdict forms require, and the risk of juror confusion.

On the benefits side, MDL courts should consider efficiency gains that special verdict forms would generate. This would involve the likelihood of follow-on litigation, as well as the likelihood that parties in subsequent litigation would want to invoke issue preclusion. If, for instance, the parties appear likely to settle immediately after the bellwether trials are complete, then perhaps the costs of this approach may not justify its application. If, on the other hand, it appears likely that litigation will continue for a significant amount of time, and parties will be forced to relitigate a complex and resource-intensive issue in follow-on litigation, then the application of the ALI adjudication plan and special verdict forms may well lower the overall costs of the litigation and lead to a more efficient resolution of the dispute.

Conclusion

Although thirty years have passed since the Supreme Court permitted nonmutual issue preclusion in *Parklane*, its effect has been quite limited in the mass torts context. Many of the scaling devices that courts have attempted to use to increase efficiency in resolution of these cases have been of limited utility, but applying *Parklane* in the context of MDL bellwether trials would promote efficient and final resolution of some mass tort controversies. It would also avoid the Due Process problems that have plagued some of these other devices.

Still, in order for the doctrine to have this desired effect, attention must be paid to the lessons of *Engle*. By itself, the ALI proposal will prevent the specific problem created in *Engle* from recurring, but it will not seriously help to resolve the majority of mass tort cases, as it only applies in the class action context. Modifying the ALI proposal,

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195 *See supra* Part II.B.3.

196 Nagareda, *supra* note 9, at 14.

197 *Id.* at 14–15.

and using it in the context where most mass torts are resolved today, might help the civil litigation system finally achieve the "judicial economy" promised by *Parklane*.[198]

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198 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).