08-16158-CC

In The United States Court of Appeals for the Eleventh Circuit

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BERNICE BROWN, as Personal Representative of the estate of Levi Brown, et al.,

Plaintiffs-Appellants-Cross-Appellees,

v.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division, No. 07-00761-CV-J-25HTS (Hon. Harvey E. Schlesinger, District Judge)

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS AND IN SUPPORT OF AFFIRMANCE

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March 12, 2009

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Under Eleventh Circuit Rule 26.1 and 28-1(b), counsel for *Amicus Curiae* hereby certifies as follows:

Amicus Curiae The Chamber of Commerce of the United States of America (the "Chamber") has no parent corporation and no company owns 10% or more of its stock. The Chamber submits that the following persons and entitles have an interest in the outcome of this matter:

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in the preclusion questions before the Court, which ask whether a generic finding that a company engaged in some unspecified wrongdoing at some point during a period of years can establish that a specific act by that same company at a specific time was also necessarily wrongful. Plaintiffs' misguided position in this case threatens the ability of automobile, health-care, chemical, and numerous other companies to defend themselves against potentially bankrupting class action and mass tort judgments.

STATEMENT OF THE ISSUE

Whether the district court correctly held that Florida law and due process prohibit plaintiffs from invoking preclusion to conclusively establish issues that were not actually and necessarily decided in any prior proceeding.[1]

SUMMARY OF ARGUMENT

1. The district court below correctly ruled that the generic *Engle* findings cannot be used to establish that specific acts were wrongful in a particular way at a particular point in time. Those generic findings do not lend themselves to any specific conclusions, and there is no practical way to use them to establish specific issues. The district court correctly recognized that reality.

2. Nor have plaintiffs identified any doctrinal basis for treating the generalized *Engle* findings as conclusive proof of the particular issues involved in this case. There are only two types of preclusion: issue preclusion and claim preclusion. Neither doctrine allows plaintiffs to rely on the *Engle* findings to establish specific facts. Plaintiffs

[1] The Chamber supports the Defendants' position on all of the issues raised on appeal (*see* Defs.' Br. 1), but this brief is limited to the collateral estoppel issue.

appear to propose a new hybrid doctrine, which shares some features of issue preclusion law except that it does not demand that the precise issue to be precluded was necessarily adjudicated and essential to the judgment in the prior suit. There is no indication that the Florida Supreme Court adopted any such new doctrine or discarded the longstanding identical-issue requirement.

3. Plaintiffs are mistaken in terming the identical-issue requirement an "antiquarian" notion whose elimination would be "pragmatic." (*See* Pls.' Br. 25, 34.) It is true that the identical-issue requirement has been recognized for centuries, but it remains deeply engrained in the fabric of our justice system. The only two decisions plaintiffs can muster for the supposed notion that the identical-issue requirement has exceeded its useful life affirmatively undermine plaintiffs' position, because those decisions relied on the fact that the parties being precluded had, after a full and fair hearing, lost on the precise issue to be precluded.

More fundamentally, the identical-issue requirement is an essential component of due process because it protects each litigant's right to a fair day in court. Without it, a single adjudication that a

defendant engaged in some wrongful conduct at some undefined point in time could be transformed into a finding that the defendant has always engaged in wrongful conduct. The Due Process Clause does not permit that profound distortion of the processes of civil justice.

In addition, combining plaintiffs' new preclusion doctrine with the realities of the modern business world would have disturbing practical consequences. Many modern businesses are built around economies of scale. But, although the mass production and distribution of goods is more efficient, it carries with it greater exposure to liability. At some point, increasing production renders the specter of an adverse product liability verdict a statistical certainty, no matter how carful a company is. So long as it is given a fair chance to defend itself in each suit, however, a prudent company can withstand the consequences of a random accident or an aberrant verdict.

Removing the identical-issue requirement in the manner plaintiffs propose would change all of that. A single adverse general verdict would ignite a conflagration of litigation, quickly engulfing even the most cautious company. A single adverse verdict would also mimic the effects of a class trial, and the filing of lawsuits would have the coercive

effect of a class certification decision. The result would not only rob defendants of their rights but also force the court system to shoulder additional litigation and transform the private attorneys who represent plaintiffs into de facto public regulators. It is precisely because of these kinds of risks that courts have traditionally refused to apply offensive, non-mutual collateral estoppel or certify class actions in mass tort litigation. Discarding the identical-issue requirement would increase those risks exponentially, leading to more litigation and to liability untethered from culpability. The outcome would be anything but "pragmatic."

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED THE PRECLUSION ISSUES.

The district court correctly ruled that the generic *Engle* findings cannot be used to establish that specific acts were wrongful in a particular way. In truth, those findings disclose nothing specific. Among the *Engle* findings are the following: "that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature

of smoking cigarettes or both"; "that all of the defendants sold or supplied cigarettes that were defective"; "that all of the defendants sold or supplied cigarettes that at the time of sale or supply did not conform to representations of fact made by defendants"; and "that all of the defendants were negligent." *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1257 n.4 (Fla. 2006).

Those findings raise more questions than they answer. For example, the singular finding that each defendant "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both" leaves open a number of issues: What information was "concealed or omitted" or what "material fact" was not disclosed? At what point during the decades at issue in the *Engle* trial did it become incumbent on the defendant to disclose that information or fact? By or to whom was the information or fact "not otherwise known or available"? Did the information or fact concern "the health effects of cigarettes" or the "addictive nature of smoking cigarettes" or both? There is simply no way to answer those questions, or any of the other

questions raised by the *Engle* findings. *See Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342–43 (M.D. Fla. 2008) (discussing questions left open by general *Engle* verdict of "negligence"). (*See also* Defs.' Br. 36–38.)

Without answers to those basic questions, the *Engle* findings cannot be applied to the facts of a particular case. Suppose a plaintiff alleges that one of the defendants concealed certain information about cigarettes and that she would not have developed a particular malady had the defendant disclosed that information. The *Engle* findings cannot possibly answer whether the defendant, in fact, breached (or had) any duty to disclose the particular information the plaintiff says she was denied at the relevant time. All we know is that the defendant concealed, omitted, or failed to disclose something from or to someone at some time; we would have to guess at what, when, and whom.

There is therefore no practical way to apply the *Engle* findings to establish specific issues. The district court's order correctly recognizes that reality. *See Brown*, 576 F. Supp. 2d at 1344 (observing that "it is impossible to discern what specific issues were actually decided by the

Phase I jury, and what facts and allegations were necessary to its decision").

II. PLAINTIFFS OFFER NO DOCTRINAL BASIS FOR TREATING GENERIC FINDINGS AS PRECLUSIVE OF SPECIFIC ISSUES.

Nor have plaintiffs identified any preclusion doctrine that would require (or even permit) a court to treat generalized findings as conclusive proof of a particular issue. There are two categories of preclusion law: (1) issue preclusion, which has "the effect of foreclosing relitigation of matters that have once been litigated and decided," and (2) claim preclusion, which has "the effect of foreclosing any litigation of matters that never have been litigated, because of a determination that they should have been advanced in an earlier suit." 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2002). *Accord McGregor v. Provident Trust Co.*, 162 So. 323, 327–28 (Fla. 1935). Issue preclusion is unavailable here because, as plaintiffs freely admit (Pls.' Br. 38), the *Engle* findings were generalized, and none of the particularized issues plaintiffs seek to preclude was necessarily decided by the *Engle* jury. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). (*See also* Defs.'

Br. 24–31.) Claim preclusion is likewise unavailable, as the claims at issue here have not been reduced to judgment. *See McGregor*, 162 So. 327–28.[2]

In fact, plaintiffs disavow any need to identify a doctrinal foundation for their position, asserting instead that the Florida Supreme Court created a wholly new form of preclusion. (*See* Pls.' Br. 32 ("the Florida Supreme Court . . . can call it 'blue turnips'").) *See also Brown*, 576 F. Supp. 2d at 1339 ("Plaintiffs contend that this Court need not determine which preclusion doctrine applies"). But nothing in *Engle* suggests that the Florida Supreme Court created or otherwise endorsed plaintiffs' *sui generis* preclusion doctrine, which would require overruling that court's longstanding precedent that the *precise* issue being precluded must have been necessarily decided and essential to the prior judgment. *See McGregor*, 162 So. 2d at 328 (issue preclusion cannot stem from matters "collaterally in question," "any matter

[2] If the claims plaintiffs pursue here had been reduced to judgment in *Engle*, then this suit would be precluded. *See Whitehurst v. Camp*, 699 So. 2d 679, 684 n.2 (Fla. 1997) ("after a plaintiff recovers a valid and final personal judgment, the original claim is extinguished and merges in the judgment"). *See also Brown*, 576 F. Supp. 2d at 1340 (noting that claim preclusion cannot apply "in the absence of Plaintiffs' claims being merged into a judgment").

incidentally cognizable," or "any matter . . . inferred by argument from the judgment" (internal quotation marks omitted)). (*See also* Defs.' Br. 24–26.)

The Florida Supreme Court simply said "res judicata effect." *See Engle*, 945 So. 2d at 1268–69. Consistent with the uniform practice (*see* Defs.' Br. 39–46), that left for later courts the question what the "res judicata effect" might be. *See Brown*, 576 F. Supp. 2d at 1339–40. The Florida Supreme Court therefore had no occasion to – and did not – adopt some expansive new doctrine.

III. DISCARDING THE IDENTICAL-ISSUE REQUIREMENT WOULD EVISCERATE THE RIGHT TO A FAIR DAY IN COURT AND EXPOSE BUSINESSES TO UNPREDICTABLE AND POTENTIALLY RUINOUS LIABILITY.

Contrary to plaintiffs' assertion, there is nothing "antiquarian" about the right to litigate a precise issue before having it determined, and nothing "pragmatic" about casting that right aside. (*See* Pls.' Br. 25, 34.) The opposite is true: the identical-issue requirement continues to serve as a fundamental due process right. Discarding it would be procedurally unfair to defendants and damaging to modern business.

A. The Identical-Issue Requirement Is an Essential Component of Our Justice System.

Plaintiffs are correct in one respect: the identical-issue requirement has a long and distinguished pedigree. By 1628, it was already engrained in the fabric of English law, when Lord Coke noted that "[e]very estoppel . . . must be certaine to every intent, and [is] not to be taken by argument or inference." 2 COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON ¶ 352A (16th ed. 1809). In 1776, the House of Lords reiterated that rule, explaining that preclusion requires a determination "directly upon the point" and may not be applied to any finding that can only "be inferred by argument." *The Duchess of 13 Kingston's Case*, 20 Howell's State Tr. 538 (House of Lords 1776), *quoted in McGregor*, 162 So. at 327–28. By the time the Fourteenth Amendment was ratified, state courts had uniformly accepted that a party cannot be precluded from litigating unless the issue had been specifically decided in prior litigation.[3]

[3] *See, e.g.*, *Standish v. Parker*, 2 Pick. 20, 23 (Mass. 1823) (Parker, C.J.) ("The principle adopted is, that in actions of trespass, or for torts generally, nothing is conclusively settled but the point or points put directly in issue."); *Cecil v. Cecil*, 19 Md. 72, 78–79 (1862) ("to conclude

For its part, the Supreme Court has consistently held that issue preclusion is unavailable where the particular findings underlying a general verdict cannot be discerned.[4] At the turn of the Twentieth Century, the Court recognized that dispatching with the identical-issue

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any matter in issue between the parties, it should appear by the record or other proof that the same matter was in issue and decided at the former trial between the same parties"); *Henderson v. Kenner*, 1 Rich. 474, 1845 WL 2529, at *4 (S.C. Ct. App. 1845) ("where the pleadings present two distinct propositions, and the verdict may be referred to either, it is inconclusive, because there is no precise issue made by the pleadings, and the verdict wants that certainty which is necessary to give it the effect of an estoppel"); *Aiken v. Peck*, 22 Vt. 255, 260 (1850) ("If, from the record . . . it should appear possible, that the question was left undecided, then there would be no estoppel; for an estoppel, in the language of Lord Coke, 'must be certain [sic] to every intent.'").

[4] *See, e.g.*, *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895) ("Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."); *Russell v. Place*, 94 U.S. 606, 608 (1877) (issue preclusion is unavailable "if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered"); *Cromwell v. County of Sac.*, 94 U.S. 351, 353 (1877) (focus of issue preclusion analysis "must always be" on what was "actually litigated and determined in the original action, not what might have been thus litigated and determined"); *Washington, Alexandria, & Georgetown Steam-Packet Co. v. Sickles*, 65 U.S. 333, 344–45 (1861) ("The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs. But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it.").

requirement "is not to be considered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure." *See Fayerweather v. Ritch*, 195 U.S. 276, 297 (1904). (*See also* Defs.' Br. 58 (discussing *Fayerweather*).)

For these reasons, the identical-issue requirement has been a bedrock principle of law since long before the Founding. And contemporary federal[5] and state[6] courts have continued to recognize that each litigant's basic right to contest each issue "must override

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[5] *See, e.g.*, *Chew* v. *Gates*, 27 F.3d 1432, 1437–39 (9th Cir. 1994); *Black* v. *Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994); *Connors* v. *Tanoma Mining Co.*, 953 F.2d 682, 684–86 (D.C. Cir. 1992); *Mitchell* v. *Humana Hosp.-Shoals*, 942 F.2d 1581, 1583–84 (11th Cir. 1991); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 764 n.1 (3d Cir. 1989); *S.E.L. Maduro (Fla.), Inc.* v. *M/V Antonio de Gastaneta*, 833 F.2d 1477, 1483 (11th Cir. 1987); *Midwest Mech. Contractors, Inc.* v. *Commonwealth Constr. Co.*, 801 F.2d 748, 751–52 (5th Cir. 1986); *Bd. of County Supervisors of Prince William County* v. *Scottish & York Ins. Servs., Inc.*, 763 F.2d 176, 178–79 (4th Cir. 1985); *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 341–45 (5th Cir. 1982).

[6] See, *e.g.*, *Fisher* v. *Space of Pensacola, Inc.*, 461 So. 2d 790, 792–93 (Ala. 1984); *Brake* v. *Beech Aircraft Corp.*, 229 Cal. Rptr. 336, 342-43 (Cal. Ct. App. 1986); *Dowling* v. *Finley Assocs., Inc.*, 727 A.2d 1245, 1251–52 (Conn. 1999); *Major* v. *Inner City Prop. Mgmt., Inc.*, 653 A.2d 379, 382–83 (D.C. 1995); *Herzog* v. *Lexington Twp.*, 657 N.E.2d 926, 930–31 (Ill. 1995); *Conn. Indem. Co.* v. *Bowman*, 652 N.E.2d 880, 883–84 (Ind. Ct. App. 1995); *Kozeny-Wagner, Inc.* v. *Shark*, 752 S.W.2d 889, 892–93 (Mo. App. Ct. 1988); *Massengill* v. *Scott*, 738 S.W.2d 629, 631–32 (Tenn. 1987).

arguments about inconsistent results and time-consuming relitigation of the same issue." *Dodge* v. *Cotter Corp*., 203 F.3d 1190, 1200 (10th Cir. 2000). Today, as before the Founding, the identical-issue requirement is necessary "to ensure that all issues are uniformly given due consideration" and to avoid "foreclose[ing] a litigant from possible relief in another court if a matter has not been determined on the merits." *See Topps v. State*, 865 So. 2d 1253, 1257–58 (Fla. 2004).

Relying on *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), plaintiffs suggest that the modern Supreme Court has become flexible to the point that the identical-issue requirement may casually be set aside. (*See* Pls.' Br. 34–35.) Quite the contrary. In those cases, the Supreme Court determined that the "mutuality" requirement (which had prohibited non-parties from relying on issue preclusion) could be avoided under certain circumstances. Critical to those decisions, however, was the existence of the very component of preclusion law plaintiffs now wish to jettison – that the party to be precluded in each case had to have been afforded at least "one full and fair opportunity for judicial resolution of the *same* issue," a

right the Court termed "a most significant safeguard." *Blonder-Tongue*, 402 U.S. at 328–29 (emphasis added), *quoted in Parklane Hosiery*, 439 U.S. at 328. Far from supporting plaintiffs' position, *Blonder-Tongue* and *Parklane Hosiery* reaffirm the identical-issue requirement's cherished place in our system of law.

B. The Identical-Issue Requirement Preserves the Core Due Process Right of a Fair Day in Court.

As the Supreme Court has recognized, "traditional practice provides a touchstone for constitutional analysis," and "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) ("We have, of course, relied on history and 'widely shared practice' as a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process . . . ."); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Because the identical-issue requirement has a long and uninterrupted pedigree, it

holds a special place of our judicial system, and cannot be sacrificed on the altar of pragmatism. *See Brown*, 576 F. Supp. 2d at 1345. (*See also* Defs.' Br. 61.)

But the identical-issue requirement's importance is not simply a product of its longevity; in fact, its longevity is a product of its importance. The most basic due process right is the right to one's fair day in court. Without the identical-issue requirement, that right becomes largely illusory in cases like this one. A single finding that a defendant engaged in some wrongful conduct at some point can be transformed into a badge of infamy, branding the defendant a perpetual wrongdoer and stripping the defendant of the ability to defend itself in later proceedings involving specific questions of fact. (*See* Defs.' Br. 60–63.)

This case illustrates the problem: The *Engle* jury found "that all of the defendants were negligent." *See Engle*, 945 So. 2d at 1257 n.4. It did not say – and it was not asked – when or where or how. Thus, the jury could have concluded that a particular defendant was an upstanding corporate citizen throughout the 1980s, but would have nonetheless been required to return a verdict for the plaintiffs on that

issue if it found that defendant acted negligently on a particular day in 1972. Despite the *Engle* verdict's vague nature, plaintiffs now assert that it should be presumed – conclusively – that the *Engle* jury found specific acts in 1974 or 1981 or 1987 to be negligent in whichever way a particular plaintiff now wishes to infer. After all, say the plaintiffs, each defendant was found to have been negligent (in some respect); what possible interest could be advanced by allowing one of the defendants to now defend any of its conduct? (*See* Pls.' Br. 35.)[7]

Whatever procedural safeguards were in place during the *Engle* trial (*see* Pls.' Br. 27), the defendants were never afforded a chance to vindicate themselves against the specific allegation of wrongdoing they now face. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense'"). Although a particular defendant could have endeavored in *Engle* to defend a particular act on a particular occasion, that defense would have been rendered academic if the jury found that

[7] Notably, when seeking to justify their position, plaintiffs rely largely on scientific findings (such as a finding that cigarettes can cause cancer), the application of which the defendants do not challenge. (*Compare* Pls.' Br. 35, *with* Defs.' Br. 45.)

the defendant engaged in wrongdoing on some *other* occasion within the relevant period. Once it made such a finding, the jury's task was complete. At that point, it had neither any need to determine whether some other acts were proper, nor any way to communicate such a finding had it wished. (*See also* Defs.' Br. 31-38.) All that can be said of the *Engle* jury is that it found *something* to be wrongful; precisely what is anyone's guess.

C. Abolishing the Identical-Issue Requirement Would Have Dangerous Consequences for Business.

Combining the freewheeling preclusion doctrine plaintiffs advance with the realities of modern business would also be anything but "pragmatic." The modern economy is built on scale. Mass production allows companies to spread overhead costs more broadly, leading to lower per-unit costs. The result is a wider variety of goods at lower prices for consumers.

But, while mass production of goods is more efficient, it carries with it greater exposure to liability. The more consumers a manufacturer's products reach, the greater the chance that some consumers will be injured, that some will sue, and that some will ultimately recover, through verdict or settlement. As a company

becomes larger and its distribution broader, adverse product liability verdicts become a statistical certainty – regardless of how much care that company takes. *See* Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 14 (1993) ("'over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*'" (quoting *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991))). But so long as it is given a fair chance to defend itself in each suit, a prudent company can withstand the consequences of a random accident or an aberrant verdict.

Removing the identical-issue requirement would fundamentally alter that calculus. A single adverse general verdict would sound a clarion's call to potential plaintiffs. Stripped of its ability to defend its actions with respect to the product in question, the company would quickly become submerged in liability. In order to stop the bloodletting, it would have to consider removing the "offending" product from shelves immediately – regardless how beneficial the product was for other consumers.

Other companies would similarly take heed. Production would be cut to reduce the odds of a ruinous verdict. Needless warning labels

would abound, drowning out necessary warnings and dissuading consumers from using beneficial drugs and other products. Redundant, unnecessary safety features would be added "just in case," causing prices to rise further and rendering many products less useful. *Cf.* Breyer, *supra*, at 13–14 (noting that consumers will not pay enormous premiums for marginal increases in safety); Richard C. Austness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L. J. 1, 88–89 (1985) ("Safety is important, but the manufacturer must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economies of materials and labor.").

Moreover, the potential for leveraging these catastrophic risks into "'blackmail settlements'" would not be lost on attorneys representing plaintiffs. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, C.J.) (collecting sources). In *Rhone-Poulenc*, then-Chief Judge Posner referred to the distorted settlement incentives that appear once a class action is certified. *Id.* *Accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

But at least the strict requirements for certifying a class impede the ability of plaintiffs to bring defendants to the precipice of ruin without adjudicating the merits of a claim. If the identical-issue requirement were eliminated in the manner plaintiffs propose, civil plaintiffs could leap directly past those obstacles and go straight for the jugular simply by filing a flurry of lawsuits related to a product. Because, in those circumstances, a single adverse judgment would have the same effect on the defendant as losing a class trial, the mere *filing* of lawsuits would create the same settlement pressures as a decision certifying a class.

These harms will not just fall on defendants; they will also dramatically impact the court system. As the Fifth Circuit noted in *Castano*, consolidated litigation "magnifies and strengthens the number of unmeritorious claims." 84 F.3d at 746. A veteran mass tort mediator has likewise observed that, as the costs of litigation decrease and it becomes more difficult for defendants to defend themselves, "the demand of new filings increases." *See* Francis E. McGovern, *Lessons in State Class Actions, Punitive Damages, and Jury Decision Making Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV.

871, 875 (2001).[8] In the class action context, courts can limit those incentives by narrowing class definitions and rigorously enforcing class certification requirements. But when aggregation is accomplished through the expansive use of issue preclusion, the job of policing the courthouse steps falls exclusively to the attorneys bringing the claims.

Such an expansive use of issue preclusion would also leave private attorneys as the de facto regulators of business. If, as plaintiffs assert, a single adverse, general verdict related to a product can constitute conclusive proof that the product is defective in every conceivable respect, then only the inventiveness of attorneys representing plaintiffs will limit the sort of safety devices that will be required. Although juries, faced with a particular plaintiff who has suffered a terrible calamity, may experience "hindsight bias" such that they artificially skew the balance in favor excess caution, *see* W. Kip Viscusi, *Overview*, *in* REGULATION THROUGH LITIGATION 1, 1–2 (W. Kip Viscusi ed., 2002), they at least impose some disinterested check on the ability of lawyers

[8] Professor McGovern distinguished "elastic" mass torts (such as products liability litigation), where the number of potential plaintiffs is virtually unlimited, from "inelastic" mass torts (such as aircraft crashes) where the number of potential plaintiffs is relatively finite. *See* 36 WAKE FOREST L. REV. at 874–75. He used the *Engle* litigation as an example of an elastic mass tort. *See id.*

bringing claims to demand greater and greater precautions without regard to marginal costs and benefits. Unburdening plaintiffs of the need to prove in each case that the product was unreasonably dangerous in a specific way would – once a manufacturer had obtained a single adverse ruling related to a product – entrust the regulatory function entirely to lawyers with a vested stake in demanding more precautions. *Cf. id.* ("The policies that result from litigation almost invariably involve less public input and accountability than government regulation."). It hardly can be argued that greater safety precautions are *always* more desirable, no matter how small the benefits or how great the costs. *See* Breyer, *supra*, at 13–14.

Because allowing a single verdict to have far-reaching consequences is offensive and harmful to our system of justice, courts have generally refused to apply offensive, non-mutual collateral estoppel in mass tort litigation – *regardless* whether the identical-issue requirement is met. *See, e.g.*, *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 & n.11 (6th Cir. 1984). *Cf. Castano*, 84 F.3d at 746 (noting that "historically, certification of mass tort litigation classes has been disfavored"). In a seminal work, Professor Brainered Currie

explained that it would be unfair to fix liability in dozens of suits based on a potentially aberrant verdict. *See* Brainered Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957). Certainly, no one would think a company that had successfully defended itself in several related suits should be forever foreclosed from defending itself once it lost one case. *See id.* at 286 ("no such absurdity would be tolerated for a moment"). But, as Professor Currie observed, it would be equally unfair to treat the first lawsuit as preclusive if that plaintiff happened to prevail: "Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series." *Id.* at 289. *See also Rhone-Poulenc*, 51 F.3d at 1304 (noting that "a sample of trials makes more sense than entrusting the fate of an industry to a single jury").

Plaintiffs' proposal to eliminate the identical-issue requirement is much worse. It moves far beyond any concern about aberrant verdicts and into the realm of litigation by conjecture and supposition. It would transform unsuccessful defendants into legal pariahs, whose conduct

would always be declared unlawful no matter the conduct or the circumstances surrounding it. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003)- ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

* * *

The modern economy functions on the idea that spreading costs (and risks) benefits consumers. Eliminating the identical-issue requirement would turn that assumption on its head, as every additional unit a company produced would marginally increase the risk of ruinous liability, no matter how many precautions a company took. The specter of such liability, and the settlement pressures associated with it, would only encourage more mass tort filings – irrespective of the merits. Companies would be forced to slash production, and take needless, redundant, and expensive precautions, and the courts would be compelled to process each of the claims. The result would be anything but "pragmatic."

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted this 12th day of March, 2009.

By_____

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(a)(7)(C) and Eleventh Circuit Rules 28-1(n), I HEREBY CERTIFY that the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendants-Appellees-Cross-Appellants and in Support of Affirmance complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it was written in Century Schoolbook, 14 point font, and with the type-volume limitations contained in Federal Rule of Appellate Procedure 32(a)(7)(B) contains 5,310 words, including headings and footnotes and excluding those parts of the brief excluded from the word count under Circuit Rule 32-4.

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Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendants-Appellees-Cross-Appellants and in Support of Affirmance has been served via Federal Express this 12th day of March 2009, to the following counsel of record:

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