# Do You Want to Play a Game? DuPont Claims Sixth Circuit Decision Turns MDL Into a Lopsided Game of Heads and Tails

**By Max Swetman | Alexandra D. Bourbon**

September 11, 2023

In its recently filed reply brief, DuPont de Nemours Inc. argues the recent Sixth Circuit decision results in a "heads-I-win-one-trial-tails-I-Lose-the-entire-MDL[1] rule" and further states: "No rational player rolls the dice when a bad result or two means they lose in perpetuity and a positive result means they roll again." The reply brief, submitted to the US Supreme Court, further argues the Sixth Circuit's decision seriously threatens MDL practice going forward.

To give a bit of a background, this case arises out of long-running MDL where thousands of plaintiffs claimed injuries from chemical releases from one of DuPont's plants. Cases were selected to be bellwether trials; three out of the initial batch of six cases resulted in plaintiff verdicts. In the Petition for Writ of Certiorari, DuPont states these cases were not designed to be representative of all the MDL cases and the district court assured that the verdicts would be non-binding.

Although these earlier trials were meant to test legal strategies and possibly reach a global settlement, the district court invoked nonmutual offensive collateral estoppel to preclude DuPont from disputing key issues of duty, breach and foreseeability across the MDL in a case brought by the Abbotts against DuPont in 2017. The case involved Mr. Travis Abbott, who was awarded $40 million after a jury determined DuPont's contamination of the Ohio River was linked to his testicular cancer.

At the heart of the reply brief is *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). DuPont argues the unprecedented extension of nonmutual offensive collateral estoppel contravenes *Parklane* and creates "asymmetrical risks" for MDL defendants that will jeopardize the use of bellwethers to resolve federal cases most in need of settlement. DuPont further states that applying preclusion to an entire MDL based on a handful of expressly non-binding bellwethers is fundamentally unfair and an "express promise that a trial will be nonbinding should be more than enough to foreclose making that trial binding via collateral estoppel."

Under this decision, DuPont states, "no matter how many bellwethers an MDL defendant wins, it cannot assert nonmutual collateral estoppel against other MDL plaintiffs but if an MDL defendant loses just a handful of bellwethers…it faces preclusion across the entire MDL." DuPont points out the practical impact of this decision, mentioning how it does not take into account plaintiffs' counsel's ability to drop or settle risk bellwethers.

DuPont further asserts the Sixth Circuit erred by allowing nonmutual offensive collateral estoppel to preclude DuPont across the MDL without a finding that the three early cases were representative of the MDL. The reply reiterates how only two of the initial batch of six cases actually went to trial but were joined by a third case that was selected as "non-representative"; the three early cases were different from later filed cases in the MDL by plaintiffs like Mr. Travis Abbott as they involved:

+ Different alleged exposure mechanisms and durations;
+ Different alleged levels of exposures; and
+ Different degrees of proximity to the releases.

Notably, the reply argues recently-filed MDL cases include individuals even father downriver and with even lower

exposure levels.

As the situation progresses, we will continue to provide updates concerning potential impacts on future MDL.

---

[1] "MDL" stands for multi-district litigation. Specifically, an MDL is when civil actions involve one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pre-trial proceedings.