LESS IS MORE: ISSUE PRESUMPTION IN MASS TORT MDLS

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In mass tort multidistrict litigation (MDL), existing scaling-up devices have failed to generate significant efficiency gains. This essay suggests a novel device: issue presumption. Where courts possess the greater power to apply issue preclusion, courts may instead apply issue presumption to shift the burden of persuasion against the losing party in subsequent cases. By scaling up through this softer, more flexible approach, MDL courts can capture lost efficiency gains.

INTRODUCTION

No longer a sleepy corner of civil procedure, issue preclusion has become a flashpoint. Nowhere is this more evident than in mass tort cases like the forever chemicals multidistrict litigation (MDL). In the numerous cases brought during the decades since carcinogenic forever chemicals first came under scrutiny, lawyers, scientists, and the public fought over the

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causal relationship between exposure and disease. At least in one venue, an MDL court swiftly ended that debate. In *E. I. du Pont Nemours & Co. v. Abbott*, a case about tens of thousands' exposure to forever chemicals, the district court applied issue preclusion to close off future litigation on duty, breach, and general causation.[1] The Sixth Circuit affirmed on appeal, and the Supreme Court denied certiorari.[2]

That caused Justice Clarence Thomas to sound the alarm. Dissenting from the denial of certiorari, Justice Thomas called "the application of nonmutual offensive collateral estoppel in the MDL context" seemingly "illogical and unfair."[3] The doctrine's application in that context, he said, "is far afield from any [the] Court has endorsed," and the extension "raises serious due process concerns."[4] He concluded: "[T]his issue should be resolved sooner rather than later. We should not sacrifice constitutional protections for the sake of convenience, and certainly at least not without inquiry."[5] Commentators called his dissental "a flare that illuminates the likelihood that the Supreme Court will address [issue preclusion] in a future case."[6]

Abbott underscores the reality that complex civil controversies defy simple solutions. Judges can get creative in the search for case management tools, but the Federal Rules of Civil Procedure, relevant statutes, and constitutional protections hem them in.[7] Even so, MDL—civil actions involving common fact questions consolidated before one district judge for

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1 *In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 529 F. Supp. 3d 720 (S.D. Ohio 2021).

2 *In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912 (6th Cir. 2022), *cert. denied*, E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16 (2023) (mem.).

3 E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16, 16–17 (2023) (mem.) (Thomas, J., dissenting).

4 *Id.* at 17 ("[P]reclusion is . . . subject to due process limitations." (quoting Taylor v. Sturgell, 553 U.S. 880, 891 (2008)).

5 *Id.* at 18.

6 Laura Dooley & Rodger Citron, *Of Mass Torts, Multidistrict Litigation, and Collateral Estoppel: Notes on Justice Thomas's Dissent from the Denial of Certiorari in* E.I. du Pont de Nemours & Co. v. Abbott, VERDICT (May 7, 2024), https://verdict.justia.com/2024/05/07/of-mass-torts-multidistrict-litigation-and-collateral-estoppel [https://perma.cc/ZSP2-NJSQ].

7 *See* David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 410 (2019) ("Attorneys and judges who control MDL do not resolve cases using a standard procedural playbook but regularly devise new ways of organizing, investigating, and resolving cases."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 585 (1978) (noting the creativity of transferee judges in using their broad powers to handle MDL); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing the transformation of American judges from detached arbiters to involved managerial adjudicators, both pre- and post-trial); Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 229 (2023) (building off of Resnik's article to state that MDL is "managerial judging 'on steroids'" (citation omitted)).

pretrial proceedings, simplification of issues, and settlement[8]—manages to be "a site of intense procedural innovation" where judges "regularly devise new ways of organizing, investigating, and resolving cases."[9]

Issue preclusion is one such procedural tool, although it long predates MDL.[10] It prevents parties from relitigating issues decided at some earlier time.[11] By ensuring that the system leaves resolved issues in the past, issue preclusion furthers efficiency and economy.[12] In MDL, the doctrine permits judges to scale up findings from bellwether trials by applying them across the board.[13]

However, although a cumbersome mass tort MDL is precisely where issue preclusion promises the most efficiency gains, issue preclusion has failed to meaningfully help judges resolve such cases.[14] Because of its

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8 *See* 28 U.S.C. § 1407 (2006).

9 Noll, *supra* note 7, at 410; *see also id.* at 407–08 (noting that judges have interpreted § 1407's directive to conduct "'coordinated or consolidated pretrial proceedings'" as an "instruction to develop ad hoc procedures to overcome emergent problems" (quoting 28 U.S.C. § 1407(a)–(b) (2012))); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 10, 19–20 (2021) (noting that MDL judges have become more "heavy-handed" and creative in case management which is in tension with the goals of the Federal Rules); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017) (noting a judicial consensus that "the very hallmark of the MDL is the ability to deviate from traditional procedures" and that "MDL procedure is still a work in progress"). Critics respond that procedural flexibility in MDLs conflicts with the rule of law. *See, e.g.*, Gluck & Burch, *supra*, at 9 (arguing for "more pretrial motion practice, more appellate review, more remands to the home forum, more attention to differences in state substantive law, adequate representation in selection of counsel, and respect for federalism boundaries"); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 106–07 (2017) (criticizing common benefit funds); Lawyers for Civil Justice, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rights* (Sept. 14, 2018), https://static.reuters.com/resources/media/editorial/20181004/rules4mdl—proposalsforrulescommittee.pdf [https://perma.cc/8NCC-2UAF] (arguing that MDLs encourage the filing of meritless claims and place unfair settlement pressure on defendants); Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 42–46 (2019) (arguing that *Lone Pine* orders are out of step with several Federal Rules of Civil Procedure). So far, the harshest criticism has come from Professors Robert Pushaw Jr. and Charles Silver, who recently attempted a takedown of all uses of "inherent powers" by MDL courts. *See generally* Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 B.Y.U. L. REV. 1869 (2023).

10 *Compare* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 837–38 (2017) (discussing the history of the MDL statute), *with* Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 44–45 (1940) (discussing the history of preclusion doctrines).

11 *See* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4416 (3d ed.), Westlaw (database updated May 2025).

12 *See* Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439, 444 (2013) (citing 18 WRIGHT & MILLER, *supra* note 11, § 4416 (3d ed.)).

13 *See id.* at 443–45.

14 *See* ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL § 9.3, at

strident effect, judges are loath to apply issue preclusion in MDLs—even when permitted by the law.[15] Moreover, the *Abbott* dissental casts doubt on whether issue preclusion is permitted in MDLs at all.[16]

This essay meets the moment by introducing a novel solution: issue presumption. Issue presumption is a scaling-up device that can apply where preclusion proves too much. Courts have the power to direct issue presumption in civil cases whenever they possess the greater power to apply issue preclusion.[17] By directing a presumption on a resolved common issue, the MDL court may give some effect to an earlier resolution by shifting the burden of persuasion on the issue against the losing party in subsequent cases.[18] Where the court directs issue presumption, the losing party bears the "risk of nonpersuasion" and faces partial summary judgment or a directed verdict on the previously resolved common issues.[19] Crucially, however, in subsequent cases, the losing party retains the ability to present sufficient evidence and rebut the presumption.[20] That possibility transforms issue presumption into a powerful solution that can balance fairness and due process on the one hand with efficiency and judicial economy on the other. With its lighter touch, issue presumption promises issue preclusion's benefits while addressing its critics' concerns.

In Part I, we start by explaining why judges are reticent to apply issue preclusion and other scaling-up devices in MDLs. In Part II, we propose the

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234 (1st ed. 2020) (noting judicial reluctance to use issue preclusion).

15 *See id.*

16 *See* E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16, 17 (2023) (mem.) (Thomas, J., dissenting) (expressing concern that issue preclusion in MDL cases "runs afoul of this Court's warning that preclusion should not be used when 'the application of offensive estoppel would be unfair to a defendant'" (citing Parklane v. Hosiery, 439 U.S. 322, 331 (1979))).

17 *See infra* Section II.A. Although "[s]tate law provides the burden of proof . . . when it supplies the rule of decision," McEwen v. Delta Air Lines, Inc., 919 F.2d 58, 59 (7th Cir. 1990) (citing Palmer v. Hoffman, 318 U.S. 109, 116–17 (1943)), "federal common law governs the claim-preclusive effect" of a federal court judgment. *See also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001). And although "[i]t is true that the greater does not always include the less . . . in general, the rule holds good." Rippey v. Texas, 193 U.S. 504, 509–10 (1904).

18 *See infra* Sections II, III.

19 Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468, 472 (6th Cir. 1980) (noting that "a true burden of proof" shifts "the risk of nonpersuasion"). Professor John Wigmore coined the phrase "the risk of nonpersuasion" to describe a judge's power to instruct jurors to resolve uncertainty against the party bearing the risk. JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2485 (4th ed. 2025), VitalLaw (database updated Mar. 2025). Then, when Professor Edward Morgan and the American Law Institute drafted the Model Code of Evidence, they dubbed the party bearing the risk of nonpersuasion as having the "burden of persuasion." MODEL CODE OF EVIDENCE, Rule 1(3) (AM. L. INST. 1942); *see also* Schaffer v. Weast, 546 U.S. 49, 56 (2005) (adopting the term "burden of persuasion" for the uncertainty rule). Above the line, this essay uses the term "presumption" to mean a procedural device that shifts the burden of persuasion.

20 *See* 21B WRIGHT & MILLER, *supra* note 11, § 5126 (2d ed.) (explaining rebuttal of evidentiary presumptions).

new doctrine of issue presumption and describe its application and benefits. Then, in Part III, we explain the legality of issue presumption and why it comports with the law of presumptions, the Seventh Amendment right to a jury trial, and the rules of evidence concerning hearsay. We conclude by respectfully calling on MDL courts to employ issue presumption.

I
SCALING UP IN MASS TORT MDLS

From Rule 1 forward, the priority in civil litigation is the "just, speedy, and inexpensive determination of every action and proceeding."[21] In mass tort litigation, courts can achieve this goal by extrapolating particular findings from representative trials to the mass of similarly situated individuals—in short, by "scaling up."[22] Scaling-up tools include "nonmutual issue preclusion, the Rule 23(c)(4) issue class, and the bellwether trial."[23]

Common issues are especially ripe for scaling up. In mass tort cases, prototypical common issues include "whether the defendant was negligent, or whether the defendant's product is capable of causing the alleged harm."[24] Indeed, such issues are the hallmark of MDL because the statute requires "one or more common questions of fact."[25] Using scaling-up devices, a common factual issue or a mixed question of law and fact resolved in one case can be applied to the mass of similar cases.[26]

Scaling-up devices help move mass tort MDLs along. Because of insurmountable difficulties, however, current scaling-up devices have failed to generate meaningful efficiency gains. Starting with issue preclusion, we provide a brief history of scaling-up devices in mass tort controversies. That history, we argue, shows the need for a softer device.

A. Nonmutual Offensive Issue Preclusion

Issue preclusion is a common-law doctrine that bars successive litigation of factual or legal issues, so long as they were actually litigated and

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21 FED. R. CIV. P. 1; *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.").

22 Savage, *supra* note 12, at 441–42. We adopt the term "scaling up" from Zachary B. Savage. *See id.* (defining "scaling up" as "taking particular findings from ordinary, bipolar trials and applying them to a mass of similarly situated individuals, in an effort to efficiently resolve complex cases").

23 *Id.* at 442.

24 *Id.*

25 28 U.S.C. § 1407 (2006).

26 *See* Savage, *supra* note 12, at 441–42 (defining "scaling up" as "taking particular findings from ordinary, bipolar trials and applying them to a mass of similarly situated individuals, in an effort to efficiently resolve complex cases").

resolved in a prior case.[27] The doctrine has five traditional elements: (1) the same issue is involved in both actions, (2) the issue was actually litigated in the first action after a full and fair opportunity to do so, (3) the issue was actually decided on the merits, (4) that decision was final, and (5) the issue was necessary to the decision.[28]

Issue preclusion presents many benefits: It avoids the expense and hassle of multiple lawsuits, conserves scarce judicial resources, and fosters systemic legitimacy by sidestepping inconsistent adjudications.[29] But issue preclusion has not always lived up to that promise. At first, it "failed to generate significant efficiency gains because of the mutuality requirement."[30] The mutuality requirement stopped litigants from using issue preclusion unless they also would have been bound by the prior judgment.[31] Mutuality rarely existed in practice, especially in mass tort contexts.[32] Accordingly, under the mutuality regime, issue preclusion hardly moved the efficiency needle.[33] About all it could do was reassure litigants that "factual issues litigated between them would remain settled."[34]

Throughout the twentieth century, the mutuality requirement eroded. In 1971, the Supreme Court formally abolished the mutuality requirement for defensive issue preclusion—permitting issue preclusion to be used by a defendant not bound by the previous judgment against a plaintiff bound by the prior judgment.[35] Eight years later, the Supreme Court took the next step

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27 *See* 18 WRIGHT & MILLER, *supra* note 11, § 4416 (3d ed.) (providing a general overview of the issue preclusion doctrine).

28 *See id.*

29 *See* Montana v. United States, 440 U.S. 147, 153–54 (1979); SAMUEL ISSACHAROFF, CIVIL PROCEDURE 164 (3d ed. 2012) (arguing that issue preclusion limits waste of "the tremendous investment of societal resources represented by a trial").

30 Savage, *supra* note 12, at 444.

31 *See* Restatement of Judgments § 99 (1942) (stating that a plaintiff cannot file suit against a possible third-party tortfeasor in a subsequent case if the former case did not find for the plaintiff for the same tort).

32 After all, if a plaintiff would have been bound by the prior judgment, why not just bundle that plaintiff's claim with the prior case ex ante? *See* FED. R. CIV. P. 19, 20, 23; *see also* Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1214–15 (1986) (arguing for "[m]aximum use of claim and issue preclusion" in the federal courts because "the liberal claim and party joinder available in federal court is intended to dispose of as many controversies as possible in the first instance").

33 *See* Savage, *supra* note 12, at 444–45.

34 *Id.* at 445.

35 *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971); *see also* James E. Pfander & Mary E. Zakowski, *Non-Party Protective Relief in the Early Republic: Judicial Power to Annul Letters Patent*, 120 NW. U. L. REV. (forthcoming 2026) (manuscript at 48–49) (summarizing *Blonder-Tongue*'s facts and holding). Many scholars point to Justice Traynor's majority opinion in *Bernhard v. Bank of America*, 122 P.2d 892 (Cal. 1942), as the landmark case that led to the eventual abandonment of mutuality in *Blonder-Tongue*. *See, e.g.*, RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1257 (7th ed. 2018) (using *Blonder-Tongue* as a key case for the abandonment of the mutuality requirement). In *Bernhard*, the court

in *Parklane Hosiery Co. v. Shore*.[36] *Parklane* held that nonmutual issue preclusion is permissible even when used offensively—by a plaintiff not bound by the previous judgment against a defendant bound by that judgment.[37]

Parklane vests the trial judge presiding over the second action with "broad discretion."[38] Still, a few guardrails went up. The Supreme Court instructed trial courts to consider several factors to protect against strategic abuses of issue preclusion. These factors include: whether the plaintiff "could easily have joined in the earlier action," any inconsistency in prior judgments, and whether the defendant received a full and fair opportunity to litigate.[39] And, of course, the five traditional elements of issue preclusion must be met as well.[40]

Issue preclusion is further limited by the "day-in-court" ideal. Although *Parklane* abolished the need for mutuality,[41] the Court did not permit a judgment to bind parties not before the court in the earlier case. In *Taylor v. Sturgell*, the Court reaffirmed its adherence to the day-in-court ideal by rejecting "virtual representation" as a nonparty exception to preclusion, which had previously permitted a nonparty to be bound by a prior judgment so long as the nonparty's interests were adequately represented by a party in the first suit.[42] Post-*Taylor*, plaintiffs in mass tort MDLs can invoke

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allowed the defendant bank to collaterally estop the plaintiff, Mrs. Bernhard, from relitigating an issue decided against her in an earlier suit she also brought, even though the bank was not a party to the first suit and therefore was not bound by the previous judgment. *See* 122 P.2d at 895. In short, *Bernhard* involved defensive nonmutual issue preclusion. *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 290–92 (1957).

36 *See* 439 U.S. 322, 331 (1979).

37 *See id.*

38 *Id.*

39 *Id.* at 331–33. The Court was concerned with "wait and see" plaintiffs, due process concerns arising out of applying results from a judgment "inconsistent with one or more previous judgments in favor of the defendant," and the distortion of litigation incentives causing defendants to overinvest or face undue settlement pressure. *Id.* at 329–30.

40 *See id.* at 330–32. Federal courts of appeals have instituted additional requirements. For example, the Ninth Circuit requires that "the party against whom [nonmutual offensive] issue preclusion is asserted was a party or in privity with a party to the prior action." Syverson v. IBM, 472 F.3d 1072, 1078 (9th Cir. 2007).

41 *See supra* notes 36–37 and accompanying text.

42 553 U.S. 880, 889–93, 896–98 (2008). The Court permitted nonparty preclusion under six very limited exceptions: (1) the nonparty explicitly agrees to be bound; (2) there is a preexisting substantive legal relationship, or privity, between the party and the nonparty; (3) the nonparty was adequately represented by a party with the same interests, such as a fiduciary or a named plaintiff in a class action; (4) the nonparty assumed control over the prior suit; (5) the nonparty serves as an agent of the party; or (6) a statute specifically forecloses subsequent litigation by nonparties. *Id.* at 893–95. *See also* Cannon v. Armstrong Containers Inc., 92 F.4th 688, 709 (7th Cir. 2024) ("As a general matter, courts are reluctant to find implied consent to nonparty issue preclusion, given the due process guarantees at stake.").

nonmutual offensive issue preclusion against a common defendant.[43] Defendants, however, cannot invoke nonmutual issue preclusion against nonparty plaintiffs,[44] because that would bind plaintiffs who have not had their day in court.[45]

Fast forward to the present day, when scholarly debate rages: Should *Parklane* nonmutual offensive issue preclusion attach in mass tort MDLs? On one side, Professor Byron Stier says no.[46] According to Professor Stier, nonmutual offensive issue preclusion should be banned outright in mass tort cases because of its unfairness to defendants.[47] On the other side, Zachary Savage offers a different vision. Savage argues that nonmutual issue preclusion is both fair and proper after plaintiffs win a series of bellwether trials.[48]

In *Abbott*, the Sixth Circuit encountered the exact situation that Savage envisioned. On the day, Savage won the debate. The Sixth Circuit affirmed the district court's application of nonmutual offensive issue preclusion, estopping the defendant, DuPont, from relitigating common duty, breach, and foreseeability questions.[49]

B. A Case in Point: Abbott

Abbott has a complex but fascinating history.[50] The suit arose out of DuPont's discharge of a chemical called C-8 into the Ohio River, landfills, and even the air surrounding its West Virginia plant for half a century between 1950 and the early 2000s.[51] By the early 2000s, the locals who drank the contaminated water had experienced the carcinogenic effects of C-8.[52] In 2001, those plaintiffs filed suit against DuPont in a West Virginia state

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43 *See Taylor*, 553 U.S. at 892.

44 *Cannon*, 92 F.4th at 712–13; *see also* E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16, 18 (2023) (mem.) (Thomas, J., dissenting) ("The preclusion was also entirely one sided: While plaintiffs were able to use their bellwether trial wins against DuPont, if the roles were reversed, DuPont could not have asserted collateral estoppel against new MDL plaintiffs without violating those plaintiffs' due process rights.").

45 In fact, due process might even bar plaintiffs from agreeing to a "unitary trial" on general issues in multi-party litigation. *See In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019–21 (5th Cir. 1997).

46 Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 733–52 (2009).

47 *See id.* at 718 (arguing that "in mass tort litigation, courts should exercise their 'broad discretion' to deny as 'unfair' the application of offensive, non-mutual issue preclusion" (quoting Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979))).

48 Savage, *supra* note 12, at 456–59, 463–64.

49 *See In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912, 923, 926–28 (6th Cir. 2022).

50 Hollywood agreed; this history was the subject of a 2019 film. *See* DARK WATERS (Focus Features 2019).

51 *Abbott*, 54 F.4th at 917.

52 *Id.* at 917–18.

court.[53]

After three years of litigation, the parties reached a unique class-wide settlement known as the "*Leach* Agreement."[54] This agreement required DuPont, among other things, to fund "a broad epidemiological study into the effects of C-8 on the community."[55] That epidemiological study was intended to define the scope of any subsequent actions by individual class members against DuPont. Pursuant to the *Leach* Agreement, class members could pursue personal claims based on diseases with "Probable Link" findings—but not for diseases with "No Probable Link" findings.[56] DuPont also agreed not to contest general causation in Probable Link lawsuits, but "it retained the right to contest specific causation and assert any other defenses not barred by the *Leach* Agreement."[57]

Based on the study's findings, class members with diseases linked to C-8, including kidney and testicular cancers, brought about 3,500 cases against DuPont in federal court alone.[58] In due course, the Judicial Panel on Multidistrict Litigation consolidated the federal lawsuits before Judge Edmund Sargus in the Southern District of Ohio.[59] After discovery, the court developed a case management plan. It would accept six cases for bellwether trials—three selected by the plaintiffs and three by DuPont.[60]

Things moved fast from there. In the first bellwether trial, a case selected by DuPont, the jury awarded the plaintiff, who suffered from kidney cancer, $1.6 million in compensatory damages for her tort claims.[61] The next bellwether trial, a case selected by the plaintiffs, handed DuPont another loss on the plaintiff's claims concerning his testicular cancer.[62] Now zero-for-two and eager to wrap things up, DuPont settled the other four bellwether cases.[63] The plaintiffs then selected the first non-bellwether case to go to trial. That trial used the same jury instructions on negligence as the two bellwether trials and wound up with a similar result: $2 million in compensatory damages for the plaintiff.[64] DuPont promptly settled the remaining MDL cases.[65]

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53 *See* Leach v. E.I. du Pont de Nemours & Co., No. 01-C-608, 2002 WL 1270121, at *1 (W. Va. Cir. Ct. Apr. 10, 2002).

54 *Abbott*, 54 F.4th at 918.

55 *Id.*

56 *Id.* at 918–19 ("A 'Probable Link' means, 'based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members.'").

57 *Id.* at 919.

58 *Id.*

59 *Id.* at 916, 919.

60 *Id.* at 919–20.

61 *Id.* at 920.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* DuPont also withdrew its appeal of the first bellwether case at this time. In that appeal,

Still the litigation continued. Additional *Leach* plaintiffs, unbound by the settlement, filed cases. Travis Abbott and his wife, Julie, sued DuPont in November 2017, alleging that his twenty-plus years of exposure to C-8 caused his testicular cancer.[66] The district court granted partial summary judgment to the Abbotts on the duty, breach, and foreseeability elements of Travis Abbott's negligence claims, barring DuPont from relitigating those issues through nonmutual offensive issue preclusion.[67] The court also precluded DuPont from relitigating the meaning of the *Leach* Agreement and the inapplicability of the Ohio Tort Reform Act (OTRA).[68] After the jury found for Travis and Julie Abbott at trial, awarding them $40 million and $10 million in damages respectively, DuPont appealed the verdict and challenged the district court's application of nonmutual offensive issue preclusion.[69]

The Sixth Circuit held that nonmutual offensive issue preclusion was appropriate.[70] With respect to the *Parklane* factors, the court concluded first that there were "few concerns about Plaintiffs using a 'wait-and-see' approach . . . when DuPont was able to select three of the six bellwether cases, including the first-tried case."[71] Second, the structure of the MDL "presented DuPont with 'every incentive' to defend itself vigorously in each of the early trials," including the likelihood that "cases could continue to be filed" "after the global settlement."[72] And third, there was "no concern about inconsistent verdicts" because "DuPont was not successful at any trial."[73] The court's decision also rested on the ground that DuPont had "received a full and fair opportunity for resolution of its issues," including many opportunities to challenge the district court's interpretation of the *Leach* Agreement both in the district court and on appeal.[74] The Sixth Circuit accordingly estopped the relitigation of issues common to the post-settlement C-8 plaintiffs, generating major efficiency gains.

C. The Need for a Softer Device

In *Abbott*, the apogee for issue preclusion in mass tort MDL, the Sixth

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DuPont had argued that the district court's interpretation of the *Leach* Agreement had rendered the trial and all other MDL cases fundamentally unfair by barring any challenges to general causation. *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 920–21.

69 *Id.* at 921. Post-trial, the district court reduced Julie Abbott's damages award to $250,000 under the OTRA. *Id.*

70 *Id.* at 922–28.

71 *Id.* at 926–27.

72 *Id.* at 927 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 (1979)).

73 *Id.*

74 *Id.*

Circuit vindicated Savage's argument that nonmutual offensive issue preclusion should attach where multiple juries reach consistent verdicts for the plaintiffs.[75] But the case was one-in-a-million: DuPont agreed not to litigate general causation in Probable Link cases, and three juries unanimously found for the plaintiffs on the scaled-up issues, including in the bellwether case selected by DuPont. These circumstances mitigated the unfairness that nonmutual preclusion typically visits on the defendant.[76]

History shows that these circumstances are difficult to replicate. In most other cases, there will not be a global settlement agreement that prevents the defendant from introducing evidence on general causation. It is also extremely rare for bellwether trial verdicts to come out unanimously in the plaintiffs' favor.[77] Accordingly, in most MDLs, judges have been reluctant to apply nonmutual offensive issue preclusion, even where permitted under *Parklane*.[78] Savage carried the day in *Abbott*, but Professor Stier's due process concerns have more than a decade of MDL practice to back them up.[79]

Even in *Abbott*, the exemplar case, Sixth Circuit Judge Alice Batchelder and Justice Thomas warned of grave due process concerns. With her partial dissent, Judge Batchelder sought to add "an additional safeguard before a

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75 *See* Savage, *supra* note 12, at 456–59, 463–64.

76 *See Abbott*, 54 F.4th at 926–27 ("The unique parameters established by the *Leach* Agreement and the resulting MDL play the key role in applying the *Parklane* factors here.").

77 For example, there were conflicting outcomes in bellwether trial jury verdicts in both the Vioxx and the Testosterone Replacement Therapy products liability MDLs. KLONOFF, *supra* note 14, at 236–38, 240–42.

78 KLONOFF, *supra* note 14, at 234. Courts have been unwilling to apply issue preclusion in mass tort cases more generally, not just in MDL proceedings. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337, 348 (5th Cir. 1982) (declining to apply nonmutual offensive issue preclusion in favor of asbestos plaintiffs on common issues of foreseeability and failure to warn).

79 *See* Savage, *supra* note 12, at 462–63 (arguing that courts should "allow[] issue preclusion to attach if plaintiffs win the vast majority of [bellwether trials]"). *But see* Stier, *supra* note 46, at 720–27, 733–52 (arguing for the opposite position and pointing to verdict variability in the tobacco, Vioxx, asbestos, and Bendectin mass tort litigations); *see also* Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 146–47 (1984).

In the class action context, the following cases have clarified the due process rights of defendants: *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298–304 (7th Cir. 1995) (reversing class certification where it would place enormous settlement pressure on defendants despite the small probabilities of plaintiffs' claims succeeding on the merits); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 365–67 (2011) (rejecting a "Trial by Formula" approach because of the defendant's right to litigate statutory defenses to individual claims); Hansberry v. Lee, 311 U.S. 32, 42–44 (1940) (holding that due process requires adequate representation of absent plaintiffs from a representative lawsuit by the existing parties); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809–12 (1985) (holding that where plaintiffs are absent in an opt-out class action, such plaintiffs must receive notice, the opportunity to opt out, and have the named plaintiff adequately represent their interests); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–28 (1997) (rejecting certification of a settlement class because of conflicts of interest between class members with actual asbestos injuries and exposure-only claimants).

court can declare mass-tort preclusion"—namely, a finding that "the sample of bellwether plaintiffs is reasonably representative."[80] She found it "fundamentally unfair for a small, nonrepresentative sample . . . to bind a defendant."[81] Although noting issue preclusion's efficiency advantages, she still opined that this "concern for efficiency . . . does not outweigh the[] overarching due-process concerns."[82] Justice Thomas reinforced these same points in his dissental, adding, "DuPont had all of the downside without any potential for upside. The lopsidedness of the preclusion adds to the potential for unfairness."[83] That one-sidedness, along with the likelihood of at least some defense verdicts if the litigation were to continue, cuts against issue preclusion.[84]

The unique and pressing due process concerns expressed in *Abbott* have been simmering in the scholarship for decades. In 1986, two practitioners previewed Professor Stier's position by arguing that *Parklane* prevents the application of offensive nonmutual issue preclusion in product liability cases.[85] In 2019, applying the factors set forth by the *Parklane* Court, two scholars agreed "that *Parklane* estoppel is simply incompatible with the purpose of contemporary MDL."[86] Some have gone so far as to argue that MDL, in its current form, violates constitutional guarantees of procedural due process.[87] Others, however, say that nonparty preclusion should extend far beyond the current doctrine.[88]

Scholars have also raised other concerns regarding preclusion. Professor Elizabeth Chamblee Burch has argued that uncoordinated public and private litigation challenging the same tortious conduct can lead, among other problems, to "unpredictable preclusion."[89] Noting that nonmutual

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80 *Abbott*, 54 F.4th at 936 (Batchelder, J., concurring in part and dissenting in part).

81 *Id.* at 939. Moreover, as Judge Posner pointed out in *In re Rhone-Poulenc*, 51 F.3d at 1299, and Judge Easterbrook echoed in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002), only decentralized trials in different jurisdictions yield information that, in the aggregate, allows parties to accurately evaluate mass tort claims.

82 *Abbott*, 54 F.4th at 941 (Batchelder, J., concurring in part and dissenting in part).

83 E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16, 18 (2023) (mem.) (Thomas, J., dissenting).

84 *See* Stier, *supra* note 46, at 727–33. The opposite result, applying nonparty exclusion from consistent defense verdicts to pending plaintiffs' cases, is barred under the Supreme Court's rejection of virtual representation and adherence to the day-in-court ideal in *Taylor v. Sturgell*. *See* 553 U.S. 880, 889–93, 896–98 (2008).

85 *See* Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y.L. SCH. L. REV. 583, 584–88 (1986).

86 Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 GA. L. REV. 1305, 1310–11 (2019).

87 *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 131–51 (2015).

88 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 602 (2011).

89 Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1922 (2015).

preclusion binds private parties but not the Government, Professor Zachary Clopton has argued that the Supreme Court precedent preventing nonmutual preclusion against the Government should be overturned.[90] At bottom, what these and other concerns reveal is that offensive nonmutual issue preclusion has failed to generate efficiency gains in most MDLs.

As with issue preclusion, other scaling-up devices—most notably, the Rule 23(c)(4) issue class and the binding bellwether trial—have so far also failed to produce meaningful efficiency gains in mass tort MDLs.[91] Although a Rule 23(c)(4) issue class can bind nonparties,[92] since Judge Richard Posner's influential *Rhone-Poulenc* decision in 1995, "Due Process and Seventh Amendment concerns have limited the utility and frequency of use of the issue class in mass tort cases."[93] Two binding bellwether trials in the 1990s were overturned because the trials violated either the Seventh Amendment jury trial right or the Due Process Clause of the Fifth Amendment.[94] Echoing *Rhone-Poulenc*, courts have also expressed concerns

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90 Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 20–33 (2019) (arguing that *United States v. Mendoza*, 464 U.S. 154 (1984), should be overruled because the Court's policy rationales lack merit and the values of preclusion—efficiency and fairness—"apply at least as strongly to government litigants").

91 Savage, *supra* note 12, at 441–42. *But see infra* note 93.

92 Class actions fall under one of the *Taylor* nonparty preclusion exceptions. *See* Taylor v. Sturgell, 553 U.S. 880, 894–95 (2008).

93 Savage, *supra* note 12, at 449–50 (discussing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296–304 (7th Cir. 1995)). More recently, scholars have advocated for the expansion of issue classes in mass tort MDLs and other complex litigation. Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133, 171, 178–84 (2021) (arguing that MDL courts should use issue classes to achieve scale efficiencies in mass tort cases); Gilles & Friedman, *supra* note 86, at 1307–08, 1322–29 (criticizing the *Rhone-Poulenc* decision and the settlement pressure rationale in particular because "[h]igh-stakes class actions are common and not per se controversial"); Burch, *supra* note 89, at 1890 (advocating for the use of issue classes to "spotlight" and "resolve a defendant['s] conduct on the merits"). Some courts—including the Sixth Circuit—have encouraged the use of issue classes in mass harm cases. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 848 & n.14 (2017); *see also* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 789–800, 812–13 (2013) (noting that increased scrutiny of class certification requirements and willingness to decertify classes after certification have cut back sharply on plaintiffs' ability to bring class action lawsuits). *But see* Cabraser & Issacharoff, *supra*, at 848, 875–77 (noting an increase in the use of class actions in MDLs and arguing that such use can benefit both plaintiffs—by improving efficiency while maintaining participation—and defendants—who benefit from the bill of peace).

94 Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319–21 (5th Cir. 1998); *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019–21 (5th Cir. 1997) (overturning a trial for violating the Fifth Amendment Due Process Clause); *id.* at 1022–23 (Jones, J., concurring) (calling for the trial to be overturned for violating the Seventh Amendment jury trial right as well); *see also* Jonathan Steinberg, Note, *The False Promise of MDL Bellwether Reform: How Mandatory Bellwether Trial Consent Would Further Mire Multidistrict Litigation*, 96 N.Y.U. L. REV. 809, 826–29, 827 n.124 (2021) (discussing the opinions in *Cimino* and *Chevron*). *But see* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331 n.27 (2008) (contrasting the *Cimino* Court's reticence, and the *Chevron* majority's willingness, to use bellwether trials to bind related claimants).

that binding bellwethers place unfair settlement pressure on defendants.[95] Today, the bellwether is limited "to its non-binding role of informing settlement."[96]

In sum, despite *Abbott*'s holding, the exceptional nature of its facts demonstrates the limited role that issue preclusion plays in mass tort MDLs. Far from ushering in a new era where issue preclusion generates huge efficiency gains in mass tort MDLs, *Abbott* instead shows just how unusual it is for courts presiding over such proceedings to apply nonmutual offensive issue preclusion.[97] And due process concerns have hamstrung the efficacy of other scaling-up devices. Therefore, in today's mass tort MDL, courts and litigants need a nimbler, more flexible scaling device that can be applied more broadly to streamline litigation and conserve resources. Issue presumption fills that void.

II
ISSUE PRESUMPTION

Issue presumption would provide an MDL court with the discretionary power to shift the burden of persuasion from the winning party on specific issues in one or more bellwether trials to the losing party on those same issues.[98] In subsequent cases, the court could grant partial summary judgment or a directed verdict on the specific issues against the losing party—unless the party rebuts the presumption.[99]

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95 *See In re Chevron*, 109 F.3d at 1022–23 (Jones, J., concurring). Writing for the majority in *Chevron*, Judge Parker left open the possibility that a statistically representative trial plan, like the one he presided over as a district judge in *Cimino*, could satisfy due process. *Id.* But in *Chevron*, he argued, the trial plan incentivized the plaintiffs and the defendant to select fifteen of the "best" and "worst" cases, respectively, in the "universe of claims involved." *Id.* at 1019. It remains unclear whether representative sampling would remedy the due process concerns associated with binding bellwethers. The Supreme Court's rejection of "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365–67 (2011), suggests that it would not.

96 Steinberg, *supra* note 94, at 854. Occasionally, nonparties agree to be bound by the judgment in a bellwether case. *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359 (2d Cir. 2003) (describing an agreement for a bellwether to bind nonparty plaintiffs on all issues but proximate liability).

97 For example, it is extremely rare for bellwether trial verdicts to come out unanimously in the plaintiffs' favor. KLONOFF, *supra* note 14, at 236–38, 240–42.

98 *See* Schaffer v. Weast, 546 U.S. 49, 57 (2005) (noting that the burden of persuasion on the elements of a claim rests by default with the plaintiff but can be shifted to defendants). Issue presumption thus adopts the "Thayer-Wigmore" theory of presumptions. "According to the Thayer-Wigmore view, presumptions are a means of attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent." Steven David Smith, Case Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1108 (1984) (quotation omitted). Crucially, unless the defendant rebuts it, a Thayer-Wigmore presumption carries the burden of proof required to obtain a summary judgment or directed verdict. *Id.*

99 *See, e.g.*, Waggoner v. Barclays PLC, 875 F.3d 79, 103 (2d Cir. 2017) (discussing the *Basic* fraud-on-the-market presumption and concluding "that the burden of persuasion, not production,

Nonmutual issue *presumption* solves the main problem that nonmutual issue *preclusion* presents in mass tort MDLs: Preclusion permits only a strict rule-based approach.[100] As a rigid and formalist doctrine, issue preclusion fully bars the losing party from relitigating the issue in all subsequent cases.[101] But even in exemplar cases like *Abbott*, where the facts overwhelmingly favor nonmutual issue preclusion, unfairness lurks.[102] On the other hand, without any scaling-up device, courts face the daunting task of trying every single individual case in mass tort MDLs.[103]

Issue presumption charts a moderate course. Adopting a presumption rule for mass tort MDLs "rejects the stark[ness]" of issue preclusion.[104] Just as with issue preclusion, the application of issue presumption "necessarily rest[s] on the trial courts' sense of justice and equity."[105] And the creation of this new doctrine reflects how the development and application of ad-hoc procedures in MDLs is a feature, not a bug, that furthers the administration of justice.[106]

A. Applying Issue Presumption

Parties can invoke issue presumption in mass tort MDLs after one or more bellwethers reach judgment. In subsequent cases, issue presumption can scale up the resolutions of common issues actually litigated, actually decided, and necessary to the decision in one or more bellwether trials by directing a presumption in favor of the side who won on those issues. Courts might apply issue presumption (1) when individual issues are more

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to rebut the *Basic* presumption shifts to defendants"); Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254–55 (9th Cir. 1982) (holding that a party can rely upon a presumption to support a motion for summary judgment under the Federal Rules of Civil Procedure). *Contra* Smith, *supra* note 98, at 1108–12 (arguing that *Overland*'s holding runs contrary to Rule 301 of the Federal Rules of Evidence).

100 A strict rules-based approach to jurisprudence has its advantages; however, it does not permit exceptions, even in situations that "present poignant and appealing human circumstances." J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907, 908–09 (1992).

101 *See In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912, 926–28 (6th Cir. 2022) (holding that issue preclusion barred relitigation of duty, breach, and foreseeability where the losing party had fully litigated those issues in prior jury trials, and noting that settlement after judgment does not negate preclusive effect); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 624–26 (2008) (emphasizing the "same issue" requirement in the nonmutual preclusion context).

102 *See supra* Section I.C.

103 In practice, most MDLs are settled after a series of informational bellwether trials. *See* Steinberg, *supra* note 94, at 813 ("[T]oday's MDLs prioritize settlement above all else.").

104 Wilkinson III, *supra* note 100, at 909 (arguing that rules of law should be viewed as presumptions).

105 Blonder-Tongue Labs, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 334 (1971).

106 *See, e.g.*, Noll, *supra* note 7, at 423 (commenting that the environment of MDL makes "procedure-making fast, collaborative, and responsive to the needs of particular cases").

significant than common issues, (2) as a bridge to issue preclusion, or (3) to scale up results from statistically nonrepresentative bellwether trials.

Issue presumption can accelerate a mass tort MDL, where individual issues dominate, leaving other mechanisms like class actions unavailable and the need for efficiency unabated.[107] Suppose a mass tort litigation presents a number of individualized issues: whether the product caused the malady in this particular plaintiff, the extent of damages, and the like. And suppose that in the first bellwether, the plaintiff prevails on the big issue common across the cases—for example, general causation: the question whether this product can, in general, cause the malady at issue. The effect of applying issue presumption on that common issue in the remaining cases would be twofold. First, the parties would focus on litigating individual issues in each subsequent bellwether trial to sharpen the informational value extracted, even where a presumption exists on the common issue. After all, the set of informational bellwethers must presage all the trials to come. With a focus on litigating individual issues across the several bellwethers, parties will be prepared in subsequent cases or settlement negotiations to compare their particular facts to one or another bellwether. In short, issue presumption can streamline information bellwethers without the all-or-nothing dynamic that issue preclusion imposes. Second, the defendant would choose strategically the subsequent cases in which to challenge the presumption. There is no sense in challenging the presumption where one might set a bad precedent and can win on one or more individual issues instead. The result: more information extracted more cheaply with no unfair settlement pressure placed on the defendant.

Courts can also use issue presumption as a bridge to issue preclusion. Where issues are resolved in favor of the plaintiffs in the initial bellwether trials, the court has the power to apply nonmutual offensive issue preclusion against the defendant. For the reasons discussed above, however, the court will likely refuse to do so.[108] By applying issue presumption instead, the court can scale up the resolved common issues without estopping the defendant from relitigating those issues in future cases. Instead, the defendant has a choice to contest those resolutions or streamline the litigation and focus on the live issues. By allowing defendants to choose the second option, issue presumption would eliminate unnecessary relitigation that would occur without the use of a scaling-up device. Moreover, because the defendant will try to rebut the presumption only where it thinks it can win, each subsequent

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107 *See, e.g.*, Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y.L. SCH. L. REV. 583, 584–85 (1986) (arguing that offensive nonmutual issue preclusion is unfair in products liability cases because individual issues dominate).

108 *See supra* notes 19–20 and accompanying text.

loss will strengthen the case for issue preclusion.[109]

Issue presumption also allows courts to scale up results from nonrepresentative bellwether trials. Bellwethers are selected by counsel with court supervision, through random sampling, by the MDL judge, or a combination of the above.[110] Therefore, nonrepresentative selection can occur for various reasons, including party selection of favorable cases and sheer luck in random sampling.[111] Without reliable data on the representativeness of the selected bellwether cases, a court will likely decline to apply issue preclusion.[112] This is especially true in mass tort contexts, where proof of causation requires proof not only of general causation but also specific causation.[113] Issue presumption presents a softer method for extrapolating nonrepresentative bellwether results. If the bellwether cases were truly outliers, then the party against whom issue presumption is directed will rebut the presumption in later cases. If the bellwether cases were representative, issue presumption avoids the waste of relitigation and speeds the MDL toward resolution.

Courts may also adjust the rebuttal standard flexibly to fit the unique circumstances of each MDL and align the burden more closely with "the strength of the policies that determined its allocation."[114] In a civil case, the typical burden of persuasion is by a preponderance of the evidence, but courts have required clear and convincing evidence for cases involving higher stakes.[115] Indeed, at least some writers contend that the standard for rebuttal should vary depending on the strength of the policy supporting the presumption.[116] In some cases, efficiency and finality interests may justify imposing a clear and convincing standard for rebuttal, rather than simply a preponderance. For example, a clear and convincing standard might be in order when more than a few bellwether trials have resulted in unanimous or

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109 *See* Savage, *supra* note 12, at 463–64 (arguing that issue preclusion is proper when plaintiffs win a series of bellwether trials).

110 Steinberg, *supra* note 94, at 830; KLONOFF, *supra* note 14, at 226–33.

111 KLONOFF, *supra* note 14, at 226–33.

112 *Cf. In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1020 (5th Cir. 1997) (holding that a trial court may not extrapolate results from a bellwether trial unless the court "find[s] that the cases tried are representative of the larger group").

113 *See* R. Joseph Barton, Note, *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, 233 (1999) (explaining that mass tort plaintiffs must prove both general and specific causation).

114 21B WRIGHT & MILLER, *supra* note 11, § 5122 (3d ed.).

115 *Id.* § 5122.

116 *See* 21B WRIGHT & MILLER, *supra* note 11, § 5126 (2d ed.) ("Courts have been aided and abetted by the writers, some of whom suggest that the standard for rebuttal should vary from presumption to presumption depending on the strength of the policy that supports the presumption.").

near-unanimous plaintiff verdicts.[117] In these ways, issue presumption can respond to the dynamic environment of each MDL while preserving fully the due process rights of litigants.

B. The Benefits of Issue Presumption

Given the high stakes in MDL, the losing party will likely attempt to rebut an issue presumption in at least some of the subsequent cases. Issue presumption can nevertheless change the face of mass tort MDLs by allowing courts simultaneously to capture efficiency gains and protect the rights of the parties.

A court that directs issue presumption transforms the economics of the litigation.[118] By reducing litigation costs for the beneficiaries of the presumption and raising litigation costs for the losing side, the court incentivizes the losing party to forgo relitigation of the common issue in cases where the chances of success are low. This places significant settlement pressure on the losing side. This pressure, however, is not unfair—it results from actual jury verdicts, and the losing side retains the ability to relitigate the issue in favorable cases.[119] Additionally, issue presumption can signal the judge's view of the merits to the parties, which may further incentivize the parties to negotiate a settlement. All this boosts efficiency, serving the core purpose of MDL.

Another benefit: Issue presumption can be used where preclusion could not. Because issue presumption is not binding, applying the doctrine against nonparty plaintiffs does not violate the day-in-court ideal or the limitations on nonparty preclusion.[120] Sometimes, the defendant has the burden of persuasion at the start of a case; this presents no constitutional issue.[121] In

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117 *Cf.* Savage, *supra* note 12, at 462–63 (arguing that issue preclusion could attach where ten out of ten bellwethers return results for the plaintiffs); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 246–49 (1992) (noting that "the marginal benefit of each additional lawsuit in reducing uncertainty declines sharply and rapidly approaches zero as the number of lawsuits increases," such that the general presumption lies in favor of nonparty preclusion unless the nonparty can show that "intervening developments make it substantially likely that relitigation would yield a more accurate result"). Issue preclusion fully estops relitigation; a clear and convincing standard merely raises the bar.

118 *See* Bone, *supra* note 117, at 240 (arguing that an efficiency-based approach to nonparty preclusion relies on the proposition that "the marginal social gain from relitigation is likely to be overwhelmed by the marginal cost").

119 *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 304 (5th Cir. 1998) (noting that sample trials yielded actual jury verdicts which were then used to calculate average damages by disease category for application to thousands of additional cases); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (decertifying a class of plaintiffs on concern that the risk of bankruptcy from a single jury verdict creates intense settlement pressure on defendants).

120 *See* Taylor v. Sturgell, 553 U.S. 880, 891–95 (2008) (holding that due process demands nonparties cannot be precluded by prior judgments outside of established exceptions).

121 *See, e.g.*, FTC v. Morton Salt Co., 334 U.S. 37, 44–45 (1948) (finding the defendant

much the same way, where a defendant establishes an affirmative defense in early bellwethers, for instance, *Taylor* does not foreclose the MDL court from directing a *presumption* on those issues against nonparty plaintiffs in later cases. The core of *Taylor* is that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[122] The court cannot apply issue *preclusion* against nonparty plaintiffs because of *Taylor*'s ban on virtual representation.[123] That would entail binding a party to the judgment. But merely directing a corresponding presumption does not bind any party to any judgment, sidestepping *Taylor*'s strictures.[124]

Likewise, under *United States v. Mendoza*, issue preclusion does not apply against the federal government.[125] Issue presumption, however, might yield a different result. Two concerns were central to the Court's decision in *Mendoza*: preventing issue percolation, i.e., "freezing the first final decision rendered on a particular legal issue," and the risk of forcing the Government "to appeal every adverse decision in order to avoid foreclosing further review."[126] Neither concern prevents the application of issue presumption against the Government. And as far as efficiency goes, there is nothing special about the Government. (Indeed, recent developments suggest that Government efficiency is dearer to voters' hearts than private efficiency.) Why shouldn't the Government conserve its litigation resources? Issue presumption, meanwhile, avoids *Mendoza*'s policy scruples. It scales up

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responsible for proving the applicability of a statutory exception to the general price discrimination rule under the Clayton Act). *But see* Schaffer v. Weast, 546 U.S. 49, 57 (2005) (calling such situations "extremely rare").

122 553 U.S. at 884 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

123 *Id.* at 892–93.

124 *See* Bone, *supra* note 88, at 602 (arguing that the "process-based day-in-court right" can "accommodate[] a more flexible approach to preclusion"); Bone, *supra* note 117, at 248 (arguing that complexity in preclusion law would be better served "through a system of rebuttable presumptions, with the general presumption lying in favor of nonparty preclusion"). We recognize that defensive nonmutual issue presumption requires reading *Taylor* broadly, and that *Parklane* does not directly support the *defensive* use of nonmutual issue presumption against nonparty plaintiffs. But neither do *Taylor* and *Parklane* prevent such use of issue presumption. We submit that the judgment in an earlier action can affect a nonparty plaintiff through nonmutual issue presumption. This is consistent with due process because, short of preclusion (rejected in *Taylor*), the plaintiff maintains the initiative and ability to litigate the plaintiff's own case. Moreover, if the issue is not the same, issue presumption would not be appropriate and the second plaintiff's case would not be affected by the earlier judgment. *See* Lahav, *supra* note 101, at 624 (emphasizing that the "same issue" must be adjudicated in order for nonmutual preclusion to be appropriate).

125 *See* 464 U.S. 154, 155 (1984) ("The United States may not be collaterally estopped on an issue such as this, adjudicated against it in an earlier lawsuit brought by a different party."). Scholars deride that fact. *See, e.g.*, Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 29 (2019) (arguing that *Mendoza* should be overruled because the Court's policy rationales lack merit and the values of preclusion—efficiency and fairness—"apply at least as strongly to government litigants").

126 464 U.S. at 161.

mixed issues of fact and law, such as duty, breach, and general causation. In much the same way, other doctrines—like stare decisis and law of the case—will continue to determine the less-than-preclusive effect of prior holdings on pure issues of law. And although issue presumption might prompt the Government to litigate more vigorously, it would not prompt the appeal of every adverse decision.

In sum, issue presumption would provide MDL courts with a softer and nimbler scaling device that, precisely because of its flexibility, can achieve the efficiency gains that harsher scaling devices have failed to realize.

III
THE LEGALITY OF ISSUE PRESUMPTION

Issue presumption may sound too good to be legal. In fact, however, issue presumption fully comports with procedural and substantive law because it operates within the existing boundaries of federal preclusion law. In *Semtek International Inc. v. Lockheed Martin Corp.*, the Court clarified that the preclusive effect of a federal diversity court's judgment, no matter its source of jurisdiction, is governed by federal common law.[127] This is as true in federal question cases as in diversity cases.[128] Then, making federal common law, the *Semtek* Court instructed federal courts sitting in diversity to incorporate the preclusion law of the states in which they sit, unless "the state law is incompatible with federal interests."[129] *Semtek* shows that federal courts possess the power to determine the preclusive effect of a federal-court judgment, although such common-law-making powers are, "of course, subject to due process limitations."[130]

Reading *Semtek* and *Parklane* together, federal diversity courts possess the lesser power to direct issue presumption whenever they possess the greater power to apply issue preclusion.[131] *Semtek* places preclusive effects

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127 531 U.S. 497, 506–09 (2001). *Semtek* expressly addressed only the claim preclusive effect of federal diversity judgments; however, the Court's reasoning extends to the issue preclusive effect of such judgments. *Id.*

128 *See Taylor*, 553 U.S. at 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law.") (citing *Semtek*, 531 U.S. at 507–08).

129 531 U.S. at 506–09.

130 *Taylor*, 553 U.S. at 891.

131 *See Semtek*, 531 U.S. at 506–09 (holding that federal diversity courts, under federal common law, must apply a state's claim preclusion rule and therefore have authority to impose issue preclusion or, if lesser, issue presumption under the same legal framework); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 323 (1979) (asserting that trial courts have broad discretion to determine whether and how offensive nonmutual collateral estoppel should be applied, insinuating that lesser tools like issue presumption fall within their procedural authority); *see also* Rippey v. Texas, 193 U.S. 504, 509–10 (1904) ("It is true that the greater does not always include the less . . . . But, in general, the rule holds good."); United States v. O'Neil, 11 F.3d 292, 296 (1st Cir. 1993) ("The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial.");

in the hands of federal common law. *Parklane* establishes the scope of the common-law preclusion doctrines. And although *Semtek* directs federal diversity courts to incorporate state preclusion law absent a true conflict with federal interests, the majority of states—thirty-seven out of fifty—permit nonmutual offensive issue preclusion.[132] Therefore, consistent with the Supreme Court's view of federalism and procedural due process as expressed in *Semtek* and *Parklane*, issue presumption can be applied to the majority of cases in mass tort MDLs.

While the counterarguments to issue presumption can be only hazily forecast, we explain below why issue presumption encounters no difficulty with three potential issues that figure in the adjacent literature: (a) the law of presumptions, (b) the Seventh Amendment right to a jury trial, and (c) hearsay evidence rules.

A. The Law of Presumptions

Issue presumption must cohere with the applicable bodies of federal and state presumption law.[133] Because these bodies of law occasionally present distinct issues, we treat them separately.

1. Federal Question Cases

In federal question cases—civil cases brought pursuant to federal law—Federal Rule of Evidence 301 ostensibly controls the law of presumptions.[134]

Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1311 n.54 (1984) ("Although . . . writers have demonstrated that the greater and lesser argument fails deductively, the argument is not left without any force; it may work inductively or as a persuasive analogy. Such forms of reasoning, though invalid in formal logic, predominate in legal and practical argument."). For a thoughtful analysis and thorough inquiry into the greater-and-lesser argument in the context of the unconstitutional conditions doctrine, see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002).

132 *See infra* Table 1. In Table 1, we attach an up-to-date survey of each state's treatment of the doctrines of mutuality of estoppel and nonmutual offensive issue preclusion.

133 Scholars have spilled endless ink debating presumptions' mysterious nature and effects. *See* Smith, *supra* note 98, at 1105 ("Presumptions have been a source of confusion since their earliest appearance in Anglo-Saxon law."). As Professor Broun asserts, "The legal term 'presumption' confuses almost everyone who has ever thought about it. . . . Despite many well-written attempts to define and distinguish presumptions from related concepts, this confusion continues." Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 697 (1984). For a sampling of the vast literature, see Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 845 (1981) (explaining that presumptions are conceptually diverse and inconsistently applied, warranting cautious treatment under applicable state or federal law).

In this essay, we steer clear of this 400-year-old tangle. Instead, in exploring the legality of issue presumption, we focus on the law of presumptions currently applicable in the federal and state courts.

134 FED. R. EVID. 301.

Pursuant to Rule 301, "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," unless a federal statute or another rule provides otherwise.[135] But under Rule 301, a presumption "does not shift the burden of persuasion, which remains on the party who had it originally."[136]

Rule 301 might seem to prevent issue presumption in federal question cases because under Rule 301, a court can shift the burden of production, but not the burden of persuasion.[137] But in practice, most courts have ignored Rule 301.[138] The Supreme Court started the law down this path in *Texas Department of Community Affairs v. Burdine*.[139] In that case, the Court relied on conventional wisdom to reach a result at odds with Rule 301's legislative history, reasoning that "[t]he nature of the burden that shifts to the defendant" in appropriate cases "should be understood in light of the plaintiff's ultimate and intermediate burdens."[140] This kind of flexible approach to a party's burden rejected, or at least minimized, Rule 301's textual strictures. Although Rule 301 remains on the books, courts have continued to exercise their power to reallocate even the burden of persuasion on particular issues.[141]

This flexibility with presumptions helps explain why issue presumption would make juries' jobs in federal question cases *easier*, not harder. Presumptions are functional. There is no need for courts to trip up over formalism in the fear that juries will do the same; after all, juries do their

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135 *Id.*

136 *Id.*

137 *See id.*; Smith, *supra* note 98, at 1104 ("The burden of persuasion always remains on the party on whom it was 'originally cast' . . . ." (quoting FED. R. EVID. 301 (1984))). That view accords with the legislative history of Rule 301 because Congress rejected a draft rule that would have shifted the burden of persuasion when a presumption was directed. *See* 21B WRIGHT & MILLER, *supra* note 11, § 5121 (2d ed.); Smith, *supra* note 98, at 1110–12.

138 *See* 21B WRIGHT & MILLER, *supra* note 11, § 5123 (2d ed.) ("[C]ourts can resolve difficult questions about the scope of Rule 301 by ignoring them."); *see also* Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. L. REV. 892, 894 (1982) (noting that the rule does not address "a judge's authority to allocate burdens of production and persuasion, to instruct the jury on inferences, or to comment on the evidence"). *But see* Smith, *supra* note 98, at 1129–33 (arguing that the case law incorrectly interpreted Rule 301 and that Rule 301 presumptions must be submitted to the jury); 21B WRIGHT & MILLER, *supra* note 11, § 5126 (2d ed.) (arguing that a Rule 301 presumption does not carry the burden of persuasion).

139 450 U.S. 248 (1981).

140 *Id.* at 253.

141 *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208–09 (1973) (creating a presumption of a prima facie case of unlawful segregative design based on a finding of intentionally segregative school board actions); NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787–89 (1979) (upholding a presumption adopted and applied by the NLRB that shifted the burden of persuasion). In doing so, courts are partly motivated by policy. *Cf.* 21B WRIGHT & MILLER, *supra* note 11, § 5124 (2d ed.) (concluding that "courts can shift the burden of persuasion . . . via an 'assumption' rather than a 'presumption'" and citing several cases).

jobs well and, by and large, succeed in the face of many other formalistic trial rules.[142] At times, we may even *overstate* the impact of formal instructions on their exercise of civic duty.[143] Common-sense doctrines like issue presumption help jurors discharge their duty. In sum, under the current application of Rule 301 and as a matter of good sense, courts may direct issue presumption in federal question cases.

2. Diversity of Citizenship Cases

Issue presumption promises the most efficiency gains in mass tort MDLs, the vast majority of which are diversity of citizenship cases.[144] Compared to federal question cases, diversity of citizenship cases require a different analysis: "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law,"[145] and the burden of proof is a substantive question of state law.[146] In keeping with *Erie*, Rule 302 states, "In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision."[147] Thus, "[s]tate presumption law applies in diversity cases, except to elements of a claim or defense governed by federal law."[148] Accordingly, pursuant to Rule 302, courts sitting in diversity must apply state presumption law.[149]

However, because issue presumption operates as federal preclusion

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142 *See* Christopher B. Mueller, *Instructing the Jury upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301*, 12 LAND & WATER L. REV. 219, 271 (1977) ("Jurors seem to go about their tasks with open eyes and good sense in part *despite* the instructions they receive, and only in part *because* of them . . . .").

143 *See id.*

144 *See, e.g.*, *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., 91 F.4th 174, 181–82 (4th Cir. 2024) (concluding that the district court possessed diversity jurisdiction and construing § 1407 as "not a jurisdictional statute," but rather "a venue-giving provision"); Sykes v. Cook Inc., 72 F.4th 195, 205 (7th Cir. 2023) ("This MDL involves individual actions, so each case must involve diverse parties and satisfy the requisite amount in controversy."); *see also* Robert A. Sedler & Aaron Twerski, *State Choice of Law in Mass Tort Cases: A Response to "A View From the Legislature*," 73 MARQ. L. REV. 625, 628 (1990) ("[T]he basis of federal jurisdiction in mass tort cases is . . . diversity.").

145 Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 427 (1996).

146 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938); *see also* Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 211–12 (1939) (holding that a claimant's burden of proof is determined by state law); Palmer v. Hoffman, 318 U.S. 109, 116–20 (1943) (holding that the defendant's burden of establishing contributory negligence was determined by state law); Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 443–46 (1959) (upholding the state-based factual presumption of accidental death, and shifting the burden to the defendant-insurer to rebut the presumption).

147 FED. R. EVID. 302.

148 21B WRIGHT & MILLER, *supra* note 11, § 5135 (2d ed.).

149 *Cf.* Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 806, 810–12 (1986) (finding the presumption of negligence per se for mislabeling under the Federal Food, Drug, and Cosmetic Act to be an insufficient federal ingredient for purposes of the federal question statute, 28 U.S.C. § 1331).

law,[150] and preclusion law is an arm of procedural law, the doctrine is fully consistent with Rule 302 and the *Erie* doctrine. When applied offensively, issue presumption is a lesser exercise of a federal court's power to apply nonmutual offensive issue preclusion under *Parklane*.[151] And when applied defensively, issue presumption does not run afoul of *Taylor*'s limitations on nonparty preclusion.[152] Where courts possess the greater power to give earlier determinations of particular issues *preclusive* effect, courts would also have the lesser power to give such determinations *presumptive* effect.[153]

To comply with *Semtek*'s command that federal diversity courts should apply state preclusion law,[154] courts should apply issue presumption in MDL only where state *preclusion* law permits nonmutual issue preclusion.[155] Thus, before applying issue presumption in favor of a nonparty plaintiff, MDL courts should ensure that state law permits nonmutual *offensive* issue preclusion. And before applying issue presumption against a nonparty plaintiff, MDL courts should consider whether the nonparty plaintiff would still have "a 'full and fair opportunity to litigate' the claims and issues" on which the issue presumption is directed.[156] In our view, defensive issue presumption would generally not deprive the nonparty plaintiff of "his own day in court."[157] The nonparty plaintiff would have the full opportunity to rebut the presumption. It may be a somewhat longer and more difficult day in court—but it is a day in court, nonetheless. Or, in the language of *Taylor*, the nonparty plaintiff never is "bound by a judgment" rendered in another case.[158] Therefore, the doctrine's application would be fair where the losing plaintiff vigorously litigated the issue.[159]

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150 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001) ("Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."). *See also supra* text accompanying notes 127–32.

151 *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979).

152 *See* Taylor v. Sturgell, 553 U.S. 880, 889–92 (2008).

153 *See supra* text accompanying notes 127–32.

154 *See* 531 U.S. at 508–09.

155 This approach has two additional virtues. First, it discourages forum-shopping. *See* JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 6.6, at 196–97 (4th ed. 2021). Under *Semtek*, because federal courts applying issue presumption must incorporate and apply state preclusion law, plaintiffs have no incentive to favor the federal forum over the state forum, or vice versa. Practically speaking, where a federal court applies issue presumption but the relevant state court does not, the plaintiff may be incentivized to choose the federal forum. But at bottom, that situation creates a *judge*-shopping problem, not a *forum*-shopping one. Second, the availability of issue presumption in both the federal and state forums quashes challenges to issue presumption on equal-protection grounds. *See* 21B WRIGHT & MILLER, *supra* note 11, § 5129 (3d ed.) (noting that "[i]n recent years litigants have begun to attack presumptions as a denial of equal protection—sometimes successfully" and citing cases).

156 *See Taylor*, 553 U.S. at 892–93.

157 *Id.* at 892 (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

158 *Id.* (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

159 *See* Bone, *supra* note 117, at 246–49 (asserting that there are social benefits and efficiency gains as a result of nonparty preclusion). Having experienced Professor Redish's brilliance

For MDL plaintiffs, following *Semtek*'s command will not curtail issue presumption's utility. Presently, a substantial majority of states—thirty-seven out of fifty, including California, Texas, and New York—permit nonmutual offensive issue preclusion.[160] Moreover, in applying issue preclusion, twenty-five states do not require that the earlier holding have been necessary to the judgment.[161] In other words, half of the states embrace a more liberal approach to preclusion than do the federal courts.[162] Accordingly, many states' laws permit issue presumption in mass tort MDLs.[163] In sum, because issue presumption operates as federal preclusion law, issue presumption overrides but does not disturb state presumption law in diversity cases.[164]

B. Seventh Amendment Right to a Jury Trial

Issue presumption also coheres with the Seventh Amendment right to a jury trial. Used offensively, nonmutual issue presumption gives a jury *more* power than nonmutual issue preclusion does. Unlike issue preclusion, issue presumption does not fully bar relitigation. And nonmutual offensive issue presumption can apply only where the requirements for nonmutual offensive issue preclusion are met. Therefore, applied within *Parklane*'s guardrails, issue presumption does not alter the relationship between judge and jury to an extent not already upheld by the Supreme Court.[165] Moreover, as a federal preclusion doctrine, issue presumption can only be directed against the defendant *after* a jury actually decides an issue on the merits in an earlier case.[166] Because the defendant has already had a full and fair opportunity to exercise its Seventh Amendment right to a jury trial, issue presumption does

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firsthand, we recognize that scholars and courts adhering to a more restrictive view of procedural due process would likely disagree. *See, e.g.*, Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 131–51 (arguing that MDLs fail to satisfy key elements of procedural due process, such as limiting plaintiffs' access to "the day-in-court ideal").

160 *See infra* Table 1.

161 *See* Joshua M.D. Segal, Note, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305, 1339 (2009) (collecting state-law approaches to issue preclusion).

162 *See id.*

163 *See infra* Table 1.

164 Issue presumption is a federal common-law doctrine that defines the effect of federal courts' judgments and is therefore "supreme" over conflicting state laws. *See* U.S. CONST. art. VI, cl. 2 (proclaiming federal laws made pursuant to the United States Constitution to be "the supreme Law of the Land").

165 Nor does a case like *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), alter our conclusion. Although the *scope* of the jury-trial right may expand, issue presumption concerns the *power* of a jury. And for all the reasons we explain, issue presumption gives more voice to the jury than do the existing issue preclusion rules.

166 *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329–35 (1979).

not violate that right.[167] In short, issue presumption deprives defendants only of gratuitous reruns.

Used defensively, issue presumption does require an extension of federal preclusion common law, but only a modest extension. After all, the application of a *nonbinding* presumption is the least coercive application of res judicata against a nonparty plaintiff that could in any way accomplish the scaling-up goals of nonmutual preclusion. And nonmutual issue presumption does not violate the general rule "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[168] Rather, because the nonparty plaintiff is affected but not bound by the earlier judgment, nonmutual defensive issue presumption carries forward into modern-day MDL "our 'deep-rooted historic tradition that everyone should have his own day in court.'"[169] In determining whether the subsequent plaintiff gets a full and fair opportunity to litigate their case, the earlier judgment's effect—and the extent of its influence on the subsequent action—makes all the difference.

C. Hearsay

Issue presumption also abides by evidentiary rules concerning hearsay. Pursuant to Federal Rule of Evidence 802, the final judgment rendered in another case is inadmissible hearsay.[170] If issue presumption is viewed as a judicial override that affords evidentiary weight to the judgment entered against the losing party in another case, then it could violate Rule 802.[171] But there are evidentiary rules, and then there are substantive doctrines of preclusion law. Issue presumption is the latter.

Issue presumption—a federal preclusion doctrine—follows American

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167 *See id.* at 334–35 (holding that even an equitable determination can have issue preclusive effect in a subsequent action without violating the Seventh Amendment).

168 *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) (emphasis added).

169 *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 WRIGHT & MILLER, *supra* note 11, § 4449 (3d ed.)); *see also* Bone, *supra* note 117, at 288 (arguing that "an individual's right to participate in litigation should vary with the type of case" and "whether the absentee has any normative claim to participate at all"). *But cf.* Pushaw & Silver, *supra* note 9, at 1941 ("Because MDLs are not class actions, however, they fall outside the exception the Court recognized in *Sturgell*.").

170 *See* FED. R. EVID. 802; *see also* Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 982–1003, 1055–56 (1986) (detailing exceptions to the general rule against the admissibility of prior judgments). Interestingly, "to affect other causes of action as well as other persons, civil law countries broadly allow an evidential use of prior judgments, rather than expand their preclusive doctrine of res judicata." RICHARD H. FIELD, BENJAMIN KAPLAN, KEVIN M. CLERMONT & ZACHARY D. CLOPTON, CIVIL PROCEDURE 897 (14th ed. 2023). For a more in-depth discussion, see *id.* at 894–97.

171 *See* FED. R. EVID. 802.

legal traditions.[172] Although American hearsay prohibitions are restrictive, American "res judicata law is distinctively a good deal more expansive than the res judicata law of other countries."[173] The American legal system strikes a bargain: Instead of extending evidentiary weight to judgments entered in other cases,[174] preclusion law provides for a two-pronged approach. "When the status of a former judgment is under consideration in subsequent litigation," either (1) "the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel" or (2) "it may be of no effect at all."[175] Because the first situation does not run afoul of any rules of evidence, and issue presumption arises out of substantive preclusion law, the hearsay rules would not affect the validity of issue presumption.

CONCLUSION

In mass tort MDLs, existing scaling-up devices have failed to generate significant efficiency gains. Issue presumption might provide the most balanced solution. This Article argued that where courts possess the greater power to apply nonmutual offensive issue preclusion, courts may instead apply issue presumption to shift the burden of persuasion against the defendant in subsequent cases. And, unlike the stricter doctrine of issue preclusion, issue presumption can be applied against nonparty plaintiffs. By scaling up in MDLs through this softer, more flexible approach, courts can avoid relitigation, encourage settlement, and capture lost efficiency gains. Where "justice and equity" favor its application,[176] courts should adopt issue presumption.

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172 *See* Taylor v. Sturgell, 553 U.S. 880, 892 & n.5 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion . . . .").

173 FIELD ET AL., *supra* note 170, at 894.

174 *Id.* at 894–97.

175 *Cf.* FED. R. EVID. 803(22) advisory committee's note (addressing the hearsay exception for former convictions).

176 *Cf.* Blonder-Tongue Lab'ys., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333–34 (1971).

TABLE 1: NONMUTUAL OFFENSIVE ISSUE PRECLUSION IN THE FIFTY STATES

State	Mutuality of Estoppel Required?	Citation	Offensive Preclusion Permitted?	Citation
Alabama	Required.	*Ex parte* Flexible Prods. Co., 915 So. 2d 34, 45 (Ala. 2005).	Not permitted.	*Ex parte* Flexible Prods. Co., 915 So. 2d 34, 45 (Ala. 2005).
Alaska	Not required.	Pennington v. Snow, 471 P.2d 370, 377 (Alaska 1970).	Permitted.	Briggs v. Newton, 984 P.2d 1113, 1120 (Alaska 1999).
Arizona	Unsettled.	*See* Hancock v. O'Neil, 515 P.2d 695, 701 n.9 (Ariz. 2022) (declining to clarify the issue).	Unsettled.	*See* Hancock v. O'Neil, 515 P.2d 695, 701 n.9 (Ariz. 2022) (declining to decide the issue of offensive use). An intermediate appellate court followed the Second Restatement approach and applied offensive nonmutual issue preclusion in *Wetzel v. Arizona State Real Estate Department*, 727 P.2d 825, 829 (Ct. App. Ariz. 1986). But the Arizona Supreme Court's last word on the subject, which predates *Parklane*, expressly prohibits offensive issue preclusion. Standage Ventures, Inc. v. State, 562 P.2d 360, 364 (Ariz. 1977).
Arkansas	Not required.	Fisher v. Jones, 844 S.W.2d 954, 958 (Ark. 1993).	Permitted.	Johnson v. Union Pacific R.R., 104 S.W.3d 745, 751 (Ark. 2003).
California	Not required.	Bernhard v. Bank of Am. Nat. Tr. & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942).	Permitted.	Arias v. Super. Ct. of San Joaquin Cnty., 209 P.3d 923, 934 (Cal. 2009).
Colorado	Not required.	Pomeroy v. Waitkus, 517 P.2d 396, 400 (Colo. 1973) (en banc).	Permitted.	Foster v. Plock, 394 P.3d 1119, 1124 n.5 (Colo. 2017) (dictum) ("Both claim and issue preclusion can be invoked defensively or offensively."); Antelope Co. v. Mobil Rocky Mountain, Inc., 51 P.3d 995, 1002–03 (Colo. App. 2001) (permitting offensive nonmutual collateral estoppel).
Connecticut	Not required. But may require mutuality if "patently unfair."	Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422–24 (Conn. 1991).	Permitted.	Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 424 n.19 (Conn. 1991).

Delaware	Not required.	Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214, 1217 (Del. 1991); Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998).	Permitted.	Sanders v. Malik, 711 A.2d 32, 33 (Del. 1998); Hawk Inv. Holdings Ltd. v. Stream TV Networks, Inc., No. 2022-0930-JTL, 2022 WL 17258460, at *14–15 (Del. Ch. Nov. 29, 2022).
District of Columbia	Not required.	Modiri v. 1342 Rest. Grp., Inc., 904 A.2d 391, 394 (D.C. 2006).	Permitted.	Modiri v. 1342 Rest. Grp., Inc., 904 A.2d 391, 394 (D.C. 2006).
Florida	Required.	Stogniew v. McQueen, 656 So. 2d 917, 919–20 (Fla. 1995). But Florida courts sometimes dispense with strict mutuality requirements "where special fairness or policy considerations appear to compel it." Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1067 (Fla. 2001) (quoting West v. Kawasaki Motors Mfg. Corp., 595 So. 2d 92, 94 (Fla. Dist. Ct. App. 1992)). These considerations seem to weigh in favor of barring successive claims brought by the same plaintiff. *See id.*	Likely not permitted.	Florida courts have not closed the door to offensive issue preclusion but have yet to apply the doctrine in a reported case. *See, e.g.*, Dudley v. Carroll, 467 So. 2d 706, 707 (Fla. Dist. Ct. App. 1985). Under Florida law, the proponent would first need to show that an exception to the mutuality requirement applies. *See* United Auto. Ins. Co. v. Millenium Radiology, LLC, 337 So. 3d 834, 837–38 (Fla. Dist. Ct. App. 2022).
Georgia	Required.	Minnifield v. Wells Fargo Bank, N.A., 771 S.E.2d 188, 192 (Ga. App. 2015).	Unsettled.	*See* Minnifield v. Wells Fargo Bank, N.A., 771 S.E.2d 188, 192 (Ga. App. 2015).
Hawaii	Not required.	Dorrance v. Lee, 976 P.2d 904, 909 (Haw. 1999).	Permitted.	Exotics Hawaii-Kona, Inc. v. E.I. Dupont De Nemours & Co., 90 P.3d 250, 263 (Haw. 2004).
Idaho	Not required.	W. Indus. & Env't Servs., Inc. v. Kaldveer Assocs., Inc., 887 P.2d 1048, 1052 (Idaho 1994).	Unsettled.	*See* Brown v. State, Indus. Special Indem. Fund, 65 P.3d 515, 518 (Idaho 2002) ("The distinction between res judicata and collateral estoppel is that the former may not apply unless both individuals were parties to a previous judgment, while the latter may be used *defensively* against a party to the original proceeding when that original party litigated the relevant issue in the prior action." (emphasis added)); State v. Dempsey, 193 P.3d 874, 878 n.1 (Idaho 2008) ("Because the constitutionality of the

				offensive use of the doctrine of collateral estoppel at a criminal trial is not presented, we express no opinion on the issue.”).
Illinois	Not required.	Ill. State Chamber of Com. v. Pollution Control Bd., 398 N.E.2d 9, 11 (Ill. 1979).	Permitted.	*In re* Owens, 532 N.E.2d 248, 251–52 (Ill. 1988) (counseling against unrestricted use of nonmutual offensive issue preclusion).
Indiana	Not required.	Tofany v. NBS Imaging Sys., Inc., 616 N.E.2d 1034, 1039 (Ind. 1993).	Permitted.	*See* Tofany v. NBS Imaging Sys., Inc., 616 N.E.2d 1034, 1039 (Ind. 1993) (noting that “great deference is given” to a trial court’s determination that offensive use of collateral estoppel is improper).
Iowa	Not required.	Hunter v. City of Des Moines, 300 N.W.2d 121, 124–25 (Iowa 1981).	Permitted.	Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 104 (Iowa 2011).
Kansas	Required.	McDermott v. Kan. Pub. Serv. Co., 712 P.2d 1199, 1208 (Kan. 1986). *But see* Kearney v. Kan. Pub. Serv. Co., 665 P.2d 757, 774–75 (Kan. 1983) (permitting defensive use of issue preclusion in cross-claim between defendants in a comparative negligence case).	Permitted. But mutuality of parties required.	*See* McDermott v. Kan. Pub. Serv. Co., 712 P.2d 1199, 1209 (Kan. 1986) (finding that the trial court erred in granting summary judgment to the plaintiff because the mutuality requirement was not satisfied).
Kentucky	Not required.	Sedley v. City of West Buechel, 461 S.W.2d 556, 559 (Ky. 1970).	Permitted.	Chesley v. Abbott, 524 S.W.3d 471, 482 (Ky. Ct. App. 2017) (quoting Moore v. Kentucky, 954 S.W.2d 317, 319 (Ky. 1997)).
Louisiana	N/A.	“Louisiana law does not recognize [issue preclusion].” Alonzo v. State *ex rel.* Dep’t of Nat. Res., 884 So. 2d 634, 639 (La. Ct. App. 2004) (citing Steptoe v. Lallie Kemp Hosp., 634 So. 2d 331, 335 (La. 1994)). *But see* Paradise Vill. Child’s Home, Inc. v. Liggins, 886 So. 2d 562, 571 (La. Ct. App. 2004) (“Louisiana first incorporated the principle of issue preclusion . . . into its	Not permitted.	*See* Alonzo v. State *ex rel.* Dep’t of Nat. Res., 884 So. 2d 634, 639 (La. Ct. App. 2004). *But see* Paradise Vill. Child’s Home, Inc. v. Liggins, 886 So. 2d 562, 571 (La. Ct. App. 2004) (affirming application of issue preclusion based on a federal-court judgment: “Louisiana jurisprudence has not addressed the propriety of the use of offensive issue preclusion . . . .”).

		res judicata law in 1991.").		
Maine	Not required.	State Mut. Ins. Co. v. Bragg, 589 A.2d 35, 37 (Me. 1991).	Permitted.	State Mut. Ins. Co. v. Bragg, 589 A.2d 35, 37 (Me. 1991).
Maryland	Not required.	Leeds Fed. Sav. & Loan Ass'n v. Metcalf, 630 A.2d 245, 249 (Md. 1993).	Permitted.	*See* Leeds Fed. Sav. & Loan Ass'n v. Metcalf, 630 A.2d 245, 250 (Md. 1993).
Massachusetts	Not required.	Home Owners Fed. Sav. & Loan Ass'n v. Nw. Fire & Marine Ins. Co., 238 N.E.2d 55, 59 (Mass. 1968).	Permitted.	Aetna Cas. & Sur. Co. v. Niziolek, 481 N.E.2d 1356, 1361 (Mass. 1985).
Michigan	Not required.	*See* Monat v. State Farm Ins. Co., 677 N.W.2d 843, 848 (Mich. 2004).	Unsettled.	*See* Monat v. State Farm Ins. Co., 677 N.W.2d 843, 849 n.7 (Mich. 2004) ("Because this case does not involve the offensive use of collateral estoppel, we express no opinion as to whether *Bernhard* was correct in its abandonment of mutuality in both the context of its offensive and defensive use.").
Minnesota	Not required.	Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990).	Likely permitted.	*See* Falgren v. State, Bd. of Teaching, 545 N.W.2d 901, 907 (Minn. 1996) (applying nonmutual offensive issue preclusion based on the revocation of a teaching license).
Mississippi	Not required.	*See* Jordan v. McKenna, 573 So. 2d 1371, 1377 (Miss. 1990); Marcum v. Miss. Valley Gas Co., 672 So. 2d 730, 733 (Miss. 1996).	Permitted.	Marcum v. Miss. Valley Gas Co., 672 So. 2d 730, 733 (Miss. 1996). However, "[w]here there is room for suspicion regarding the reliability of" the "fact findings" made in the first case, "collateral estoppel should never be applied." Miss. Emp. Sec. Comm'n v. Phila. Mun. Separate Sch. Dist., 437 So. 2d 388, 397 (Miss. 1983).
Missouri	Not required.	Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 719 (Mo. 1979) (en banc).	Permitted.	James v. Paul, 49 S.W.3d 678, 685 n.5 (Mo. 2001) (en banc) ("Missouri appears to follow the narrow use of offensive collateral estoppel laid down in *Parklane* . . . ."); Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 581 (Mo. 2017) (en banc) (noting that offensive issue preclusion is permitted but "disfavored by courts").

Montana	Not required.	*See* Aetna Life & Cas. Ins. Co. v. Johnson, 673 P.2d 1277, 1280–81 (Mont. 1984).	Likely permitted.	The Montana Supreme Court has not had a recent opportunity to address the issue. However, in *Wallace v. Goldberg*, the court permitted nonmutual offensive issue preclusion to attach. 231 P. 56, 59–60 (Mont. 1925).
Nebraska	Not required.	Cunningham v. Prime Mover, Inc., 567 N.W.2d 178, 181 (Neb. 1997).	Permitted.	Hara v. Reichert, 843 N.W.2d 812, 817 (Neb. 2014) (citing JED Constr. Co., Inc. v. Lilly, 305 N.W.2d 1, 3–4 (Neb. 1981)).
Nevada	Not required.	*See* Five Star Cap. Corp. v. Ruby, 194 P.3d 709, 713–14 (Nev. 2008).	Permitted.	Five Star Cap. Corp. v. Ruby, 194 P.3d 709, 713–14 (Nev. 2008).
New Hampshire	Not required.	*In re* Breau, 565 A.2d 1044, 1049 (N.H. 1989).	Permitted.	*In re* Breau, 565 A.2d 1044, 1048–49 (N.H. 1989).
New Jersey	Not required.	Allesandra v. Gross, 453 A.2d 904, 908–09 (N.J. Super. Ct. App. Div. 1982).	Permitted.	Kortenhaus v. Eli Lilly & Co., 549 A.2d 437, 439 (N.J. Super. Ct. App. Div. 1988).
New Mexico	Not required.	Deflon v. Sawyers, 137 P.3d 577, 583 (N.M. 2006).	Permitted.	Silva v. State, 745 P.2d 380, 383–84 (N.M. 1987).
New York	Not required.	B.R. DeWitt, Inc. v. Hall, 225 N.E.2d 195, 198 (N.Y. 1967).	Permitted.	Halyalkar v. Bd. of Regents of N.Y., 527 N.E.2d 1222, 1227 (N.Y. 1988) (citing cases).
North Carolina	Not required.	Rymer v. Estate of Sorrells, 488 S.E.2d 838, 840 (N.C. Ct. App. 1997).	Permitted.	Rymer v. Estate of Sorrells, 488 S.E.2d 838, 840 (N.C. Ct. App. 1997).
North Dakota	Required.	Fettig v. Estate of Fettig, 934 N.W.2d 547, 555 (N.D. 2019) (citing Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992)).	Not permitted.	*See* Fettig v. Estate of Fettig, 934 N.W.2d 547, 555 (N.D. 2019).
Ohio	Required.	Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 987 (Ohio 1983). However, Ohio permits exceptions to the mutuality of estoppel rule. *Id.* at 985.	Permitted, but disfavored. Under *Goodson*, Ohio law likely does not permit nonmutual offensive issue preclusion in mass tort cases.	*See, e.g.*, Hicks v. De La Cruz, 369 N.E.2d 776, 778 (Ohio 1977) (permitting nonmutual offensive issue preclusion on governmental immunity in a medical negligence suit). *But see* Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 988 (Ohio 1983) (refusing to permit nonmutual issue preclusion on "design issues relating to mass-produced products when

				the injuries arise out of distinct underlying incidents"); State *ex rel.* Nickoli v. Erie MetroParks, 923 N.E.2d 588, 593 (Ohio 2010).
Oklahoma	Not required.	Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7, 13 (Okla. 1974).	Permitted.	Lee v. Knight, 771 P.2d 1003, 1006 (Okla. 1989).
Oregon	Not required.	State Farm Fire & Cas. Co. v. Century Home Components, Inc., 550 P.2d 1185, 1188 (Or. 1976) (citing Bahler v. Fletcher, 474 P.2d 329, 338 (Or. 1970)).	Permitted.	*See* Bahler v. Fletcher, 474 P.2d 329, 337–38 (Or. 1970); Friends of Yamhill Cnty., Inc. v. Bd. of Comm'rs of Yamhill Cnty., 264 P.3d 1265, 1284 n.25 (Or. 2011) (assuming, in dicta, the availability of nonmutual offensive issue preclusion).
Pennsylvania	Not required.	*See* Off. of Disciplinary Couns. v. Kiesewetter, 889 A.2d 47, 54 (Pa. 2005).	Permitted.	Toy v. Metro. Life Ins. Co., 863 A.2d 1, 15 (Pa. Super. Ct. 2004); Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996).
Rhode Island	Not required.	Providence Tchrs. Union v. McGovern, 319 A.2d 358, 361 (R.I. 1974).	Likely permitted.	Blue Ribbon Beef Co. v. Napolitano, No. PM 89-4450, 1991 WL 789842, at *2 (R.I. Super. Ct. July 26, 1991); Cronan v. Cronan, 307 A.3d 183, 195–96 (R.I. 2024) (assuming the availability of offensive issue preclusion but declining to apply it).
South Carolina	Not required.	McPherson v. S.C. Dep't of Highways & Pub. Transp., 376 S.E.2d 780, 781 (S.C. Ct. App. 1989).	Permitted.	McPherson v. S.C. Dep't of Highways & Pub. Transp., 376 S.E.2d 780, 781 (S.C. Ct. App. 1989).
South Dakota	Not required.	*See* Mendenhall v. Swanson, 889 N.W.2d 416, 419–20 (S.D. 2017).	Permitted.	Mendenhall v. Swanson, 889 N.W.2d 416, 419–20 (S.D. 2017).
Tennessee	Not required.	Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102, 115 (Tenn. 2016).	Permitted.	Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102, 114 (Tenn. 2016).
Texas	Not required.	Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990).	Permitted.	Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 802 (Tex. 1994) (first citing Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990); and then Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971)).

Utah	Not required.	Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983).	Permitted.	Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983).
Vermont	Not required.	Trepanier v. Getting Organized, Inc., 583 A.2d 583, 588 (Vt. 1990).	Permitted.	Trepanier v. Getting Organized, Inc., 583 A.2d 583, 587 n.2 (Vt. 1990); State v. Brunet, 806 A.2d 1007, 1010 (Vt. 2002).
Virginia	Required.	Norfolk & W. Ry. Co. v. Bailey Lumber Co., 272 S.E.2d 217, 219 (Va. 1980).	Not permitted.	Norfolk & W. Ry. Co. v. Bailey Lumber Co., 272 S.E.2d 217, 220 (Va. 1980).
Washington	Not required.	State v. Mullin-Coston, 95 P.3d 321, 324 (Wash. 2004) (citing Kyreacos v. Smith, 572 P.2d 723, 724 (Wash. 1977) (en banc)).	Permitted.	*See, e.g.*, Kyreacos v. Smith, 572 P.2d 723, 724 (Wash. 1977) (en banc).
West Virginia	Not required.	Conley v. Spillers, 301 S.E.2d 216, 220–21 (W. Va. 1983).	Permitted.	Holloman v. Nationwide Mut. Ins. Co., 617 S.E.2d 816, 822 (W. Va. 2005) (but noting that offensive issue preclusion "is generally disfavored").
Wisconsin	Not required.	McCourt v. Algiers, 91 N.W.2d 194, 197 (Wis. 1958).	Permitted.	Michelle T. by Sumpter v. Crozier, 495 N.W.2d 327, 333 (Wis. 1993) (citing McCourt v. Algiers, 91 N.W.2d 194, 197 (Wis. 1958)).
Wyoming	Not required.	Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857, 864–65 (Wyo. 1987).	Permitted.	Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857, 864–65 (Wyo. 1987).